International Law in Domestic Systems

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Introduction

The Netherlands have emerged as an independent State from Habsburg rule after separation in 1581 from Spain. Over time it developed into an independent republic uniting seven provinces in a confederation structure.

During a turbulent period from 1795-1813 it successively went through the phases of a unitary republic, a kingdom and an integral part of the French empire. In 1813 it revived as a kingdom and independent State and, from 1814-1839, was united with present-day Belgium. Gradually, it became a constitutional monarchy. Over time the Netherlands also evolved from a colonial power into a post-colonial State.

The Kingdom of the Netherlands maintained special constitutional ties with its former colonial overseas territories which were laid down in the 1954 Charter of the Kingdom (Statuut). Nowadays the Kingdom consists of three autonomous entities or Countries (Landen): the Netherlands (sometimes referred to as the ‘Kingdom in Europe’) and the Caribbean islands, Aruba and the Netherlands Antilles. In the near future the latter will probably be split up into two autonomous territories, Curaçao and Sint Maarten (Saint-Martin), whereas three smaller islands, Bonaire, Sint Eustatius and Saba will be politically integrated into the Netherlands.

The Kingdom’s internal relations are governed not only by domestic law but by international law as well, particularly so, as far as the right to self-determination of the overseas territories is concerned. In international relations the Kingdom acts as the legal entity exercising in particular the treaty-making power. Occasionally, the Kingdom’s twofold constitutional structure tends to complicate matters. In this paper we use the term ‘the Netherlands’ as indicating the subject of international law. Where the relations between the Countries (Landen) is concerned we will refer to the ‘Kingdom’.

Running ahead of what will be addressed in more detail later, the attitude vis-à-vis international law in the Netherlands could and can be characterised by a relative openness of the written and unwritten constitution towards international law. In doctrine, the Netherlands system has been qualified as moderately monistic. In a recent summary of the present-day State practice the Government has endorsed this view. It explained that term in pointing to the fact that the Constitution sets some conditions for the internal effect of international law such
as Parliamentary approval and official publication and does not treat all sources of international law equally.¹

Further, as a typical development of foreign relations can be mentioned what has been called its ‘democratisation’. Parliamentary approval increasingly has become a precondition for the internal effect of international treaties. The last two centuries saw an extension of the categories of treaties subject to such approval at the expense of the powers of successively the King and the Executive.

1. **Constitutional and Legislative Texts**

1.1. **Provisions of the National Constitution referring to International Agreements, Treaties, Customary International Law and other Sources of International Law**

International relations are dealt with in the Constitution under subsection 2 of Chapter 5 ‘Legislation and Administration’, entitled ‘Miscellaneous Provisions’ the following articles are relevant here:

Art. 90 The Government shall promote the development of the international rule of law.

Art. 91

1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament.

2. The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval.

3. Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour.

Art. 92 Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Art. 91 para. 3.

Art. 93 Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.

Art. 94 Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

Art. 95 Rules regarding the publication of treaties and decisions by international institutions shall be laid down by Act of Parliament.

These articles are followed by specific provisions (Articles 96-102) on declaring the Kingdom in a state of war, conscription² and, generally, on the military; they are less relevant here.

¹ See *Doorwerking internationaal recht in de Nederlandse rechtsorde* (Governmental note on the effect of international law in the Netherlands legal order), *Parliamentary documents* 2007-2008, 29861 No. 19, p. 3.
Finally, mention should be made of Article 120 restricting the judiciary’s competence to review:

Art. 120 The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.

The quoted articles of the Constitution lend direct effect or – to borrow a term from US constitutional law ‘self-executingness’ – to some provisions of international law i.e. of treaties and of decisions of international organisations on the condition that they are ‘binding on all persons’. Such provisions of international law rank high in the hierarchy of legal norms; they enjoy priority over Acts of Parliament as well as over the Constitution itself. Besides, Article 120 precludes the courts from reviewing the constitutionality of treaties, a question which is of special relevance with regard to treaties deviating from the Constitution and thus requiring under Article 91 para. 3 a qualified majority for approval.

The Act referred to in Articles 91 paras. 1 and 2 and 95 is the (Kingdom) Act of Parliament on (parliamentary) approval and publication (Rijkswet goedkeuring en bekendmaking verdragen).\(^3\) It elaborates the conditions for and exceptions from parliamentary approval of treaties and also lays down some rules about the publication of treaties and of some decisions of international organisations in an official journal called Tractatenblad.

The Constitution thus refers explicitly only to treaties and decisions of international institutions (i.e. organisations). It is silent on customary international law, general principles of law, the decisions of international tribunals and international texts of a declarative nature.

Inter alia in its judgment of 1959 – to be discussed in Section 4 on customary international law below – the Supreme Court has sketched roughly the contours of the courts’ constitutional competencies with respect to international law, in general. This judicial attempt to fill the gap in the written Constitution is neither perfect nor hard. Yet, it has been accepted as valid and legal practice conforms to it.

It boils down to the following. The application of self-executing provisions of treaties and decisions of international organisations generally excepted, the courts ought to avoid an open confrontation with the parliamentary legislature; they should not review Acts of Parliament and squash them for non-conformity with international law. The underlying idea, apparently, stems from the implied constitutional supremacy of Parliament as the democratically elected legislator. Sometimes even self-executing international law may be denied that effect. Such is the case when the courts prefer to ‘abstain’ as will be explained in § 2.3 below.

That being said, international non-self-executing law from whatever source, of course to the extent that it is fit for judicial application, may produce all sorts of effects. These effects range from mere relevancy to great authority and from recommendatory to fully legally binding effect. In applying such international law the judiciary has the power to review delegated statutory law but not Acts of Parliament. The situation is different for the administration and the legislature which are under the international and constitutional obligation to comply with international engagements even if they are not cast in self-executing form.\(^4\) A complicating factor in this respect is that the latter obligations of the administration in some circumstances may subsequently as yet permeate into the case-law and

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2 This provision is nowadays merely hypothetical since conscription has been terminated as from 1996.
3 *Staatsblad* (Official Gazette) (hereafter abbreviated as *Stb.*) 1994, 542.
4 So Governmental note (*supra* note 1), p. 5.
become subject to judicial review viz. in tort actions against the authorities for non-compliance with international law.\(^5\)

### 1.2. Legislative Provisions calling for the Application of International Law within the National Legal System

There are several statutory provisions about the application of international law. The most important ones are: Article 13a of the *Wet algemene bepalingen* (General Provisions

Kingdom Legislation Act of 1829) (*Stb.* 28) lays down:

‘The courts’ jurisdiction and the enforceability of judgments is subject to the exceptions recognised in international law’.

‘International law’ in this provision is considered to extend to all sources of international law including customary international law, general principles of law and decisions of international tribunals. It excludes notably the courts’ jurisdiction with regard to acts of State and has been elaborated in Article 3 para. 3 of the 2001 *Gerechtsdeurwaarderswet* (Bailiffs Act).\(^6\) A bailiff is not to enforce a judgment if he has been informed by the Minister of Justice that he wishes to stay the enforcement of a court order because such enforcement would run contrary to obligations of the State under international law.

Similar provisions are to be found in the Criminal Code and the Code of Criminal Procedure. Article 8 of the Criminal Code stipulates:

‘The applicability of the previous Articles 2-7 is subject to the exceptions recognised in international law’.

The Articles 2-7 concern especially the territorial scope of the Criminal Code. Further, Article 539 Section (a) (3) of the Code of Criminal Procedure reads:

‘The powers conferred under the provision of this Title can be exercised only subject to the law of nations and the rules of inter-regional law’.

This section of the Code establishes to what extent the powers in Title VI (A) relating to criminal procedure outside a court’s area of jurisdiction (including jurisdiction for seizure on the high seas), can be exercised when rules of international law and the rules in force between the constituent parts of the Kingdom are involved.\(^7\)

In both provisions international law is to be understood as international law originating from any source, not just treaties or decisions of an international organisation.

\(^5\) Fleuren 2004, p. 304.
\(^6\) *Stb.* 2001, 70. A similar earlier provision, Art. 13 of the Regulations for Bailiffs (*Deurwaardersreglement*), had been applied by Supreme Court 25 November 1977 (*’t Hart/Helinski*), *NJ* 1978, 186; see Erades 1993, p. 633; see also President Judicial Section Council of State 24 November 1986, *Kort Geding*, 1987, 38 (see also Section 4.2 *infra*).
The Algemene Wet inzake rijkbelastingen (State Taxes Act) in Articles 37-39 contains some provisions for the prevention of double taxation. Article 39 provides specifically:

‘In cases where international law or in the opinion of the Minister of Finance international usage (in Dutch: ‘gebruik’) so requires exemption of taxation is granted. Our Minister is authorized to issue further regulations on the matter’.

Again the scope of the provision is comprehensive: international law from any source. Besides, the notion of usage is generally understood to be wider than customary international law; it includes also unilateral practices of the Netherlands State or of its administration.

The Wet internationale misdrijven (Act on international crimes) of 19 June 2003 (Stb. 270) also frequently refers to international law with respect to international humanitarian law. The 1922 Wetboek militair strafrecht (Code of Military Criminal Law) (Stb. 1352), in Article 38, mentions the laws of war in connection with impunity, especially, of the military.


As mentioned in the Introduction the Kingdom (i.e. the Netherlands in Europe and the Caribbean overseas territories) has an uncommon structure; it is neither federative nor confederative in the strict sense. Recently it has been described as a ‘cooperative structure’ or ‘constitutional association’ since it is more of a procedural device ‘for the Dutch organs to consult with the Netherlands Antilles and Aruba before acting on their behalf’ than a body politic encompassing all elements and performing the traditional activities of an ordinary State.

In matters of international law the Kingdom acts as an indivisible single legal entity according to Article 3 para. 1b of the Charter, the functions as a subject of international law being exercised mostly by the authorities of the European mother country.

With regard to formal acts such as treaty making and the membership of international organisations, however, the Charter contains specific rules (Articles 24 ssqq.). The gist of it is that the Kingdom formally has the monopoly of conducting the international relations. However, the separate entities (i.e. motherland as well as the overseas Countries) may take considerable influence on the material contents of the international obligations to be engaged in, particularly so, where autonomous matters (not belonging to the ‘Kingdom affairs’) are concerned. Agreements with other powers and with international organisations affecting an overseas Country shall be submitted to its representative assembly. The overseas Countries of the Kingdom have the opportunity to opt in or out international agreements, especially those dealing with economic or financial matters. Article 28 even enables the Antilles and Aruba to accede to – separate – membership of international organisations. Moreover, these territories have been associated with the European Community under Part four of EC-treaty as ‘overseas countries and territories’.

The above quoted Articles 90-95 of the Constitution also apply to the Kingdom in virtue of Article 5 para. 1 and Article 3 para. 1b of the Charter; the latter qualifying foreign affairs as an ‘affair of the realm’. This implies inter alia that provisions of international law which ‘may be binding on all persons’ take priority even over the Charter of the Kingdom.

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8 Of 2 July 1959, Stb. 301 as amended.
10 Art. 5 para. 1: ‘The Kingship and the succession to the throne, the organs of the realm referred to in the Charter, and the exercise of royal and legislative powers in affairs of the realm shall be governed, if not provided for by the Charter, by the Constitution of the realm’.
There is no special court charged with adjudicating any conflicts between international law and the law of the Antilles and Aruba. However, the Netherlands Supreme Court (Hoge Raad) is – in civil, criminal and fiscal matters – as is the Council of State’s judicial branch (Raad van State Afdeling bestuursrechtspraak) – in other administrative law matters – acting as a cassation court (French: ‘cour de cassation’) and applying the law of the Country involved (i.e. Antillean and Aruban law). Thus, although the statutory substrata are not the same, it is unlikely that the judicial methods and practice of applying international law (discussed in the following paragraphs) will differ with respect to Antillean and Aruban law. The more so, because the just quoted provisions of the Constitution apply equally to the overseas Countries.

2. Treaties and other International Agreements

2.1. Definitions

The Articles 93 and 94 of the Constitution cited above treat the self-executing provisions of treaties and decisions of international organisations on an equal footing. The treaties will be discussed here, whereas the decisions will be discussed below in section 3.

The Constitution refers to ‘verdragen’ (i.e. treaties) in order to ascertain that – irrespective of their designation – formally and materially the same instruments are meant as in international law. This qualification is of importance in the first place for Parliament, since in principle a treaty needs to be approved as a condition for being binding on the Netherlands State. When approved by Parliament there is little or no reason for the courts to still question the qualification as a treaty. Besides, Article 120 of the Constitution precludes the courts from reviewing the qualification given by the Government and Parliament and from deciding for their part the nature of an international text under domestic law.

A treaty which merely implements another treaty does not require parliamentary approval.11

Nevertheless, on one occasion, the Government gave in to political pressure and submitted a treaty, implementing a treaty approved by Parliament, to Parliament for approval. It concerned an agreement with the USA about the deployment of nuclear weapons on Dutch territory. The Government did so in order to rally more democratic support.12

In order to be applicable the treaty must have been duly published in the Tractatenblad (the official journal containing treaties and other international documents). It is for the courts to test the publication.13 With that formal exception they will – as a rule – rely on international law for the interpretation and application of a treaty.

It is, particularly at the occasion of the Constitution’s revision in 1983 that, both in doctrine and administrative practice (but not so much in case-law), the distinction between legally binding and legally non-binding international texts has been elaborated. With regard to the latter there is a further distinction, though not a very sharp one, between ‘international policy agreements’ and ‘international administrative arrangements’. The former are usually referred to as ‘memoranda of understanding’. They commit politically but cannot be held in law against the State. The term ‘international administrative arrangements’ is used for engagements entered into by e.g. the Government or a Cabinet Minister with a foreign counterpart. Here the demonstrable intention of the authorities – either domestic or foreign – is required for their non-binding character. Otherwise such a document is deemed to be a

11 Art. 7 b of the 1994 Kingdom Act on (Parliamentary) approval and publication.
13 See Hoge Raad (abbr. HR) (Supreme Court) 24 June 1997, Nederlandse Jurisprudentie (NJ), NJ 1998, 70.
treaty.\textsuperscript{14} \textsuperscript{15} It is likely that the courts, in line with this approach of doctrine and administration and, in similar circumstances, will accept the binding force of such an agreement.

The ‘upgrading’ of an administrative arrangement or any other originally non-binding text does not necessarily imply that parliamentary approval would be needed, as yet. The 1994 Kingdom Act on approval and publication in Article 7 lit. b provides that agreements for the implementation of approved treaties do not need to be approved themselves unless Parliament decides to the contrary (Article 8). This seems most practical since implementing treaties and administrative arrangements are often hard to distinguish.

2.2. Effect of Ratified Treaties

Ratified treaties that have been explicitly or silently approved by Parliament and have entered into force do not, as far as self-executing provisions are concerned, need special acts of incorporation provided they have been duly published.

On the other hand, implementing legislation is needed to make the non-self-executing provisions applicable by the courts. If and to the extent that implementation might encompass (elements of) self-executing provisions such implementation does not, however, preclude the courts from testing the implementing domestic statutory law for conformity with the original treaty. Generally, implementation by legislation does not create an irrefutable presumption of non-self-executingness because the legislature often leaves it – explicitly or implicitly – to the courts to consult the \textit{travaux préparatoires} and other relevant data in order to interpret and apply properly the domestic legal texts implementing a treaty.

2.3. The Doctrine of Self-executing and Non-self-executing Treaties

Since the Constitution embraced in 1953 a doctrine of self-executingness the courts are inclined to adhere to that doctrine.\textsuperscript{16} The criteria taken into account are a mixture of international and domestic law. So self-executingness is not esteemed to be entirely dependent on the intention of the States parties. In the leading case the Supreme Court considered that it was not relevant whether the

‘States parties intended to recognise the direct effect of Art. 6 para. 4 of the European Social Charter, since neither from the text nor from its \textit{travaux préparatoires} it could be inferred that such effect had been excluded. In those circumstances, according to Netherlands law, only the contents of the provision is decisive: does it oblige the Netherlands legislator to make rules of a certain content or import or is that provision of such nature that it can be applied as objective law right away’.\textsuperscript{17}

In the case-law those criteria have been further elaborated.\textsuperscript{18} \textit{Fleuren} mentions in this respect \textit{inter alia} the following criteria:

- the way in which the engagements of the States parties to a treaty have been couched;
- is a provision fit to be applied by the courts;

\textsuperscript{14} Fleuren 2004, p. 149. See also Alkema 2008, p. 184-186.
\textsuperscript{15} HR 7 November 1984, \textit{NJ} 1985, 247.
\textsuperscript{17} Supreme Court HR 30 May 1986 (\textit{NS/FNV}), \textit{NJ} 1986, 688 § 3.2.
\textsuperscript{18} See generally Fleuren 2004.
- is it sufficiently concrete;
- is gradual implementation provided for;
- is the provision binding the State in its relations to other States only;
- does the provision contain a ‘positive’ obligation (particularly relevant with respect to social fundamental rights as opposed to classical fundamental rights).19

A most interesting development in the case-law is that the courts have created some sort of an escape in order to avoid a direct conflict with the political branch, the so-called ‘abstaining’. Occasionally the courts have ruled that even if the provision of international law is to be considered as self-executing it would – under certain circumstances – lay outside their competencies to apply the international law provision and let it prevail over the domestic statutory provision. This is particularly so, when those circumstances call for a weighing of different alternatives which the courts deem is beyond their judicial task and rather a matter for the political branch to decide. Apparently for constitutional reasons, the courts in those circumstances shrink from setting aside domestic statutory provisions. In doing so they clearly abstain from giving effect to an international law provision, in spite of their recognising it being self-executing.

Sometimes the courts leave the question of self-executingness undecided. They can do so because they first preliminarily examine whether the contested domestic legal provision or decision is in conformity with international law.20 If so, the question of self-executingness becomes moot.

Especially in connection with the International Covenant on Economic, Social and Cultural Rights (ICESCR) the matter of self-executingness has been discussed amply in the literature.21 With respect to that Covenant the courts – with a few exceptions – have not considered its provisions as self-executing. The Government when submitting the treaty for parliamentary approval observed that most of its provisions will not be directly applicable. In support of that view it pointed to Article 2 para. 1 where the State ‘undertakes to take steps […] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights concerned in the present Covenant.

Although this reasoning has been criticized by the UN Committee supervising this Covenant as early as 1998. Still the courts are not inclined to lend direct effect to the Covenant’s provisions. In the doctrine, to the contrary, it has been suggested that there could and should be exceptions. For one, it would be conceivable that some of these fundamental social rights would be applied by the courts, notably when newly introduced domestic legislation threatens to reverse a progressive development with respect to such a right into a retrograde development.

It is to be noted here that international law – whether self-executing or not – does not oblige just the State as a single entity but can address and obligate its component parts, notably the local authorities, as well. Disputes between central and local authorities including disputes about questions of international law used to be subject to administrative (non-judicial) review by the Crown and could result in annulment or non-approval of the local authorities’ acts or regulations. Nowadays – since the appeal to the crown has been abolished

20 Vlemminx & Vlemminx-Boekhorst 2005, p. 32.
following the ECtHR judgment in re Benthem – most such disputes are no longer finally decided by the administration but by the Judicial Branch of the Council of State. There is no reason to believe that this judicial body in future disputes between central and local authorities would not apply non-self-executing international law provisions either. Though non-self-executing, those provisions indirectly may benefit the legal position of private parties in disputes with local authorities.

2.4. Treaties and Private Parties

The foregoing already sheds some light on the conditions or circumstances under which treaties can be invoked and enforced in litigation by private parties. Generally, there are no special conditions nor special tests applied in such disputes with regard to the standing of private parties.

They may claim, as noted before, that the authorities have acted contrary to self-executing and non-self-executing treaty provisions and bring civil actions for tort and damages. However, private actions for an injunction with respect to the ratification or non-ratification of international treaties by the political branches are not permissible. In this and other instances the courts for obvious – constitutional – reasons have refrained from interfering in matters of foreign relations.

2.5. Judicial Interpretation of Treaties

In interpreting treaty law the courts are not obliged to defer to the views of the government or the legislature. In principle, they have full power to interpret treaties. If deemed necessary, they even may review a treaty under international law itself, notably with respect to compatibility with other treaties or international law. It goes without saying that they also may cite the Vienna Convention on the law of treaties. Occasionally, the Advocates-General attached to the Supreme Court as well as the Government have referred to that Convention. The Vienna Convention as such is not being subjected to the test of self-executingness; the application of its rules on interpretation rather precedes the decision about the self-executingness of other international law and ought to be distinguished there from.

The courts do, however, take note of the information and opinions voiced at the occasion of a treaty’s submittal for approval to Parliament and are used to accept these as a guidance. Such guidance is the more important since the power to review under Articles 93 and 94 is a ‘diffuse’ one: all courts have to apply international law but some of them, in particular courts of first instance, may lack the proper expertise or experience to do so.

On the other hand, as mentioned before (§ 2.2), the political branches often explicitly leave the interpretation of international law to the judiciary on the assumption that the courts may meet the dynamic development of international law more flexibly and effectively than the legislature itself.

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22 ECtHR 23 October 1985, Benthem v. the Netherlands, Series A 97.
23 Royal Decree of 19 February 1993 (Eems-Dollard treaty Art. 48), Administratief rechtelijke beslissingen (abbr. AB) 1993, 385; see also Royal Decree of 19 July 1974, Stb. 496 and Royal Decree of 10 September 1974, Stb. 556 both squashing regulations of the City of Rotterdam for non-compatibility with the Convention on the Elimination of All Forms of Racial Discrimination.
25 HR 10 November 1989 (Stichting verbiedt de kruisraketten/Staat), NJ 1991, 248 § 3.4.
26 Ibidem the Advocate General Mok’s brief § 5.4 and 6.1 and Governmental note (supra note 1) p. 7.
2.6. **Reservations**

Courts have the power to decide whether a statement attached to an international instrument by the government or legislature during treaty approval indeed is a reservation.\(^{27}\) However, they may review the question only under international law, *not* under constitutional law (the latter ban follows from Article 120 of the Constitution). Case-law to that effect has not been reported; neither is there a reported instance of a court deciding on the scope or legality of a reservation.

2.7. **Effect of Treaties among Third-parties**

Courts do refer to treaties to which the Netherlands is not a party. Here a distinction can be made. Firstly, treaties can be binding although they have not yet been approved by Parliament. Article 10 para. 1 of the 1994 Kingdom Act on approval and publication allows for provisional application of treaties if such is considered to be particularly urgent; in those instances parliamentary approval has to follow as soon as possible. Secondly, treaties which have not yet entered into force for the Netherlands (e.g. because they have been signed but not yet ratified) are formally not binding.\(^{28}\) Nevertheless the courts occasionally apply them in anticipation\(^{29}\) or may pray in aid such treaties where they have to determine (the contents of) a rule of positive law.\(^{30}\) It is noteworthy that this has happened also in cases with respect to constitutional principles, such as the ban on discrimination and the fundamental ‘right of person’ or the fundamental ‘right to a personality’. Thirdly, it is conceivable but not very likely that a court would refer to a treaty to which the Netherlands is not a party nor has taken steps to become a party. Such reference, however, could only support but not be a decisive element in the courts’ reasoning.

Comparable rules apply with respect to the far more rare cases of termination or of withdrawal from a treaty.

2.8. **Federal Systems**

The foregoing is fully relevant with respect to the Kingdom and the Countries (overseas territories). As mentioned in § 1.3 the provisions of the Netherlands Constitution on foreign relations are equally applicable and likely to be interpreted within the entire Kingdom in the same manner.

3. **Decisions of International Organisations, Tribunals and Bodies**

Since the Netherlands Constitution places in juxtaposition the provisions of both treaties and decisions of international organisations ‘which may be binding on all persons by virtue of their contents’ a few remarks will be made about the latter category which is of increasing importance nowadays.

We will not dwell long on the decisions of the European Community since that international organisation has its own rules for and judicial supervision over interpretation and implementation of ‘secondary’ community law by the member States. Yet, one comment

\(^{27}\) HR 5 January 1990 (*X*/*Jugendamt Tempelhof*), *NJ* 1991, 591 § 3.4.

\(^{28}\) HR 29 May 1996 (*X*/VZB), *NJ* 1996, 556; see further Fleuren 2004, p. 236, nt. 2.

\(^{29}\) See for examples of such anticipatory interpretation or enforcement: Erades 1993, p. 282; p. 559; p. 561-563; *contrary*: HR 24 January 1984 (*Magda Maria*), *NJ* 1984, 538 § 5.6.

should be made. Since the Court of Justice of the EC judgment in re Van Gend & Loos/Netherlands\textsuperscript{31} ruled that the Community constituted itself an autonomous legal order, in the Netherlands the doctrine has been prevailing that the Articles 93 and 94 were not instrumental in giving effect to European Community law within the domestic Netherlands legal order, European Community law being supposed to have such an effect in its own capacity.

Moreover, this understanding seems to have been confirmed by the Supreme Court and has firmly been adopted by the administration.\textsuperscript{32} In spite of such evidently well established constitutional practice, recently some authors have questioned that understanding.\textsuperscript{33} They point to the fact that the present Articles 93 and 94 were introduced in the Constitution in 1953 precisely for enabling European Community law to have effect within the domestic legal order and, they argue that therefore, these provisions still have to be considered as instrumental in that respect.

Decisions originating from other international organisations pose problems with regard to binding force, legality and legitimacy. Their binding force does not depend solely on the sovereign State’s will as the decisions may have been taken by a majority of the membership within the international organisation. Further and in contrast to the treaties instituting the international organisations, these decisions are not subject to parliamentary approval and they rarely have been translated and published officially.\textsuperscript{34}

The constitutional notion of decisions of international institutions (i.e. organisations) still is unclear in some respects. The Supreme Court turned down the argument advanced by a taxpayer that the Universal Declaration of Human Rights qualified as ‘a decision of an international institution’; it found that the United Nations General Assembly from which the Declaration originates has no power to issue decisions that are binding on the Netherlands.\textsuperscript{35}

With respect to judgments of the European Court of Human Rights (ECtHR) establishing a violation of the European Convention on Human Rights (ECHR) by the Netherlands, in theory, a similar reasoning could have been followed considering those judgments as ‘decisions’ in the sense of Articles 93 and 94 of the Constitution. Indeed, those judgments – though not explicitly qualified so in case-law nor in doctrine – have such effect. The same effect, however, has been given as well to judgments rendered against other States parties to the ECHR. Yet, Article 46 of that Convention only provide\textsuperscript{s} that judgments are binding\textsuperscript{inter partes}.

Therefore in literature, the binding force or\textit{ erga omnes} effect of the latter has been explained in a different manner as some sort of\textit{ incorporation}: the case-law of the ECtHR being construed as an authoritative interpretation of the ECHR and, therefore, entailing the same binding force as has been attributed to the Convention itself. In this manner the doctrine evades qualifying the ECtHR’s case-law as ‘decisions’ in the sense of the Constitution.

The doctrine as well as the courts have extended this reasoning to the views of the UN Human Rights Committee supervising the Covenant on Civil and Political Rights (ICCPR)

\textsuperscript{31} 5 February 1963, Case 26/62 Jur. 1963, p. 8.\textsuperscript{32} HR 2 November 2004, NJ 2005, 80 and Governmental note (supra note 1), p. 6. See also Van Emmerik 2008, p. 149.\textsuperscript{33} See for this discussion further: Van Emmerik 2008, p. 145-161, especially p. 149-150; see also Governmental note (supra note 1), p. 5-6; see also Besselink & Wessel 2009 who advocate priority for the Constitution over international law in virtue of the ‘principle of democracy’, p. 84 ssq. and p. 106-109.\textsuperscript{34} So-called ‘rulings’ made by the tax authority with respect to (foreign) taxpayers are an exception; their official publication takes place in the\textit{ Staatscourant}. See Alkema 2008, p. 184, note 421.\textsuperscript{35} HR 7 November 1984, NJ 1985, 247.
and other international bodies supervising the interpretation and application of human rights, though formally non-binding.  

Judgments and views of international (quasi-)judicial bodies often are concrete, elicited by and addressed to individuals; they, therefore, often easily meet the constitutional requirements for self-executingness and so do the underlying treaty provisions. Although so far, these international texts do not have exactly the same constitutional status as decisions of international organisations occasionally, they may take priority over contrary domestic statutory law.

The process of implementing international decisions, not only those concerning human rights but also more technical decisions originating from Specialised Organisations as the World Health Organisation, International Civil Aviation Organisation, International Monetary Fund etc. shows a great variety and lacks a proper statutory or constitutional structure. All branches of government: the executive, the legislative and the judiciary, are involved. Sometimes they act consecutively e.g. the administration can take provisional measures or the courts may adapt – for the time being – their internal organisation awaiting the amendment by the legislature.

Implementation within the Kingdom can be even more complicated. Yet, a proper procedure is lacking here too.

Exceptionally, special implementation procedures are provided for. With respect to the implementation of judgments of the ECrtHR in criminal matters the Code of Criminal Procedure in Article 957 para. 1 sub 3 provides for reopening of the contested proceedings.

As for the interpretation and implementation of international judgments and decisions, especially those taken by international supervisory bodies in matters of human rights, the political branches often can offer little or no guidance to the courts. Whenever the State itself has been participating in drafting the treaties or participating in the proceedings before the international tribunals or supervisory bodies it has acted in the completely different role of a defendant State, whose interpretations carry, of course, little or no special authority.

4. Customary International Law

4.1. Status in Domestic Law

The Netherlands Constitution is silent on customary international law. Articles 93 and 94 are not applicable. Therefore, in principle, customary international law does not prevail over Acts of Parliament, the Constitution or the Charter of the Kingdom. There are, however, some specific statutory provisions recognizing it as a source of law. These few exceptions have been mentioned above in § 1.2; they concern the execution of court judgments as well as some matters of criminal and fiscal law. In virtue of these statutory provisions customary international law – provided it is self-executing and in the circumstances therein indicated – prevails over all other domestic legal norms.

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36 Occasionally, Netherlands courts also refer to General Comments of the Committee supervising the ICESCR; an example albeit negative is: Centrale Raad van Beroep (Supreme court in matters of social security), 11 October 2007 (LJN BB 5687).


In other instances, customary international law is being recognised as a source of international law that could and should be applied by the courts but take priority over domestic delegated legislation only.\textsuperscript{39}

The leading case with respect to customary international law still is the Supreme Court’s judgment in re \textit{Nyugat} dating from 1959.\textsuperscript{41} In that case, the Supreme Court, strongly relying on the article’s drafting history, found that Article 66 (now Article 94) of the Constitution had as its purpose to define the courts’ competence to review domestic law for compatibility with international law and that, for that matter, any such review was limited to self-executing provisions of treaties and of decisions of international institutions. In the instant case this precluded the application of customary international law on prize.

The judgment, though leading, in fact – it is submitted here – is atypical in several respects: in matters of prize the Supreme Court exercised exclusive jurisdiction in two instances; that jurisdiction had not been used for over a century; the case concerned emergency legislation with retroactive effect while the facts had occurred in wartime. Nevertheless, during the 1983 overall revision of the Constitution the Government explicitly upheld the Supreme Court’s narrow doctrine in \textit{Nyugat}: matters of customary international law lay outside the courts’ reviewing mandate. It did so notwithstanding the judicial tradition before 1953 and the opinions held in literature which were more favourable to applying customary law.

It is possible, though, that customary law is taken into account when the courts or the administration have to decide preliminarily about the validity under international law of (self-executing) treaties and decisions of international organisations. Neither is it to be excluded that the courts, in the future, might refer to customary international law in support of an interpretation of domestic law in conformity with customary law.

\subsection*{4.2. The Judiciary and Customary International Law}

In view of the above, answering the questions on customary international law posed by the general \textit{rapporteur} is not always possible and often will be hypothetical. Yet, the following can be remarked.

As mentioned before customary international law is referred to rarely in the case-law. Incorporation or implementation, however, is necessary in order to enable the courts to give effect – if any – to it. Courts may apply customary international law – to the extent it is self-executing – in those instances where domestic law explicitly refers to it (see \textit{supra} \S 1.2). A case in point is a court ruling about the interference of the administration with the execution of a judgment providing for seizure of the bank account of the Turkish Republic’s embassy in order to ensure the payment of salary to a Dutch citizen and former employee.\textsuperscript{42} At that occasion the judge expressly rejected the State’s assertion that the jurisdiction would be restricted with respect to interference with the execution of judgments. The court conceded though that, generally, in matters of customary international law it has to be taken into account that the Government represents the State in international relations and is as such a law-making \textit{actor}. Therefore, it may be appropriate for the courts to hear the Government’s

\textsuperscript{39} District Court of Rotterdam 8 January 1979, \textit{NJ} 1979,113 (\textit{Stichting Reinwater e.a. MDPA}) where the court considered: ‘this law [i.e. the law prevailing in the Netherlands] includes the unwritten rules of international law; Dutch courts are not only empowered, but even obliged to apply unwritten international law where appropriate’, \textit{NYIL XI} (1980) p. 329.

\textsuperscript{40} So Governmental note (\textit{supra} note 1), p. 5.

\textsuperscript{41} HR 6 March 1959 (\textit{Nyugat}), \textit{NJ} 1961, 2.

\textsuperscript{42} President of the Judicial Division of the Council of State 24 November 1986, \textit{Kort Geding} 1986, 38.
advisors in international law. However, the instant case – in the opinion of the court – did not require such a hearing since the customary international law about State immunity was sufficiently clear on the point at issue: it allows for immunity from execution in cases where assets to be seized – as in the present case – are meant for public purposes.43

4.3.  **Ex officio Application and Scope of Customary International Law**

As appears from this case-law the courts take judicial note of customary international law and, incidentally will apply it *ex officio*. This can be inferred from the just mentioned judgments of the District Court of Rotterdam and of the Supreme Court about the Universal Declaration of Human Rights.44 In the latter case it would have been conceivable that the court had examined whether the Universal Declaration in the meantime had acquired binding force as customary international law45 but it did not do so.

From the above it follows that customary law has plaid a role with respect to State immunity. It is likely that it will also permeate into the case-law about (military) criminal and fiscal law. In those areas legislation explicitly gives leeway to do so.

5.  **Hierarchy**

5.1.  **The Rank of Treaties and Customary International Law**

As explained before in § 1.1, the Netherlands Constitution focuses in particular on self-executing treaty law and on decisions of international organisations. Self-executing international law enjoys top rank in the hierarchy. Article 94 of the Constitution provides that all statutory regulations in force, i.e. also the Constitution itself and the Kingdom’s Charter, are not applicable if in conflict with self-executing international law. This is affirmed also by Article 120 of the Constitution: the courts have no power to review such international law for constitutionality.

The Constitution does not refer to other sources of international law nor to *non*-self-executing international law. In principle, this does not imply a lower priority for such international law provisions. In doctrine it is held that according to constitutional customary law international law not provided for in the Constitution – if binding on the Netherlands – equally enjoys priority. However so far, that is not born out by practice (see with regard to customary international law the previous section).

With respect to the non-self-executing provisions of treaties and of decisions of international organisations there is no doubt priority. This is especially relevant for the administration and the legislature. The political branches are firstly responsible for the regulations and measures implementing international law and, generally, for compliance with international law engaged into by the State. In addition Government and Parliament have to test, in virtue of Article 91 para. 3, whether international law is in conflict with the Constitution but not in order to let the latter prevail. A positive test requires – at least in theory – a stronger legitimacy through an approval of the treaty by a qualified majority of

43 The Court made a distinction with respect to a Supreme Court judgment, of 26 October 1973, *NJ* 1974, 361. There the Supreme Court held that the Socialist Federal Republic of Yugoslavia, although not a party to the Treaty of 10 June 1958 of New York in matters of recognition and execution of foreign arbitral awards, could not be received in its claim – based on customary international law – for immunity from an award to which it is a party.

44 HR 7 November 1984, *NJ* 1985, 247; See, generally, on the conflicts between treaties in Dutch case-law, Mus 1996.

45 See Humphrey 1979, p. 38 ssqq.
votes in Parliament. Rarely however, the procedure of Article 91 para. 3 has been followed. An omission, that is recently being criticized in Parliament, notably in the Senate, with respect to Treaties establishing the EC and EU and also with respect to the Treaty on the International Criminal Court. This criticism is understandable; if a treaty considered to be conflicting with the Constitution has not been approved with such a qualified majority but with a simple majority only it, nevertheless, will have the effect of amending the Constitution materially. The conditions for a formal revision of the Constitution are much stricter. They are spelled out in Articles 137-142 providing for a twofold reading by Parliament and a two thirds majority in its Lower House.

Like the customary international law the general principles of law are so to speak in limbo. During the last decades, however, several of these principles have been codified in (multilateral) treaties e.g. the principles of equality and non-discrimination, abuse of rights and of other principles essential to the Rule of Law. Such codified principles, of course, have the same status as other treaty law.

5.2. Reconciling or Conforming Domestic Law to International Law?

In contrast to the judiciary in some Scandinavian countries, the Netherlands courts are not used to explicitly referring to a ‘rule of presumption’. Rather they interpret domestic law in conformity with international law implicitly. Some thirty years ago they occasionally did so in a reverse manner. Several international legal rules were bended so as to conform to domestic notions and rules! Apparently, at the time the courts not being accustomed to apply the new power (dating from 1953) to review domestic statutory law preferred avoiding an overt conflict with the political legislative branches.

As for the technique of ‘abstaining’: when the courts for political and constitutional reasons refuse to apply international law although it is considered self-executing, we refer to § 2.3 supra and § 5.4 infra.

5.3. Ius cogens

The courts recognize the doctrine of *ius cogens* norms. An old but somewhat shaky precedent dating back to the 1948 Constitution is the Supreme Court’s judgment of 28 November 1950. It concerned the winding up of a colonial heritage: the question where to demobilize the former colonial military troops mostly originating from the Moluccan Islands: in – at the time hostile – newly independent Indonesia or in the motherland in Europe. The Court, rejecting the Government’s argument derived from international law and from the Union treaty with Indonesia, referred to other ‘rules and principles of law’. Although it did not use the term *ius cogens* as such it ruled that not demobilizing the troops in the Netherlands would have been illegal and constituting a tortuous act endangering the fundamental right to life of the persons concerned. At that moment the Netherlands was not yet bound by a treaty spelling out the right to protection of life, the ECHR not yet being ratified by the Netherlands. Since the Constitution does not contain a guarantee for the right to life either, the norm referred to was in fact unwritten and probably part of international customary law.

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48 See HR 10 November 1989 (*Stichting verbiedt de kruisraketten/Staat*), *NJ* 1991, 248 rejecting the applicability of *ius cogens* in the instant case and the Advocate General Mok’s brief § 6, pointing to the codification of *ius cogens* in the Vienna Convention on the Law of Treaties.
49 HR 2 March 1950 (*demobilization of KNIL military troops*), *NJ* 1951, 217.
At a first glance the more recent record of case-law about *ius cogens* appears to be scanty. Again this may be a matter of codification. Over time much *ius cogens* norms have been laid down in treaties, particularly human rights treaties. Notably Article 3 of the ECHR and Article 3 of the European Convention for the Prevention of Torture, have exercised and still do exercise a considerable influence in the courtrooms and affect directly the policy of *e.g.* the immigration and penitentiary authorities.

It goes without saying that the courts and the administration when applying these norms strongly subscribe and defer to the case-law of the ECrtHR, of other international tribunals and to the reports of supervising quasi-judicial bodies like the European Committee for the Prevention of Torture. It is in this context that the ‘technique of incorporation’ (see *supra* section 3) often plays an important role.

### 5.4. Effect of International Law on the Case-law

International law guarantees for human rights have had and still have an enormous impact on domestic case-law. This is particularly so for the civil and political rights laid down in the ECHR and International Covenant on civil and political rights (*ICCPR*). Most of them are considered to be self-executing. Through the afore mentioned technique of ‘incorporation’ the judiciary takes due account of the interpretation by the ECrtHR and the UN Committee on Human Rights.

The huge influence of the self-executing human rights law finds its cause in so to speak a contradiction within the Constitution.\(^{50}\) Firstly, pursuant to Article 120 Acts of Parliament are not subject to review for unconstitutionality, whereas Acts of Parliament and any other domestic statutory regulation are subject to judicial review for compatibility with self-executing international law (Article 94) as was noted before. However, both the Constitution and international treaties contain similar provisions, notably fundamental rights. Consequently, any dispute about the alleged illegitimacy of Acts of Parliament concerning such fundamental rights, necessarily tends to revolve around the application of international law and is not being considered under the comparable constitutional provisions.

Secondly, the 1983 revision of the Constitution has not been used to mend that flaw. To the contrary, Government and Parliament did not avail themselves of that occasion to adapt and complete consistently the existing catalogue of constitutional fundamental rights and thus missed the opportunity to make the Constitution more protective or at least as protective as the international fundamental norms. Therefore, in practically each case about an alleged conflict between fundamental constitutional rights and *delegated* legislation or administrative decisions both constitutional and international fundamental rights are invoked and to be applied side by side. The more so, since the courts have to let the most protective provision prevail (see *i.a.* Article 53 ECHR and Article 5 para. 2 ICCPR). As a consequence, interpretation and application of international human rights have become a matter of daily routine in the courtrooms and also in legislators’ quarters.

Other international fundamental rights that are not self-executing firstly need implementation in domestic legislation; an example is the Convention on the Elimination of All Forms of Racial Discrimination. Yet, the courts in interpreting certain notions from that treaty have referred to the treaty itself.\(^{51}\)

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Some treaties, such as the European Social Charter (Turin, Italy, 1961) and the International Covenant on Economic, Social and Cultural Rights, are less influential. Here the non-self-executing character of most rights is a hurdle – if not a barrier – in domestic court proceedings. A similar divide in effects can be observed with regard to ‘mixed’ treaties protecting specific groups of persons e.g. the Convention on the Rights of the Child containing civil and political rights as well as social rights.52

A special problem is posed by the internationally guaranteed principle of equality and non-discrimination. That has been enshrined in numerous treaties, including the Treaties, regulations and directives of the EC. The principle is considered to be self-executing. Claims combining this principle with social fundamental rights tend to make the latter in that respect apt for judicial review, as yet. It is precisely in this context that the technique mentioned in § 2.3 of ‘abstaining’ has developed. Disputes about social fundamental issues linked with discrimination may be of such a political calibre if not ‘explosiveness’ that the judiciary tends ‘to pass the buck’ to the legislature and, in doing so, in fact declines to apply the self-executing non-discrimination principle.

It can be concluded that the effect of international fundamental rights on constitutional matters is considerable and so is the impact, generally, on the interpretation and application of the constitutional provisions concerning international law. Rarely, other elements of the Constitution, to my knowledge, underwent any such influence. An exception perhaps are the specific provisions introduced in 1983 in the Constitution (Articles 42 ssqq.) singling out the Prime Minister among the other cabinet ministers. Before, the Prime Minister was considered a primus inter pares. The amendments have been introduced to reflect the new coordinating role for the Prime Minister necessitated by his membership of the European Council of the European Union. On the other hand, following the discussion briefly mentioned in § 3 (supra) it has been advocated – but so far in vain – to introduce a general provision about the status and effects of European Community law.

5.5. Differences in Status for Specific Parts of International Law?

The Constitution does not foresee any hierarchy neither between treaties and decisions nor among decisions of international organisations. It is likely, though, that the courts will attribute a higher rank to the treaties establishing an international organisation than to the decisions originating from such an organisation. A comparable hierarchy is made by the Court of Justice of the EC with respect to the Treaties establishing the EC and the EU and the EC’s so-called secondary rules like regulations and directives.

Conflicts between Community law and other international legal obligations may occur. This was the case in the Barber judgment of the Court of Justice (CoJ)53 which was followed by a ‘view’ of the UN Committee on Human Rights in a case concerning the Netherlands.54 The legal dispute revolved around the date as from which a distinction based on sex with regard to pensions was to be illegitimate. The Government endorsed the point of view of the EC CoJ and a similar judgment of the Centrale Raad van Beroep (Supreme Court in matters of social security)55 and reacted by stating that it was unable to share the ‘view’ ‘for compelling reasons of legal certainty’.

53 Court of Justice E.C., Case of 17 May 1990 C—262/88 (Barber).
54 View of 26 July 1999 Communication No. 768/1997 (Vos v. the Netherlands).
Sometimes this type of conflicts can be resolved outside the domestic legal system by the EC CoJ. A case in point is the CoJ’s judgment in re *Kadi and Al Barakaat/Council*.\(^{56}\) In that case the Court of Justice tested the EC regulation implementing a decision of the Security Council Committee against fundamental principles underlying Community law, notably those concerning a fair trial, and concluded that the regulation did not meet this standard.

In another case about a conflict between treaties the Netherlands Supreme Court exercised a comparable test.\(^{57}\) The facts concerned a handing over under the NATO Status Treaty of an American military billeted in the Netherlands and suspected of the murder of his spouse. Handing over of the man to the American authorities would have conflicted with Article 2 of the ECHR and Article 1 of the 6\(^{th}\) Protocol to the ECHR since it was likely that he would be sentenced to death. The Court weighed the conflicting international law: at the one hand the interests of the individual protected notably by Article 2 of the ECHR (prevention of the death penalty) and at the other hand the obligation derived from the international NATO Status Treaty obligation. It ruled that fundamental principles (i.e. the human rights provisions) had to prevail. No doubt this judgment was inspired by *Soering v. UK* of the ECtHR.\(^{58}\)

The conclusion can be that there are no general unqualified answers to questions of status or rank of different types of international law in the Netherlands legal order.

6. **Jurisdiction**

6.1. **Universal Jurisdiction over International Crimes?**

Generally, pursuant to Article 13A of the General Provisions Kingdom Act 1829 the courts’ jurisdiction is subject to the exceptions recognised in international law. This article was inserted during the 1\(^{st}\) World War. The reason for the amendment was that a District court had been neglecting state immunity and had ordered, contrary to international law, the seizure of a German state-owned vessel. The incident was politically very serious and could have been a ‘casus belli’ for Germany since the Netherlands at the time was a neutral state.

The jurisdiction with respect to criminal law is laid down in Articles 2 to 7 of the Criminal Code (see also § 1.2 *supra*). They provide for the applicability of the Criminal law (viz. jurisdiction) in the following cases: crimes committed within the Netherlands territory and on board of Dutch vessels and aircrafts; certain crimes committed by whomsoever outside the Netherlands (i.e. universal jurisdiction *stricto sensu*); crimes for which the prosecution has been taken over from another state; certain crimes committed by Dutch nationals abroad.\(^ {59}\) Further, it is provided for that foreigners with a fixed abode in the Netherlands who have committed war crimes or certain other special crimes abroad come under Netherlands jurisdiction.

Following the institution of the International Criminal Court in The Hague the *Wet internationale misdrijven* (International Crimes Act) 2003 (*Stb. 270*) has been adopted. It establishes universal jurisdiction for crimes like genocide, torture and war crimes as defined

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\(^{56}\) Of 3 September 2008, C-402/05 and C-415/05P.

\(^{57}\) HR 30 March 1990 (*Short*), *NJ* 1991, 249.

\(^{58}\) Of 7 July 1989, *Series A 161*.

\(^{59}\) A recent example is HR 30 June 2009 (*v. A./State*) (conviction for supplying the Saddam Hussein regime with raw material for chemical weapons), *LJN* BG 4822. Subsequent to this penal judgment also private law suits for damages have been initiated. Jurisdiction – international or national – with respect to piracy (notably by Somali nationals) is under discussion now (see *Parliamentary documents II* 2009/2010, 29521 No. 124). Especially, the trial of pirates arrested by the Netherlands navy acting within the framework of the EU or UN poses a problem. So far, it resulted in some pirates being released, some others being extradited, while one criminal case is still pending.
in the relevant specific international treaties and conventions. The District Court of The Hague is competent in these matters.

Criminal courts are equally competent in the adjudication of indemnifications connected with the afore-mentioned crimes on conditions that victims or their relatives have joined as civil parties in the criminal proceedings.

6.2. Civil Courts’ Jurisdiction for International Law Violations?

The civil courts also have jurisdiction in matters of indemnification. Moreover, they exercise jurisdiction with respect to non-compliance with international law in actions for tort against the State. This is the case where the State or the state authorities allegedly have failed to comply with international law obligations e.g. if they do not take the proper administrative action or pass the required legislation. It even is conceivable that state acts in conformity with international law nevertheless are subject to civil actions where the measures taken affect civil parties unevenly and therefore violate the principle of égalité devant les charges publiques.60

In this context it is to be noted again that the distinction between self-executing and non-self-executing tends to become blurred. In principle, tort actions can be brought against the State for not complying with international law irrespective whether it is self-executing or not.

7. Other Sources of International Law

In the Netherlands Constitution there is no explicit reference to the general principles of (international) law. Yet, occasionally the courts have referred to these principles.61 They are legally binding. In principle, they do not take priority over Acts of Parliament. In the case-law, however, one exception, although not concerning a principle of international law as such, has been recognised. On condition that during the legislative process a possible conflict with principles of (international) law has not been addressed explicitly the courts may, incidentally, consider the contrary statutory provision as inoperative.62 In doing so they exercise a sort of ‘mitigated review’: the statutory provision is not applied in the instant case but nevertheless remains valid. It is likely that the courts will follow a similar reasoning with regard to disputes about domestic law allegedly conflicting with general principles of international law.

Another source of international law rarely is referred to in the case-law: comitas gentium.63 It is not clear, though, which legal force has been attributed to it.

7.1. Non-binding Declarative Texts

Non-binding declarative texts like the Universal Declaration of Human Rights64 and the UN and European standards for the treatment of prisoners are relevant and often authoritative for the courts. Of course, they can become legally binding if enhanced by later developments e.g. if reference is made to these standards in subsequent binding or recommendatory resolutions of international organisations or conferences, in judgments of international tribunals or through state practice to that effect. The courts have considerable discretion in these matters

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60 In connection with the International Court of Arbitration award in re Belgium/Netherlands (Iron Rhine) 2005.
61 Erades 1993, p. 115; p. 117 and p. 131.
63 Erades 1993, p. 37.
64 HR 28 November 1950, NJ 1951, 137 (Tilburg).
and also may be influenced by the stance taken by the administration as to the quality of these norms.

7.2. Application or Enforcement by the Courts of Binding and Non-binding Decisions or of International Tribunals’ Judgments

As explained before, the Netherlands courts are used to apply the decisions of international tribunals to the extent that they can be considered as self-executing. This is notably the case with respect to the judgments of the ECtHR and the Court of Justice and the Court of first instance of the EU.

There is few case-law reported in which decisions of non-judicial treaty bodies have been applied. The Commentaries on the OECD Model Tax Convention might be an example. More frequent are the references to the interpretations of the UNHCR of the Refugee Convention. In this context also are relevant the General Comments of the Committee supervising the ICESCR, mentioned before. It can be concluded that the courts, generally, will react favourably to those resolutions of international organisations and may refer to them or even might ‘incorporate’ them and treat them as part of the interpreted treaty itself and lend it the same legally binding force and rank.

65 See HR 21 February 2003, BNB/177C where the Supreme Court observed – merely *ex abundantia* – that its interpretation would conform to such a commentary; see also Alkema 2008, p. 180.

66 District Court The Hague 27 August 1998, referring for its interpretation to a position paper of the UNHCR.

67 See *supra* note 36.
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