state agents in accordance with the provisions of the FSIA, even where the ATS claims a violation of *ius cogens*.[110]

The *Sosa v Alvarez-Machain* decision of the Supreme Court confirms this domestic framework.[111] Apart from its implications regarding the *Erie* doctrine, *Sosa* also emphasised that the statutory incorporation of the "Law of Nations" did not result in a wholesale, unqualified transposition of customary international law.

> In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.
>
> … Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized. This requirement is fatal to Alvarez's claim.[112]

The four reasons given by the Court go to the core of the separation of powers.[113] The first is the modern US restraint in judicially applying common law, in particular internationally generated norms, given the realisation that this is active law-making. The second is the revised role held by the federal courts after *Erie*, where "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law."[114] Third, the creation of private rights of action are better left in general to the legislature. Lastly, the ramifications on the foreign position and policy of the US counsels judicial caution not to invade the discretion of the Legislative and Political Branches.

4.4.3 And the Rule?

Where all this leaves us is, is without any express source of general jurisdiction for the US courts to apply customary international law outside statutory enactments, or the *Sabbatino* considerations regarding foreign policy. Both, to be sure, are excellent, sound bases from the optic of the separation of powers. But they do not

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[110] *Argentine Republic v Amerada Hess Shipping* 488 US 428 (1989) (state) and *Matar v Dichter* 500 F Supp 2d 284 (Dist NY 2007) (immunity for former head of Israeli secret service in class action under ATS and TVPA for war crimes).

[111] *Sosa v Alvarez–Machain* 542 US 692 (2004); see also Bradley et al. 2007, p. 892ff; Koh 2004; Note 2006 (case note on *Sosa*); Flaherty 2004, and Panel 2007.

[112] *Sosa v Alvarez–Machain* 724–725 (per Souter J for the court).

[113] Hence, the due sense of triumph in Bradley et al. 2007.

[114] *Sosa v Alvarez–Machain* 726 (per Souter J for the court).

get us far, especially to the general application of customary international humanitarian and human rights law. Resort might be had to the hoary old chestnut of *The Paquette Habana*[115] as a source authority for the seamless integration of (customary) international law into US law. Putting to one side prize jurisdiction question, the case primarily discussed whether a rule of international law existed that exempted coastal fishing vessels from wartime capture. The majority simply declared, without more, that international law was part of US law.[116] The difficulty with this statement in a modern day setting is obvious, and is articulated by Souter J in *Sosa* in setting out the four reasons for judicial restraint. The twentieth century political and social *acquis* to structuring the institutional exercise of power demands "anxious scrutiny" for some identifiable source or rationale for that exercise. And this is in addition to *Erie* doctrine considerations. So, either its claim to authoritative incorporation rests in the constitutional arrangement of state power. Hence, the reference to *Brown v US* in the dissent to *Paquette Habana*, namely,

> [t]his argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign, and although it cannot be disregarded by him without obloquy, yet it may be disregarded.
>
> …Like all other questions of policy, it is proper for the consideration of a department which can modify it at will, not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.[117]

Or it will rest perhaps in the inherent nature of the courts, legal process, and thus, the law itself. This is the favoured tack of those advocating human rights and humanitarian law, on both a national and international level.[118] (Whether this will duly account for the separation of powers remains to be seen.) But even here the constitution intrudes, for it is the particular constitutional arrangements of a polity which establish the courts and valid law-making procedures. It is no facile argument to say that any constitutionally situated authorisation logically subordinates international law to constitutional and domestic law, even if practically a specific priority is accorded international law (as is done in the Netherlands, France, and the US for treaties). The constitution remains the governing framework. Moving beyond the

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[115] *The Paquette Habana* 175 US 677 (1900) 700 ("international law is part of our law"). See also *Murray v Schooner Charming Betsy* 6 US 64 (1804) 118 (construing US statutes so as not to be inconsistent with or violate the law of nations).

[116] I find persuasive the critique of the judgment levied by Goldsmith and Posner 2005, p. 66ff.

[117] *Paquette Habana*, 715 (per Fuller CJ, Harlan J, and McKenna); *Brown v US* 12 US 110 (1814) 128–129 (per Marshall CJ).

[118] See the works on globalised and constitutions and transnational constitutionalism referred to in Chap. 2. And see the critique of wholesale incorporation in Trimble 1986 and McGinnis and Somin 2007; note also Bradley 1998a.

constitution, into a theory of law loses in practicability what it may gain in intellectual satisfaction, whether for national law or international law.

So as it the matter stands, there are two options open to the courts for the application of customary international law. The first is, under the *Erie* doctrine as clarified by *Sabbatino* and *Sosa,* as a matter of federal common law arising in connection with federal subject matter jurisdiction. The second is by way of statutory reference, subject to the terms and scheme of the statute, whether not also considering the qualifications expressed in *Sosa*. In both instances, the Constitution remains the locus of power, and thus so too the US separation of powers.

4.5 France and Inscrutibility

It is not without reason, considering the separation of powers doctrine applied in France, that is difficult to locate French cases which expressly refer or rely on free-standing customary international law.[119] This is not to say that customary international law, or "public international law" in general terms, does not figure in French judgments. The closest to an institutional strategy for customary international law in France is the reference in the preamble of the 1946 Constitution, "La République française, fidèle à ses traditions, se conforme aux règles du droit public international."[120] This is incorporated by reference in the Preamble to the 1958 Constitution, "Le peuple français proclame solennellement son attachement aux Droits de l'homme et aux principes de la souveraineté nationale tels qu'ils ont été définis par la Déclaration de 1789, confirmée et complétée par le préambule de la Constitution de 1946, ainsi qu'aux droits et devoirs définis dans la Charte de l'environnement de 2004."[121] Nevertheless, it usually appears by way of integration through statute or treaty. This is particularly true of cases applying the principle of sovereign immunity.[122]

The Conseil d'Etat is more reserved in dealing with customary international law whereas Cassation and the Cour Constitutionnel appear to be more open.[123]

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[119] Erades 1993, pp. 583–84, 585, in his magnum opus casebook, refers principally to a series of prize court decisions; in Annex IX he lists older cases applying international law with no demonstrated constitutional or statutory mandate. See generally Reuter et al. 1972 and Teboul 1991.

[120] "The French Republic, loyal to its traditions, conforms to the rule of public international law."

[121] "The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946, as well as to the rights and duties defined in the Charter of the Environment 2004."

[122] See e.g., °07–21091 Cass. (6 May 2009); °07–86412, (9 April 2008), and °02–80719 (17 June 2003).

[123] Dupuy 2008, p. 427 (citing a 1986 study emanating from the Conseil d'Etat which simply ignored customary international law altogether).

Until the 1997 *Aquarone* decision, and reiterated in the 2000 *Paulin* decision, references to customary international law in the jurisprudence of the Conseil d'Etat had been few and far between. Consistent with its restrictive view of its position under the French separation of powers, it sought to ground any principle of customary international law in current legislation. This "indirect" approach was decidedly dualist.[124] Both decisions arose out of taxation disputes, where pensions earned from employment with the ICJ and the ILO respectively were held subject to tax. Attempts to seek exemptions, by reference to the treaties, and Art 55, and customary international law were rejected. In both instances, and of remark for the otherwise reserved and reticent judges, the Court held that "neither [Art55] nor any other provision with constitutional weight prescribes or implies that an administrative court judge ought to hold customary international law paramount over a statute in a case of conflict between the two norms."[125] It should not go unnoticed that the Court's consideration of customary international law was uttered in the same breath as Article 55 of the Constitution and other constitutional provisions (impliedly the 1946 Preamble). In effect, as Alland observes, the Conseil d'Etat has transferred the problem of hierarchy to the Cour Constitutionnel.[126]

The Court does not prevent the invocation of customary international law; it only considers its effect within the French legal system once invoked. The real question of course is yet unasked and unanswered by the Court. Namely, what of a rule of customary international law which is contrary to French law? In *Aquarone*, the rule of customary international law was held not to exist. In *Paulin*, the court did not find any patent, substantive contrarity between French tax provisions and the international situation of the claimant. The same might be said for *Nachfolger*. The legislative screen "loi ecran" doctrine would likely serve as a further hindrance to the application of customary international law over and around French law.[127]

The courts of ordinary jurisdiction have often referred to the general rules of the "law of nations" or customary international law.[128] But this more active reference to customary international law than with the Conseil d'Etat has not matched the real and active application of customary international law. The primary reason is that customary international law concerns the relations of sovereign entities, states

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[124] Dupuy 2008, p. 199, citing °53934 CdE 18 april 1986 (*Potasse d'Alsace*), and °72951 Cass. 23 October 1987 (*Nachfolger*) (destruction of a sinking ship with dangerous cargo which posed a threat to shipping in and around French waters, not contrary to any rule of international law).

[125] And in any case in °148683 CdE 6 June 1997 (*Aquarone*), the customary international law invoked was not shown to exist in fact. Dupuy 2008 p. 428 sees this as a side, obiter, point, and noting that the Lyon appeal court set its reasons much more widely and that Art. 14 of the 1946 Constitution was not bereft of any legal effect. See also Alland 1997.

[126] Alland 1997.

[127] Alland 1997 and Bachelier 2001.

[128] Dubuis 1972; and see e.g., Rennes CA *Rego Saules Andres* (26 March 1979); Cass. *Barbie* (6 Oct 1983); °00–87215 Cass. (13 Mar. 2001); °00–45629, °00–45630 Cass. (20 June 2003), and the cases note above.

in fine; an individual has no status, as Cassation noted in *Argoud*.[129] Nonetheless, in *Barbie*, Cassation found that the rule of statutory limitations applied to crimes against humanity by virtue of the law of nations. In matters of sovereign immunity as well, customary international law can afford rules applicable to individuals: *Association SOS Attentats* and *Ecole Saoudinne*.[130] But customary international law itself could not supplement or create an offence in the absence of statutory direction, in the absence of a legislative basis: *Aussaresses*.[131] Thus, in attempting to justify prosecuting a French general for wartime atrocities in Algeria, customary international law was not an "auxiliary source" of law: it guided the interpretation of law, but did not create rules of its own accord.

This said, the Court demonstrated a more typical approach in *Iraqi State v Dumez SA*.[132] A subcontractor to a Kuwaiti contractor attempted to attach Iraqi funds in France, after Iraq refused to pay. A 1990 Iraq law forbade corporations from bring actions before Iraq courts. The appeal court had found Iraq not to have waived immunity. But because France and Iraq were nonetheless subject to 1991 UNSCR 687 (that Iraq scrupulously adhere to debt repayment obligations), and since by the UN Charter, UNSCRs were directly applicable and binding on UN member states, Iraq could not claim immunity. Cassation overturned the appeal court. It relied on Art 55 of the Constitution and the principles of immunity from jurisdiction and execution brought into the Civil Code. So long as UNSCRs were not duly brought into French law, they were not directly applicable, even if taken into account as a "fait juridique".

The basis for invoking and applying customary international law before the Cour Constitutionnel is much narrower and more limited given the jurisdictional remit of the Cour Constitutionnel. Nonetheless, the Court held that no rule of international law (via the Constitution's preamble) was engaged, given the exercise by referendum of the free expression of the population's will to remain French.[133] Nevertheless, Dupuy remarks that the Cour Constitutionnel seems more adept at avoiding the question of customary international law and its application than in actually applying it at all.[134] While the Cour Constitutionnel may have referred to general principles of international law in its Maastricht Treaty decisions,[135] specifically "*pacta sunt servanda*", this was not to invoke them as rules justiciable by and in the Cour Constitutionnel.[136] It confirmed that only those specific

[129] Cass. *Argoud* (4 June 1964).

[130] °00–87215 Cass. (13 Mar. 2001) and °00–45629, °00–45630 Cass. (20 June 2003).

[131] °02–80719 Cass. *MRAP v Aussaresses* (17 June 2003).

[132] °02–17344 Cass. (25 April 2006) *Iraqi State v Dumez SA* ILDC 771 FR 2003.

[133] See °76–76 DC and °76–78 DC, 28 Dec. 1976, and see °85–194 DC, 10 July 1985.

[134] Dupuy 2008, p. 431 (citing a 17 July 1980 decision which rejected arguments alleging a breach of general principles of international law by a Franco–German convention in addition to the European Convention).

[135] °92–308 DC, 9 April 1992, and °92–313, DC 2 September 1992.

[136] See Dupuy 2008, p. 431.

principles taken up expressly in the Constitution could find judicial effect, pursuant to its jurisdictional remit.[137] It does not consider the substance of the Treaty itself, but only the legislative authorisation. In its ICC decision of 22 January 1999, it was prepared to consider the general rules of international law contemplated by the 1946 preamble as wider and more diverse than just *pacta sunt servanda*.[138]

4.6 The Netherlands and the Constitution Supreme?

Given its strong and professed tendencies to favour monism, the Netherlands legal system ought to present many if not all the trademark characteristics of the presumptive approach when dealing with customary international law. Primarily, the presumed integration of customary international law and domestic law would meet the inevitable conflict between the two sets of rules by having the domestic defer to the international. It could also be expected that the courts would drive the integration within their ordinary constitutional jurisdiction of interpretation and application of law. The rule of recognition would not require any additional legislative fiat to give domestic legal force to customary international law within the legal system. Indeed, that is the thrust of the argument wielded in the US and the UK that "international law is part of our law". Admittedly, this broad-brush representation requires some nuancing to deliver its point. In particular, framing the issue as one of deference immediately presumes the "new customary international law" described above, the shift of international law to an internal point of view where its precepts actively regulate the interactions between individuals and governments. And it would seem to discount simple judicial abstention, or at least prefer an explicit choice of one rule over another. Be that as it may, however, anchoring a presumptive approach in the Netherlands legal system faces the signal difficulty of Articles 93 and 94 of the Constitution. This constitutional authorisation has ostensibly substituted an institutional approach for the presumptive. But in doing so, its emphasis on the separation of powers may have allowed for a more extensive dualism.[139]

4.6.1 Nyugat (No. 2) and a Change of Optic?

The starting point for any discussion on the legal force of customary international law in the Netherlands legal system is the 1959 Hoge Raad decision in *Nyugat*

[137] Favoreu 1993.

[138] °98–408 DC, 22 Jan. 1998.

[139] As recognised by, e.g., Brouwer 1992, p. 213 and Besselink and Wessels 2009.

(No. 2)[140] This set the defining interpretation for the supremacy clause in the Constitution (at the time Article 66 in the 1956 version). It was a prize case, in which a Swiss shipping concern claimed damages for the State's unjustified seizure and scuttling of its ship, flying under a Hungarian flag. Both characteristics, it submitted, had put it outside prize jurisdiction. And it argued that the State's later retroactive application (by Order) of its prize law to cover just such a situation infringed customary international law. The Court found that, regarding the question how far a judge might go to finding national law in contravention of international law, Article 66 demonstrated a clear and certain intention to restrict from that time onward that jurisdiction only to directly applicable treaty terms. Thus the Court refused to entertain the case because it rested on customary international law (and equally for non-directly-applicable treaty terms).

The "Nyugat doctrine" returned front and centre in the 2001 Hoge Raad case of *Bouterse*.[141] As army commander-in-chief in Surinam, Bouterse allegedly ordered the execution of some 15 people in 1982. Dutch relatives of two victims laid a criminal complaint against Bouterse in 1997 for these acts, seeking his prosecution for crimes against humanity and torture, as prohibited by customary international law and by the 1984 UN Torture Convention. Apart from the question of the limitations period, the more pressing problem was the 1989 Netherlands implementation of the Torture Convention, and without any explicit retroactive effect. Yet Article 16 of the Constitution and Article 1 of the Criminal Code prohibited retroactivity. The Court of Appeal had allowed the investigation and prosecution to continue by on the basis that the Convention merely declared extant customary international law regarding crimes against humanity (for which universal jurisdiction was to have existed already in 1982) and that the customary international law crimes against humanity were not subject to statutory limitation. The Hoge Raad rejected this position on the grounds of the Nyugat doctrine. It offered, however, significantly more reasoning than in *Nyugat (No. 2),* accounting for the 1983 constitutional amendments realising Articles 93 and 94. Constitutional and statutory provisions were subject to review against directly applicable treaties, but not customary international law.[142] Retroactive effect therefore could not be attributed to the clear terms of the 1989 implementation Act, by characterising the

[140] HR *Nyugat (No. 2)* 6 March 1959, NJ 1962 2 (*sub nom Swiss Corp. v The Netherlands* (1963) 10 Neth. ILR 82). For commentary on the decision, see, *inter alia*, Fleuren 2005, pp. 82–84; Besselink 1995, pp. 54–56; Brouwer 1992, pp. 211–215 (and the works cited there); Bos 1985, p. 42ff, and van Panhuys 1964, p. 105. HR *Nyugat (No. 1)* 13 Jan. 1956, NJ 1956 141 addressed what capacity the court was seized—as prize court or some type of national court (opting for the latter): see Brouwer 1992, p. 212.

[141] HR *Bouterse* 18 Sept. 2001, NJ 2002 559 (*sub nom. Desi Bouterse* ILDC 80 (Netherlands 2001).

[142] Following: HR 8 July 2008, LJN BC7418 (no jurisdiction to restrict interpretation of Wartime Offences Act (incorporating 1949 Geneva Conventions) on basis of purported unwritten international law excluding vertain internal conflicts).

Convention as extant customary international law.[143] It framed the holding in terms of the court not being free to decide not to apply the Act on the grounds that it was inconsistent with customary international law.

Of particular note is the prominent place of separation of powers considerations in the Court's reasons. It drew heavily and decisively upon an Explanatory Memorandum in support of the Bill to introduce Article 94 and submitted to the Estates General.[144] While it accepted there that unwritten international law can be regarded as binding in the Netherlands legal system (noting the amendment to Article 99 of the Judiciary Act to allow for appeals based thereon), it denied its primacy over domestic legislation as a result of the 1953 and 1956 constitutional amendments. And picking up where *Nyugat (No. 2)* left off, the separation of powers point was made explicit. Allowing such primacy would represent an extension of judicial power into constitutional review. And apart from the practical difficulties of locating certain, clear justiciable rules, the risk of conflict between extant legislation and a treaty under Parliamentary consideration was undesirable. "A different system might frustrate the constitutional powers of the Government and Parliament…. In our view, a system for the internal operation of international law that takes account of our constitutional arrangements, and provides a sound basis for the courts, the administration and citizens is more important than the aspect of legal theory [suggested unacceptability of distinction between written and unwritten international law in legal theory regarding internal operation of international law]."[145] The constitutional arrangement of a polity, *pace* Kelsen, precedes law. Sovereignty trumps.

The logic of the matter, then, is that by expressly setting out jurisdiction for the paramountcy of directly applicable treaties, the Constitution has prohibited paramountcy of customary international law (the "*a contrario*" reading). Three considerations are apt here. First, the Nyugat doctrine does not restrict jurisdiction so far as to prohibit any consideration of customary international law.[146] The doctrine goes only to the legal force of customary international law within the domestic legal system, without more. Where a statute incorporates or refers to customary international law, unquestionably the courts operate within their constitutional jurisdiction when giving effect to it pursuant to that statutory direction. The two leading examples are Article 8 Criminal Code and Article 13a General Provisions Act.[147] The former qualifies according to unwritten international law those to whom the Criminal Code applies, in effect a sovereign immunity provision. Likewise, the latter subjects execution of judgments to

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[143] Compare HR *Knesevic* (*No. 2*) 11 Nov. 1997, NJ 1998 463 (prospective incorporation of 1949 Geneva Conventions into Wartime Offences Act).

[144] Kamerstukken II 1977–1978, 15 049 (R 1100) nr. 3, 11ff.

[145] *Desi Bouterse,* ILDC, para. 4.4.2.

[146] Emphasised by Brouwer 1992, p. 214. For cases prior to 1960, see Erades and Gould 1961, p. 270ff.

[147] On which see Erades 1993, pp. 627ff, 879. Besselink 2007, pp. 79–80 provides further examples.

unwritten international law (also sovereign immunity provisions).[148] But the Nyugat doctrine does undercut the overall force of unwritten international law as a measure for national law. It must rely on the momentum of moral force: unless directly applicable, judges are not obliged (except by convention and academic protestation) to apply it. The doctrine can provide judges with an easy and convenient way to sidestep difficult questions (or exercise a cautious constitutional patriotism) where domestic and international measures collide.

Second, and following, the Courts do remain open to hear arguments relying upon customary—or unwritten—international law. But of course the condition for its application is the characteristic of directly applicability. In its 1989 *Cruise-missiles* decision, regarding a short-lived treaty to station cruise-missiles with atomic warheads in the Netherlands, the Court was prepared to assume without deciding that all the rules of public international law invoked could be relied upon by individual parties (particularly given that they were tied to Article 1401 Civil Code, creating state liability for state-caused torts).[149] And likewise in the *NATO Nuclear Weapons* decision, this time in connection with the Netherlands' commitments to NATO and its deployment of strategic nuclear weapons, the court was prepared to accept the standing of the special interest groups,[150] and their claim as sounding in general international law.[151] Nevertheless their claim failed in substance principally because they had not demonstrated a sufficient degree of specific and actual risk necessary to ground a Civil Code Article 6:162 cause of action, nor could they demonstrate on the (international) authorities that the use of nuclear weapons was prohibited in each and every circumstance. And a 2004 attempt to tread the (not directly applicable) provisions of the UN Charter, specifically Articles 2(4), 42, and 51, and other norms of international law, into a positive and legally enforceable duty of the state under Article 90 Constitution was also rejected on its merits by the Court.[152] It is important to recognise that these cases asserted positive rights sounding in unwritten international law, unlike cases involving sovereign immunity where judicial abstention, as a form of self-limitation of sovereignty, provide "negative" rights.[153] Unwritten international law did not confer such positive rights unless the rule could be established with due certainty and clarity, and importantly moreover, the rule was directly applicable as required by the constitutional rule of recognition.

Third, a strict reading of the Nyugat doctrine would not prevent judicial review of secondary legislation on the basis of unwritten principles of international law. The origin and application of the doctrine has addressed primary legislation alone.

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[148] HR 22 Dec. 1984, NJ 1991 70; and see Fleuren 2005, p. 98.

[149] HR *Cruise–missiles* 10 Nov. 1989, NJ 1991 248.

[150] The State had not challenged their standing at the right time or in the right way: HR *NATO Nuclear Weapons* 21 Dec. 2001, NJ 2002 217, §3.8.1.

[151] HR *NATO Nuclear Weapons*.

[152] HR *Afghanistan* 6 Feb. 2004, NJ 2004 329.

[153] Fleuren 2005, p. 98.

The Hoge Raad has recognised judicial power to assess subordinate legislation (and including "general rules of governance" and "generally binding precepts") on the basis of unwritten principles of law and justice.[154] This could be construed to include in that collection the unwritten principles of international law.[155] It bears recalling that the jurisdiction to review extends only to a "marginal" control, the unreasonableness or irrationality (in its administrative law sense) of tenor and operation. Courts are prohibited from deciding on the actual merits or necessity of the law by Article 11 of the General Provisions Act. Practically speaking, there seems little problem to invalidating an extant regulation. But insofar as giving a further power of "interpretative amendment", to create rights based on those regulations, this would approximate the judicial-law making frowned upon by the Netherlands separation of powers doctrine.[156] It is conceivable that the courts would be persuaded to work by analogy and apply the rule of recognition requiring direct applicability, as noted above.[157]

4.6.2 Sovereign Immunity

Sovereign immunity does the bulk of the work in the courts regarding customary international law.[158] (While Article 13a General Provisions Act makes explicit provision therefor, that section may not always find its way into the reasons for decision.) The courts follow and apply the general developments in the doctrine, including the waiver of immunity where the state is pursuing non-public, private and commercial objectives.[159]

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[154] HR *Landbouwvliegers* 16 May 1986, NJ 1987 251; HR *Harmonisatiewet* 14 April 1989, NJ 1989 469 (primary legislation remains exempt).

[155] As argued by Besselink 1990, Besselink 1995, pp. 55–56, and Besselink 1996, p. 40ff. And see the critique of Fleuren 2005, p. 84.

[156] Yet ABRvS 20 July 2007, LJN BB0917 (Council Directive 2004/83/EC regarding asylum application of Kosovar Roma not defining "internal armed conflict", entitling court to seek clarification in international humanitarian law, the 1949 Geneva Conventions, to be precise).

[157] This might produce the result that *ius cogens* and obligations *erga omnes*—given precedence over treaty provisions in the VCLT (and thus over treaties entered into by the Netherlands)—might not have general precedence in the national legal order. Barendrecht 1992, p. 106 observes that this may be a moot point, or one of merely academic interest, since the types of obligations so characterised represent the minimal conditions for functional human rights and a democratic society under the rule of law. Any constitutional democracy, like the Netherlands, will already be well within the boundary conditions set thereby.

[158] See, e.g., CA The Hague 15 March 2007, LJN BA2278 (Organisation Prohibiting Chemical Weapons entitled to full immunity against execution of default judgment) the cases cited by Fleuren 2005, p. 98.

[159] HR *Soc. Europ. D'Etudes et d'Entreprises v SFR Yugoslavia* 26 Oct. 1973 NJ 1974 361 (Yugoslavia not entitled in the circumstances to benefit from immunity in enforcement of ICSID arbitration award in the Netherlands); Rb Rotterdam *Sierra Oil v Georgia* 1 Nov. 2006, LJN

Of interest, though, is the Hoge Raad decision of *US v Bank voor Handel en Scheepvaart*, a decision subject to the Nyugat doctrine.[160] Shortly described, BHS brought an action to recover assets seized during World War II by the US government as "enemy property". Specifically, these were shares in and debts owing from Union Bank, an affiliate of BHS.[161] Since the war, the Union Bank had been liquidated and the surplus retained by the US government for its own use. BHS attacked the seizure as an expropriation contrary to international law, and its characterisation as an "enemy" for the purposes of the Act. The Court dismissed the claim on its merits, rather than declining jurisdiction for reason of US sovereign immunity. In fact, the Court held that no rule of law barred it from examining whether the US action was correct, including under customary international law. Nor did customary international law bar consideration where all elements, legal act and property, were situated within the foreign state.

This case can be examined from three vantage points. The first addresses the merits of the decision, based on its articulation of the governing rule in international law. The second, and related, concerns the role of domestic courts in creating and developing customary international law—that the source of international law is national law and practice.[162] The third approach considers the effect of the Nyugat doctrine. In particular, it would emphasise that a similar result could not obtain were the legislation domestic in origin. The Nyugat doctrine deprives the courts of jurisdiction to do so. Thus the result that the court may enter into the merits of foreign law and its execution in that state, but may not do so regarding its own laws. There is a divide, a distinction thereby created between national law and international law, one which originates in the constitutional structure of a legal and political system. The case exemplifies the change of optic occasioned by *Nyugat (No. 2)*. At one level, this might be said to undercut the monistic project of integrating national and international law, especially given the new, internal perspective of international law. In perhaps a less epic way, the divide also reflects that the kernel of validity and legitimacy to law irresistibly originates not in some inherent or innate quality of "law" or "justice" but in the particular constitutional and social construct of a polity.

(Footnote 159 continued)
AZ1511 (Georgia not entitled to avoid garnishee of amounts owing by Netherlands foundation, on judgment concerning petroleum supply agreement).

[160] HR 17 Oct. 1969, NJ 1970 428. See also *Bank voor Handel en Scheepvaart v Slatford* [1953] 1 QB 248, as a furthur chapter to its story to recover assets seized in wartime.

[161] BHS itself was part of a corporate group ultimately owned and controlled by Thyssen–Bornemisza, of Hungarian/German descent.

[162] To raise the spectre of the Bergbohm hypothesis once more: see Chap. 2 above. And it brings to mind *Banco Nacional v Sabbatino* 376 US 398 (1964), both for the dissent of White J, and Harlan J's view on the nature of immunity as judge-made locally.