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"General concepts of implementation of international law"

by Mr Godert W. MAAS GEESTERANUS,
Former Legal Adviser to the Minister of Foreign Affairs, Netherlands,
Member of the Venice Commission

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Mr President,

I feel greatly honoured to have been offered the opportunity to address today this learned meeting, and to exchange some opinions with you and the other participants on matters that may be of importance to the work of the Constitutional Court.

Ladies and Gentlemen, honourable judges and other lawyers from Ukraine! Allow me to speak to you on a highly intriguing subject, namely on problems arising at the tangent of two different legal systems: the international legal system on the one hand, and a given national legal system on the other. Of the latter, the national legal system, there are of course many variations, in principle as many as there are nations. But the problems arising at the tangent with the international legal system are on an average the same everywhere.

What the two systems - the national and the international - have in common, is a reflection of our desire as well as our attempts to promote the development of the rule of law in society as a whole, both on the national and on the international level.

It is my firm belief, Mr President, that the rule of law is inseparable from democracy and acquires true meaning only in the context of a constitutional order guaranteeing fundamental rights and freedoms, the principle of the sovereignty of the people as the genuine source of all powers in the State, fair, free and universal suffrage and a balanced distribution of State powers.

In a State governed by the rule of law, the law takes precedence over any action and all State organs are subject to the law. Their actions are legitimate and valid only if they are in accordance with the law, including international law.

What is true about relations within the State is just as true for the relations between States. In this field too, respecting the rule of law, in this case the rules of international law, is a condition of up-building and upholding a humane, democratic and peaceful society.

As already said, the two systems - the national and the international - have in common that both reflect our attempts to create the rule of law in society as a whole. There is, however, a fundamental tension between the two systems: between the development of the law of nations, on the one hand, and the development of national law on the other. The national legal order is, at least in most European countries, based on "democracy", that is to say on a consensus - or the best possible approximation to consensus - between the governing powers and the governed.

On the contrary, the international legal order is marked by a functional split: usually, the governments of the States negotiate among themselves the rules to which they are willing to submit. By doing so, the governments, acting on the international level, are at the same time the governing powers and the governed.

This fundamental tension towards the national legal systems is most noticeable where the rules of international law are contained in agreements, treaties: pre-eminent examples of the contractual nature of by far the greatest part of the law of nations. But this contractual feature is by no means limited to treaties! Decision-making procedures within international organisations, for instance, do also contain elements of negotiation. We shall return to this.

From both sides, that is to say: in the law of nations as well as in the different domestic law systems, attempts are made to bridge over the gap between the two systems and to create a uniformity of purpose while respecting the diversity. So, for instance, does the law of nations refer to provisions of internal law of the State where the competence of the State to conclude treaties is at issue (Art. 46, 1969 Vienna Convention on the law of treaties)? And in the national legislation of many if not all States, statutory provisions have been made to guarantee that effect will be given to the contents of a treaty once the treaty has been duly concluded.

This, Mr President, brings us down to the core of the matter that we intend to treat today: implementation of rules of international law in the national legal sphere.

There is still, however, a preliminary question of a general nature requiring our attention. I mean the question of where to find the rules of international law. The traditional and highly authoritative answer to this question is provided by the Statute of the International Court of Justice. Article 38 of the Statute, in its first paragraph, contains an enumeration of sources on international law. For the purposes of the present report it may suffice to distinguish as the main sources: treaties and international custom.

I wish to mention in addition, to be accurate, the decisions of international organisations to which I made reference a minute ago. Decisions of international organisations were not on the list of the International Court of Justice, for the simple reason that the phenomenon of international legislation through decisions of international organisations is a fairly new one. The drafters of the Statute of the International Court, more than half a century ago, were not just yet aware of the potential importance of this new phenomenon.

Such decisions may have legal effect in as far as the organisation has been authorised to take decisions to be binding on member-States. The power to take binding decisions has to have been conferred upon the organisation expressly. This may have been done in the constitution of the organisation itself, or in any other treaty. Consequently, the binding force of such decisions is based on a treaty, i.e. on a consent to be bound given, at a previous occasion, by the States involved.

Finally, as a source of international law I have to mention the judicial decisions. In accordance with Article 59 of the Statute of the International Court of Justice, the judgments of international tribunals have 'no binding force except between the parties and in respect of (the) particular case'.

Nevertheless, both the decisions of international organisations and the judgments of international tribunals may have legal effects outside the parties directly concerned, in as far as such decisions and judgments may furnish proof of the existence of a rule of customary law.

Back now to our main sources: treaties and custom. As to the treaties, it has to be observed that a treaty has legal force only for the States who have become parties to it.

On the contrary, a rule of international customary law, in as far as there is evidence of its existence, has to be considered as binding on all States.

The main evidence of a rule of customary law is to be found in the actual practice of States. Evidence, as already said, may also be found in certain decisions of international organisations - in particular where such a decision claims to be declaratory of customary law, which has been

the case, for instance, in some decisions of the U.N. General Assembly. Moreover, as you know, evidence can be found in the jurisprudence of international tribunals.

This being said, we now broach the question as to which rules of international law may become operative within the domestic sphere.

Viewed from the angle of the international legal order, the answer to this question wholly depends on the intentions of the drafters of the international legal rule. In other words, it depends on the intentions of the contracting States in the case of a treaty, on the intentions of the organ of an international organisation in the case of a decision, or on that of the tribunal in the case of a judgment.

This answer immediately limits our field of investigation largely to written rules of international law: treaties, decisions of organisations, jurisprudence of tribunals. Custom does not spring from any intention of the States concerned; it grows from their practice! When States have an intention to formulate a rule of law, they most certainly will set down such rule on paper.

The answer to the question of whether a given international legal instrument, say a treaty, does contain rules that may become operative within the domestic sphere of the State Party, has to be found in the treaty itself. The intention of the Parties can, in most cases, be ascertained easily from the text: if they, the Parties, commit themselves to introducing a particular piece of legislation or to taking certain measures, then, normally, the contents of the treaty will not have immediate effect in the domestic sphere.

On the other hand, many treaties contain rules that are worded in such a way as to address directly the citizens of the contracting States, defining their rights and obligations. If, moreover, such rules have been couched in sufficiently explicit and precise terms, so that they can be applied without further elaboration in additional legislation, then the contents of the treaty is fit to become part of the domestic legal order. Provisions of a treaty - or of a resolution of an international organisation - which may be binding on individual persons by virtue of their contents, are sometimes referred to as self-executing provisions.

Such a case is illustrated by Article 55 of the Charter of the United Nations. Nobody questions the binding nature of the Charter. Article 55 says that the U.N. shall promote universal respect for human rights for all without distinction as to race etc. Article 56 adds, that all Members pledge themselves to take action for the achievement of the purpose just quoted. It would seem to me that the only legal obligation for the Parties under these articles is to make an effort towards a better observance of human rights. The citizens will not derive rights directly from these articles.

As opposed to the Charter provisions just mentioned, many provisions in the European Convention for the Protection of Human Rights and Fundamental Freedoms are couched in the form of legal rules from which private persons may derive rights and obligations.

Having discussed the nature of the particular rule of international law, let us now look at the problem from the angle of national law: How do the rules of international law, which by nature are fit to be applied within the domestic sphere, actually become operative? The choice of means to achieve this goal, is largely, or even entirely, left to the State.

At this point in my argument, we cannot avoid going into a short consideration of the well-known, philosophical antithesis between two legal conceptions usually referred to as the

monistic and the dualistic doctrine. Putting it briefly, according to the monistic doctrine, international law and national law are to be considered as forming parts of one legal order. This order is built up as it were "step by step": the uppermost norms not regulating all relationships but leaving it to the next inferior body to lay down further regulations, and so on, the delegating procedure being repeated. In this step by step up-building of the single legal order, national constitutions do not represent the uppermost steps. Above national law rises the law of the international community.

The dualistic doctrine, on the other hand, recognises two separate legal orders. Norms of international law being the result of contracts between States, they can never produce directly any duties or rights for individuals. To have that effect, each of the States involved has to transform, by means of its national legislation, the international norm into a national one.

This philosophical and rather abstract approach to the problem of the relationship between national and international law has no doubt an influence on the solutions applied in the different States. However, actual practice is far more diversified than the simple dichotomy between a monistic and a dualistic doctrine. As a matter of fact, no two States apply strictly identical rules to questions such as the method of incorporation of international law, or to the question of whether and to what extent international rules take precedence over national legislation.

Broadly speaking - and here I adhere to the division made by Van Loon in 1986 - we may distinguish three categories of national solutions:

A first category admits the automatic and immediate effect of the international rule into domestic law. Once a treaty has been duly ratified by the State, and has entered into force in accordance with its own provisions, the treaty provisions which by their nature are fit to be applied within the domestic sphere, are binding on all persons within that particular national legal order, provided of course that the treaty provisions have been published. The application of the international rule takes precedence over the application of national legislation, whether prior or subsequent to the international rule. This system, which clearly comes from monistic inspiration, is adhered to in the Netherlands for instance.

In a second group of States, a treaty, strictly speaking, has itself no effect in the domestic sphere: its contents require transformation by a legislative act in order to produce the desired effect. Since the transformation or incorporation of the treaty provisions into the domestic sphere takes place by a legislative act, the result is that the incorporated treaty provisions are now on an equal footing with national legislation. In this regard, the system reflects a dualistic inspiration. Once the legislative act - mostly coinciding with the parliamentary approval of the treaty - has been adopted, the treaty provisions obtain applicability within the domestic sphere. To that extent, the result comes close to that of the first group. The Federal Republic of Germany is an example of the States belonging to this group.

In a third group of States, including the United Kingdom and Denmark, the treaty provisions are seen as addressed exclusively to the contracting States. It is up to their governments to use these provisions in one way or another as a basis to enact legislation in the domestic sphere. In the latter, citizens and courts are not bound by the international rules but solely by the provisions as incorporated in an Act of Parliament.

The automatic incorporation of rules of international law in the States belonging to the first-mentioned category requires some system of publicity whereby the subjects in the domestic sphere can have access to those rules. Since many treaties, in particular multilateral treaties, are

concluded in a language other than the national language of most contracting States, the publication intended for national use has to be a translation from the original text. This, unavoidably, involves a risk of discrepancy between the, 'binding', original and the, accessible, translation. A Court may be confronted with questions of interpretation due to such a discrepancy.

Where, in the second category, an act of transformation is required to give effect to the treaty provisions, there is a risk that the international and the national mechanisms may fail to converge as regards the dates of their entry into effect.

A risk of higher importance is that, in case of a conflict between national and international law, courts might be inclined to give precedence to subsequent national law over the earlier enacted international law, thus amending the domestic application of the international rule while the State, of course, remains bound unabated to the fulfilment of its international obligations..

The risk of discrepancies between national and international law is, in the nature of the case, even greater in the third-mentioned system. The national legislator, by transforming treaty rules into domestic law, cannot get away from using form and language that are standard for its own legislation.

Mr President, from my foregoing remarks you might have understood that the national legislator has a perfectly free hand as regards the implementation of rules of international law in the sphere of domestic law. That, however, would be an error. The domestic application of treaties and other rules of international law does involve certain requirements of international law.

What are these requirements? Parties to any treaty have a primary interest in seeing their treaty duly implemented by the other Party or Parties. In speaking of requirements determined by international law, we recognise that the international society has a common interest in compliance, by each State, with its international obligations.

With respect to requirements determined by international law, Judge Pescatore has once formulated three postulates, which cannot seriously be contested. In his postulates he concentrated on the implementation of treaties, but the same goes *mutatis mutandis* for other rules of international law.

First, Pescatore notes that every treaty has to be performed in good faith, according to its content and purpose. This rule, *'pacta sunt servanda'*, is one of the most fundamental principles of international law, as expressed by Article 26 of the Vienna Convention on the Law of Treaties.

Secondly, treaties are equally binding on all Parties. They require by their nature uniform implementation with equal effects. They should be interpreted in the same way by all Parties. Any discrepancy in effectiveness or interpretation of a treaty creates an imbalance between contracting Parties and therefore raises a problem of reciprocity.

And thirdly, a State may not oppose rules of its internal law, even constitutional rules, against the implementation of an international treaty. This principle has also been embodied in the Vienna Convention. Article 27 says that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." In other words, treaties must be implemented according to the standards of international law, not municipal law.

Mr President, Ladies and Gentlemen, there is, no doubt, a good deal more to be said about the relationship between international law and national law, and about the implementation of parts of the former into the sphere of the latter. I hope that the discussions, today and tomorrow, will offer the opportunity to fill up some gaps in the present report.

In conclusion, I wish to thank you for giving me the opportunity to participate in an exchange of views on these subjects.

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