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COMMENTS

ON

**THE IMPLEMENTATION
OF INTERNATIONAL HUMAN RIGHTS TREATIES
IN DOMESTIC LAW
AND THE ROLE OF COURTS**

by

Mr Pieter van DIJK (Expert, the Netherlands)

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IMPLICATIONS FOR THE DIFFERENT POWERS IN THE STATE

by Pieter van Dijk¹

I. Incorporation of International Law, in particular Human Rights Treaties, in the Domestic Legal Orders²

Under international law, States are obliged to fulfil their international legal obligations, as they have been laid down in treaties to which they are parties and in binding decisions of international bodies whose competence they have recognised, and ensue from general principles of international law and international customary law.³ They may not invoke their domestic law as a justification for not complying with these obligations; on the contrary, States are obliged to ensure that their domestic law is in conformity with their international legal obligations.⁴ This duty becomes a more and more comprehensive one, since international law covers ever larger areas of legal relations that traditionally fell under the sovereignty of the State. The law of the European Union is a clear example, covering vast areas of economic, financial and cultural activities, which traditionally were predominantly regulated by domestic law. Other examples are international criminal law, international economic law, international environmental law and, of course, international human-rights law. Especially the European Convention on Human Rights and Fundamental Freedoms (ECHR) quite frequently obliges Contracting Parties to amend or supplement their legislation, in particular as a result of the case law of the European Court of Human Rights (ECtHR), which in many cases gives a dynamic interpretation of the obligations laid down therein.⁵

I.1 Monistic versus dualistic systems⁶

According to international law as it stands today, States are free to choose the ways and means of implementing their international legal obligations, provided that the result is in conformity with those obligations.⁷ However, two or more States may agree on the internal effect obligations laid down in or resulting from a treaty concluded among them will have, or on the way they will implement those obligations which have no direct effect. The treaty establishing the European Union is a clear example.⁸

¹ Former member of the Council of State of the Netherlands, former member of the Commission for Democracy through Law (Venice Commission) and former member of the European Court of Human Rights.

² For this paragraph, use has been made of a forthcoming study to which reference will be made at a later stage.

³ Cf. Article 36, paragraph 2, of the Statute of the International Court of Justice.

⁴ Articles 26 en 27 of the Vienna Convention on the Law of Treaties. See also Articles 3 en 32 of the 'Articles on responsibility of States for internationally wrongful acts' drafted by the International Law Commission, as annexed to Resolution 56/83 of the General Assembly of the United Nations, and the comments on those articles, *Yearbook of the International Law Commission* 2001, Vol. II, Part Two, p. 36-38 en 94.

⁵ On the dynamic interpretation, see F. Matscher, "Methods of Interpretation of the Convention", in: R.St.J. Macdonald, F. Matscher and H. Petzold, *The European System for the Protection of Human Rights*, Nijhoff, Dordrecht etc. 1993, pp. 63-81; E. Bates, *The Evolution of the European Convention on Human Rights – From its Inception to the Creation of a Permanent Court of Human Rights*, Oxford University Press, Oxford 2010.

⁶ The terms 'monistic' and 'dualistic' relate to the question of whether the international and domestic legal orders constitute one (monistic) or rather two separate (dualistic) legal orders.

⁷ A. Cassese, *International Law*, 2d edition, Oxford: Oxford University Press 2005, p. 219-220; S.D. Murphy, 'Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?', in: D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement. A Comparative Study*, Cambridge: Cambridge University Press 2009, p. 61-119, esp. p. 66-85; E. Denza, 'The Relationship between International and National Law', in: M.D. Evans, *International Law*, 3d edition, Oxford: Oxford University Press 2010, p. 411-412.

⁸ See Article 288, second paragraph, of the Treaty on the Functioning of the European Union, which stipulates that EU Regulations have binding effect within the legal orders of the Member States.

As to the methods by which States implement their international legal obligations, traditionally and globally there are two main theories and related systems.

According to the *monistic* theory, the international and domestic legal orders complement each other. The domestic authorities are bound by the regulations of both orders, and private parties are bound by international law - and may rely on international law before the domestic courts - to the extent that the provision concerned is apt to create obligations or rights (is self-executing). This theory starts from the supremacy of international law. Examples of States with a monistic system are Belgium, France, Germany and the Netherlands.

Germany, where the doctrine of 'dualism' originated⁹, is nevertheless listed as a State with a monistic system. This shows that the distinction is not an absolute one. The German system also has dualistic features: some form of domestic legislation or regulation is necessary to empower the courts to apply international law. For treaties this is the law approving the treaty concerned. However, according to present-day doctrine in Germany the law does not transform the treaty into domestic law but empowers the courts to apply the treaty as international law.¹⁰

In some of the 'monistic' States certain conditions apply for the direct effect of treaties within the domestic legal order.¹¹ First of all, for obvious reasons, the treaty has to have binding force for the State concerned. Secondly, not necessarily as an implication of the first condition, the treaty must have been approved by Parliament according to constitutional or other procedures. Thirdly, for the benefit of legal certainty, the treaty must have been made public in the prescribed way.

In the Netherlands, to give an example, treaties that have become binding for the State, automatically constitute part of the legal order of those parts of the Kingdom to which they apply. Approval by Parliament is not a requirement in those cases where such an approval is not a *conditio sine qua non* for becoming a party to the treaty. Publicity is also not a requirement for internal legal force. However, as Articles 93 and 94 of the Constitution provide, provisions of treaties may only be applied by courts and be given precedence over conflicting domestic law after they have been duly made public.

According to the *dualistic* theory, international legal norms bind the States, but they are applied by the domestic authorities and may be invoked before domestic courts only after they have been transformed into national law, either by a rule of national law having that effect or by the adoption of legislation containing the rights and/or obligations laid down in the international legal rule concerned. This theory takes as a point of departure the supremacy of the domestic legislator: only legal norms originating from the domestic legislator are directly applicable and cannot be set aside by a treaty concluded by the (executive of the) State, while courts may not apply "external" law without the authorization of Parliament.¹² Examples of States with a dualistic system are Great Britain and Sweden.

In a dualistic system, if and to the extent domestic law is not yet in conformity with a certain treaty, the legislature or, as the case may be, the executive has to enact a law or regulation by which the provisions of the treaty are incorporated ("transformed") into domestic law. This may be done either by stipulating that these provisions also constitute part of domestic law or by incorporating the substance of these provisions in the domestic law or regulation. Courts may

⁹ See H. Triepel, *Völkerrecht und Landesrecht* [International Law and the Law of the Land], Leipzig: Hirschfeld 1899.

¹⁰ Zie het antwoord op vraag 3.a in het Duitse landenrapport.

¹¹ [Zie de antwoorden op vraag 3 van de questionnaire].

¹² See J.W.A. Fleuren, 'De historische ontwikkeling van de verhouding tussen internationaal en nationaal recht' [The historical development of the relation between international and national law], *Ars Aequi* 61 (2012), p. 510-519. In many States, of course, Parliament is involved in the approval of treaties, but not in their drafting; Parliament may only approve or reject, not amend the treaty concerned.

apply the norms concerned only after transformation. In the former method of incorporation they apply the treaty provisions as such, authorized by the law or regulation that stipulates that they form part of the law of the land. In the latter method they apply the relevant provisions of domestic law. The former method, therefore, in general provides a better guarantee that the treaty as a whole and in all its provisions has been incorporated. Moreover, in the former method the status of the treaty provisions may be higher than the law or regulation that provides for its incorporation, while in the latter system the provisions have been transformed into provisions of the law or regulation concerned and, by necessity, share the legal status of the latter.

The dualistic system may have as a result that a treaty, although binding on the State, has little or no relevance within domestic legal practice. Thus, although Sweden and the United Kingdom were among the first States Parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1953, it was only in 1995 that in Sweden the Convention was transformed by law into domestic law, while in the United Kingdom the courts may apply the provisions of the Convention only since October second 1998 in virtue of the Human Rights Act.

I.2. The status of unwritten international law

In several States unwritten international law constitutes 'part of the law of the land', irrespective of whether the State concerned adheres to the monistic or the dualistic system. Thus, from Article 25 of the German *Grundgesetz* it follows that the general principles of international law form part of the federal law, have precedence over federal statutes and statutes of the *Länder*, and create directly rights and obligations for individuals. In some cases, however, unwritten international law has this status under certain conditions. Thus, in the United Kingdom duties ensuing from international customary law are considered 'law of the land' only to the extent that the norms concerned have clearly been established and lend themselves for direct application by the courts. However, in a State with a strong dualistic system like Sweden unwritten international law does not constitute 'part of the law of the land', be it that even there some court decisions take a more positive strand.¹³

I.3. The status of the law of the European Union

At an early stage of the existence of the European Communities, now the European Union, the Court of Justice of the European Communities held that the Member States, by concluding the treaties establishing the European Communities, agreed to restrict their sovereignty in the area covered by the powers of the Community Institutions and have created a new and separate legal order. The legal norms of that order form part of their respective domestic legal orders and have precedence over conflicting provisions of domestic law, irrespective of what their own constitutional law provides as to the relation between international and national law.¹⁴ Constitutional law or statutory law may stipulate the internal force and precedence of EU law, as is the case in the United Kingdom in the European Communities Act 1972, but according to the prevailing doctrine the internal force and hierarchy of EU law do not depend on what the domestic law of the individual Member States provides in that respect. However, some constitutional courts still find it difficult to accept this, especially in cases where in their opinion the European Union has acted *ultra vires*.¹⁵

¹³ [Zie de antwoorden op vraag 3a van de questionnaire].

¹⁴ CoJ 5 February 1963, Case 26/62, *Van Gent & Loos*, Jur. 1963, 1; CoJ 15 July 1964, Case 6/64, *Costa/ENEL*, Jur. 1964, 1199; CoJ 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft*, Jur. 1970, 1125; CoJ 9 March 1978, Case 106/77, *Simmenthal II*, Jur. 1978, 629; CoJ 22 October 1998, Joined Casers C-10/97 - C-22/97, *IN. CO. GE '90*, Jur. 1998, I-6307.

¹⁵ See M. Claes, *The National Courts' Mandate in the European Constitution*, Oxford: Hart 2006.

II. The concept of self-executing treaty provisions

II.1. Introduction

Even if treaties form part of the law of the land - as international legal norms in the monistic systems, or after transformation in the dualistic systems - they cannot always be directly applied by the executive and the courts. They may need (further) implementation by the domestic legislator before they are apt for application ("self executing"). It may be that a competent domestic authority has to be established and/or that its competence has to be further defined, or it may be that the rights and duties envisaged by the treaty have to be made more specific. The Netherlands Constitution takes this condition of applicability expressly into account by stipulating that only treaty provisions 'which may be binding on all persons', may be applied by the courts and have then priority over conflicting domestic law.¹⁶ The notion of 'provisions which may be binding on all persons' refers to provisions that are self-executing.

The concept of 'self-executing' provisions plays a central role in determining the internal effect of treaties within the domestic legal order. It therefore deserves some special attention.

In Europe, the meaning and scope of this concept have been influenced to a large extent by developments in the case-law of the Court of Justice of the European Union. This has brought some uniformity within highly diverse doctrines in the different member States.

II.2. The concept of 'directly applicable/self-executing' provisions in International law in general

In relation to the internal effect of international law in general, legal practice refers mainly to either of the two concepts: 'directly applicable provisions' and 'self-executing provisions'.

Outside the context of the law of the European Union where domestic courts have to follow the interpretation given by the Court of justice of the European Union, the concept of direct applicability is not an univocal one and may cause confusion, since it may have different meanings in case-law and doctrine of the different States¹⁷ It may be used in the broad sense of referring to the internal effect of international law within the domestic legal order. It may also have the narrower sense of direct effect, referring to the issue of whether the provision of international law may be relied upon before the domestic courts. Therefore, in general, the term 'self-executing provisions' has to be preferred.

The term 'self-executing' refers to the question of whether the provision concerned is formulated in such a way that it may be directly applied by the domestic courts. The answer to that question depends on whether the provision concerned is exclusively directed to the public authorities and contains obligations for them in their relations with other States.

Different from the law of the European Union which has an autonomous character and dictates its internal effect in the legal orders of the Member States, the internal effect of international law is determined by the domestic law of the State concerned, usually by its constitutional law. The States must fulfil their international legal obligations and achieve the purposes and aims set, but may determine the legal ways and means to do so.

The Netherlands may be used as an example here, since there the criterion of self-executing provision has been laid down in the Constitution. From Articles 93 and 94 of the Constitution it follows that only such provisions of international law may be invoked before courts in the Netherlands and then have to be applied in precedence of domestic law, which are 'binding on

¹⁶ Articles 93 and 94 of the Constitution.

¹⁷ Fleuren 2004, pp. 66-67.

all persons', which means: which are 'self-executing'. Whether and to what extent a provision of international law is self-executing, is determined in the last instance by the Dutch court before whom such a provision is relied upon, unless the provision concerned states explicitly that it is self-executing, which rarely is the case. Thus, the Netherlands Court of Cassation, in a judgment of 1986,¹⁸ considered as follows:

Whether the Contracting States have intended to give direct effect to Article 6, paragraph 4, of the European Social Charter is not relevant, since neither its wording nor its Legal history indicate that they have agreed that that provision shall not have that effect. In those circumstances the wording of the said provision is decisive according to Netherlands law: does it require the Netherlands legislator to adopt a domestic regulation with specific contents and scope, or is it of such a character that it may directly apply within the domestic order as objective law.

Different from the European Union, in the international legal order there is no international jurisdiction to which the domestic courts must refer this question and which has the power to interpret international law in a generally binding way. Courts in the Netherlands have, in general, given a rather restrictive interpretation to the concept of 'self-executing'.

According to the prevailing jurisprudence in the Netherlands, international law provisions are 'binding on all persons' in the sense of Articles 93 and 94 of the Constitution, if their wording and contents make them appropriate for application by a domestic court in cases in which private parties are involved. This appropriateness is assessed on the basis of the following criteria:

- 1) the character of the provision concerned;
- 2) its contents and scope;
- 3) its wording; and
- 4) the necessity of implementing regulation for its effect.¹⁹

In fact, together these criteria boil down to the rule that international law provisions are not self-executing if they only contain obligations for the State in its relations with other States and do not directly create rights or obligations for citizens.

With respect to the question of whether a treaty provision is self-executing, there are two main approaches: the dichotomist approach and the contextual or relative approach.²⁰

In de dichotomist approach, the qualification by the competent authority of a treaty provision as self-executing or not self-executing is an abstract one, depending on the contents and scope of the provision concerned but without taking into account the concrete context in which it is relied upon.²¹ In the contextual approach, that qualification depends on the circumstances of the concrete case, such as the constitutional position and powers of the competent court, the facts of the case and the applicable legislation.²² The latter approach may have as a result that one and the same treaty provision may be considered to be self-executing in the one situation and to be not self-executing in another one.

In general, the contextual approach will enhance the internal effect of the provision concerned in cases where it leads to the conclusion that this provision is self-executing while in the dichotomist approach the same provision would be deemed to be not self-executing. There are, however, also cases where the contextual approach may weaken the internal effect of a treaty

¹⁸ Court of Cassation, judgment of 30 May 1986, (*Spoorwegstaking*).

¹⁹ See J.W.A. Fleuren, *Een ieder verbindende bepalingen van verdragen* (Treaty provisions which are binding on all persons), BJu, The Hague, 2004, Chapter 5, para 3, with references to relevant case-law.

²⁰ Fleuren 2004, pp. 68ff.

²¹ Fleuren 2004, p. 68 and pp. 240ff.

²² Fleuren 2004, p. 69 and pp. 404ff.

provision, to the extent that it denies internal effect to a provision in specific circumstances where the dichotomist approach would recognise its self-executing character. An example of the latter situation is to be found in a decision of the Dutch Central Board of Appeal in Social Security Matters (*Centrale Raad van Beroep*). This court held that Article 26 of the UN Covenant on Civil and Political Rights became self-executing with respect to the prohibition of discrimination on the basis of sex in social security matters on the moment the relevant Directive 79/7/EEC of the then European Economic Community should have been implemented by the Netherlands.²³ By this judgment the self-executing character of the prohibition was postponed to a later moment than might have been the case in the dichotomist approach, *viz.* the moment on which the said Covenant had entered into force for the Netherlands; and this even for parts of social security law that were not covered by the Directive.

The courts in the Netherlands as a rule apply the dichotomist approach; the self-executing character of a treaty provision depends on its contents and purpose. A clear example may be found in a recent judgment of the Court of Cassation. The court held the second paragraph of Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women to be not 'binding on all persons' according to its contents, since it was insufficiently precise and thus not appropriate for direct application by a domestic court. The provision concerned contains an obligation for the States Parties to take appropriate measures, *inter alia*, to prohibit dismissal on the ground of marriage or maternity leave and to introduce maternity leave with pay or with comparable social benefits, but is not precise as to the modalities of maternity leave, since it does not regulate the duration and form of the leave not the level of payment.²⁴ The discretionary power for the States to implement the provision was seen as an obstacle to its direct application by the domestic courts. On the other hand, the Administrative Jurisdiction Division of the Council of State held Article 25 of the International Covenant on Civil and Political Rights (the right to take part in the conduct of public affairs and the right to vote) to be self-executing' as to its contents. In applying that provision, the Council of State held the exclusion from the right to vote of persons who were declared by a court decision unfit to conduct legal acts, to violate that treaty provision.²⁵

Recent case-law in the Netherlands shows that also international legal provisions which leave a certain margin of discretion to the national authorities as to the means to implement the international obligations, may nevertheless have a direct effect to a certain extent. Decisive is that the obligation concerned is sufficiently precise and manageable to be applied by a court. This may ultimately lead to a more relative approach of the question of whether a provision is self-executing.²⁶

A recent example is offered by both the judgment of the Court of Cassation and the decision of the Administrative Jurisdiction Division of the Council of State in the case of the Reformed Protestant Party (Dutch acronym: SGP), a confessional political party basing itself on the Word of God as revealed in the Holy Bible. According to its interpretation of the Bible, men and women, although of equal value as God's creation, have a different place in society. Article 10 of its statement of principles states that the participation of women in representative and administrative political organs is incompatible with woman's calling. On that basis the SGP did not admit women to its list of candidates for the election of members of the Second Chamber of Parliament. In a civil suit and in administrative proceedings certain non-governmental organisations demanded that Government would take action to put an end to what they claimed to be discrimination against women. They invoked, *inter alia*, Article 7 of the Convention on the

²³ Judgment of 23 May 1991, RSV 1991, 255. See Fleuren 2004, p. 422.

²⁴ Court of Cassation, judgment of 1 April 2011, AB 2011, 370 (www.rechtspraak.nl).

²⁵ Administrative Jurisdiction Division of the Council of State, judgment of 29 October 2003, AB 2003, 463, para 2.5 (www.raadvanstate.nl).

²⁶ For a recent example of the impact of the case law of the Court of Justice on Dutch case law, see the decision of the Administrative Jurisdiction Division of the Council of State of 7 February 2012 (www.raadvanstate.nl).

Elimination of Discrimination against Women.²⁷ Both jurisdictions held that, although the introductory phrase, stipulating that the States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country, was formulated in a very general way, the words 'shall ensure' in the next phrase were more specific and introduced obligations that were deemed to be 'binding on all persons' in the sense of Articles 93 and 94 of the Constitution.²⁸

II.3 The self-executing character of the provisions of the European Convention for the protection of Human Rights and Fundamental Freedoms

From the legal history of the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) it appears that its drafters had the intention that its substantive provisions would be directly applicable in those Contracting States where it forms part of the domestic legal order.²⁹ In conformity therewith, the courts in, e.g., Belgium, France, Germany and the Netherlands use to directly apply the provisions of the ECHR and its Protocols.³⁰ In Sweden, where the ECHR has been declared to constitute domestic law, the issue does not seem to play any significant role. In the United Kingdom, the Human Rights Act of 1998 enumerates the provisions of the ECHR and its Protocols which the courts and other public authorities have to apply.³¹

In general, the substantive provisions of the ECHR and its Protocols directly create subjective rights and obligations in the Contracting States. However, the competence of the courts may be limited in some way, as is clear from the British Human Rights Act of 1998, which, different from the European Communities Act of 1972, does not allow the courts to declare provisions of domestic law null and void because they conflict with one or more ECHR provisions; they may only determine such a conflict. Moreover, the courts may be more reluctant to directly apply the ECHR when it concerns so-called 'positive obligations' on the part of the Contracting States which have not explicitly been laid down in the provision concerned but in the case law of the European Court of Human Rights are considered to be an implied consequence.³²

III. The solution of conflicts between international and national law

If a State becomes a party to a treaty or, in another way, becomes subject to an international legal obligation, it is responsible for a correct and timely implementation of the ensuing obligations. In what way the State meets this responsibility is, in general³³, left to the State; not the way in which but the result counts.

In a dualistic system, it is predominantly the role of the legislator, or of the executive, as the case may be, to correctly and timely implement the State's international legal obligations by

²⁷ Article 7 reads as follows:

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

a. To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
b. To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
c. To participate in non-governmental organizations and associations concerned with the public and political life of the country.

²⁸ Court of Cassation, judgment of 9 April 2010, nrs. 08/01354 and 08/01394 (www.rechtspraak.nl); Council of state, decision of 5 December 2007, Case nr. 200609224/1 (www.raadvanstate.nl).

²⁹ See Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, 8 vols., The Hague: Nijhoff 1975-1985, Vol. V, p. 26-27, 34-35, 66-67, 74-75.

³⁰ [Zie de antwoorden op vraag 6.a van de questionnaire.]

³¹ [Zie de antwoorden op vraag 6.a van de questionnaire.]

³² On the concept of 'positive obligations', see D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights*, Routledge, London etc. 2012.

³³ Above, under I.3., the exception for EU law was explained.

adopting the required legislation or amending existing legislation, and by taking the required action, respectively. If and as long as this implementation has not been brought about, the courts have no role to play; they may reach the conclusion that the applicable law or challenged action is not in conformity with the State's international legal obligations, but may not annul the legal provision or action concerned on that ground.³⁴ They may, however, point in their judgments to the failure on the part of the authorities and, in some countries, they may even give a warning. After the legislator has acted upon the international legal obligation, it depends on the status of the implementing regulation whether the courts may use that as a standard for reviewing other laws and regulations. If it has an ordinary statutory status, it may be given precedence only over prior statutes and over subsidiary legislation, not over posterior statutes. If it has the status of a constitutional statute, it may be given precedence also over posterior 'ordinary' statutes, but not over the Constitution. If it has a status equal to or higher than the Constitution, it may be given precedence over conflicting constitutional provisions.

In a monistic system, international law forms part of the domestic legal order and may be directly applied by the courts, provided that the provisions concerned are of a self-executing character. This does not alter the fact that, internationally, the State as such and not its judiciary is responsible for the correct and timely implementation of its international legal obligations. However, if the legislator or executive, as the case may be, fails to take the required action, the courts, in concrete cases put before them, may directly apply the international legal norms. If that would bring its ultimate decision in conflict with one or more provisions of national law, it depends on the status of the international legal norm concerned within the domestic legal system whether the conflict may be solved by leaving the conflicting provision of national law out of application or declaring it null and void. If, e.g., the international legal norm has a statutory or sub-constitutional status, the court may or must give priority to that norm over the conflicting statutory provision, at least if the latter is anterior to the former, but it may not deviate from the Constitution.³⁵ If, on the contrary, international law constitutes the highest law of the land, the courts may or must also deviate from conflicting provisions of the Constitution.

If a court reaches the conclusion that the international legal obligation invoked before it, has not been implemented, or that the legislature or executive has not acted according to the terms set by the provision of international law concerned for its implementation, even if it may have the power and even the obligation to declare the domestic law or administrative act inapplicable in virtue of the relevant constitutional or legal provision concerning the relationship between international and national law, it may find this inappropriate or even *ultra vires*. The margin of discretion that may be left to the legislature or administration, may have as a consequence that the court cannot always replace the legal provision or administrative act concerned by its own decision because of the *trias politica*. In many cases the legislature will have to adopt a new law or the administration will have to take a new decision, with different options for an adequate solution. It may also be that the court can decide the case while not applying the legal provision of act concerned. And in most cases, the court may avoid not applying the law or act concerned by giving the law or act an interpretation that brings it in conformity with the provision of international law (the so-called 'harmonizing interpretation'). It may do so on the presumption that the legislator or executive have had the intention to implement the State's international legal obligation concerned correctly. The British Human Rights Act of 1998, in Article 3, paragraph 1, even contains an obligation for the courts, to the extent possible, to apply this interpretation method in relation to the ECHR: 'primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights'. This obligation also includes the obligation to take the case law of the European Court of Human Rights into account.³⁶

³⁴ See, as an example, the British Human Rights Act: the court may not annul or declare null and void an Act of Parliament, but it may annul a conflicting administrative act provided that the latter does not obligatory ensue from an Act of Parliament.

³⁵ See, e.g. Article 55 of the French Constitution.

³⁶ Article 2, paragraph 1.

In most legal orders the courts do not have the power to order the legislature to adopt or amend a law in order to respect the State's international obligations. One of the exceptions is the German *Bundesverfassungsgericht*, which may give an order to put an end to an unconstitutional situation, while in Belgium it is common practice that the legislature will put an end to a legislative shortcoming determined by the Constitutional Court.³⁷

³⁷ [Zie de antwoorden op de vragen 6.c en 9 van de questionnaire].