reaffirming the separation of powers as understood in the Netherlands. That is, the courts have little if any power to make law or interfere with primary law. The Legislative Branch is charged with making law. It is comprised of the Estates General and the government, with the government taking the pole position in international law matters. The constitutional optic seems inescapably and necessarily that of the separation of powers, situating the authority for making rules which count as law within a polity. In other words, the language through which a constitution must conceive and speak of law-making authority within a polity cannot be but that of the separation of powers, of the trio of the Legislative, Executive, and Judicial departments of state.

By doing so, the Constitution is splitting or separating international law from national law, and raising inevitably a dualism, a dichotomy, between the two, particularly if we agree that Article 94 presupposes the supremacy of international law.[451] For the Netherlands, that does not flow from the recharacterising of international law as domestic through some constitutional process. Instead, the dualism would issue from the two ways of conceiving the separation of powers: form and function. On the one hand, the constitutional origins of the courts ties them to the institutional boundaries read from a strict understanding of the separation of powers. They are national courts, and are duty bound to observe constitutional precepts. Accordingly, they administer the law, but do not make law nor control the content of (primary) law, directly or indirectly by some form of judicial review. On the other hand, their role, their function, of administering the law imposes the logic of the system of rules which sets international law above national law. (Needless to say, it remains an unargued conclusion in the Netherlands' jurisprudence—weighted with the encrustation of habit and practice—that international law ought to have and deserves such precedence.[452]) To repeat, the formalist position under the separation of powers requires a judge to comply with the national criteria, notwithstanding the legal order's professed monism. The national legal order is distinct from the international, and the former institution determines the rules of recognition. The functionalist position should justify a court applying the treaty as directly applicable in spite of those criteria because the rules of recognition derive from the inherent character of law. There is a presumed unity between the two legal orders.

Consider the effect of the supremacy clause on treaty terms which fall afoul of the approval provisions of, *inter alia*, Articles 6 and 15(1, 2, 3) *Treaty Approval and Publication Act* and Article 91(1, 3) Constitution.[453] In the first example, a treaty not approved by the requisite 2/3 majority appears to mandate a legal solution diverging from the constitutionally and statutorily prescribed one. In the

[451] Thus the argument of Feuren 2004, Chap. VII to scrap the constitutional division between directly applicable and not directly applicable, and actively pursue monism by integrating treaties more completely into the judicial reasoning process as the lead premise.

[452] The academic literature was somewhat more attentive to the point: see, e.g., the survey in Van der Zanden 1952.

[453] See Fleuren 1995, pp. 259–260, and Schutte 2003, p. 34ff.

second, a treaty provisionally (and directly) applicable appears likewise to mandate a resolution diverging from established law or the Constitution. We have already considered above the option of the courts declaring the provisional application as an *ultra vires* administrative act. In the same vein, under the second hypothesis, the courts could find the government's invocation of Article 15(3) as incorrect, for—under the separation of powers—the courts are the final arbiters of whether a treaty provision is directly applicable or not. None of these options directly address the nature of international law in the domestic legal system. The real problem arises where clearly and certainly the treaty is directly applicable. Obviously the courts could strain the interpretation of both statute and treaty to find no conflict.[454] But set aside the undesirable situation of impracticable or unrealistic interpretations. The problem arises because the national legal order has prescribed validity conditions, internal criteria for recognition as law. Only if a rule meets those criteria does it become enforceable (as directly applicable) domestic law. The terms of the treaty provision remain the same; only the rule of recognition varies. Thus there is a differentiation between at least two types of law: domestically applicable, and not applicable.

Now, it can be said that the concept of directly applicability of treaties is the manufacture of domestic law. We might rush to the conclusion that no problem exists, because the rules of recognition originate within a national legal order, and as such may be varied or reconciled there. It is not a question of juxtaposing or opposing national law with international law. But this would concede that the nature and effect of international law (at least within a domestic legal system) derives from the national legal order, and not because of some coordinate, co-original equivalence.

Or we could turn to international law, specifically the VCLT. We have seen above that the Administrative High Court was prepared to ignore internal validity criteria on the basis of Article 46 VCLT.[455] Yet this specific argument of internal (constitutional) criteria not barring the bindingness of an international instrument does not contain any limits on its application. It would in principle therefore sweep away any and all legal or constitutional conditions limiting the application of international treaties in the Netherlands, including Articles 91 and 93 Constitution. It would present, at least on its face, a complete form of monism. The alarming depth and breadth of such a conclusion no doubt would invite much closer attention for errors and faults.[456] But the expectation of and search for errors (even nuances) presume binding, effective validity criteria for domestic law. And this rests on the existence of two separate legal orders: one national, and the other, international. For example, an easy riposte to the Court's reasoning marks the confusion between bindingness of compacts at the national level, and at the

[454] See HR 21 Nov. 1972, NJ 1973 123, discussed below.

[455] CRvB 27 Jan. 2006, LJN AV0802.

[456] Prime among them is likely the question whether VCLT direct applicability actually results from the Constitution's authority, the very authority it is seeking to undermine.

international level. It is generally accepted that the two are not equivalent or identical: each relies on its own legal order. And once again we come to dualism.

Putting these varied considerations to the side, it does appear nonetheless that the problem of this creeping dualism originates in the legal consequences of directly applicable treaty provisions, given the current separation of powers in the Netherlands.

3.6.3.2 Directly Applicable Treaty Terms

It is the task of the courts to determine whether a treaty provision is directly applicable or not.[457] This depends primarily upon the wording of the treaty provision itself. To this end the courts will check whether the supporting materials to the treaty (negotiating *travaux*) offer a definitive answer.[458] The courts will also give consideration to parliamentary materials when forming their opinion, consistent with established statutory interpretation practice underpinned by their role in the separation of powers: the task of articulating and interpreting the law as prescribed by the Estates General. Significant among those materials is the explanatory memoranda supporting the bill for approval of the treaty, those supporting the statute in question, and less frequently, perhaps also those relevant to any constitutional provision in issue.[459] The courts will also consider the rulings and opinions of those international bodies charged with monitoring the treaties or relevant international law, or, as is the case with the ECtHR and ECJ, issuing binding rulings on interpretations, or rights and obligations arising under the treaty.[460] Indeed, the courts may well reverse themselves, adjusting their reading of a treaty provision in light of such rulings. Just how far a court is willing to go is amply illustrated in a 2006 Administrative High Court decision.[461] The issue was a

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[457] See, e.g., HR *Spoorwegstaking* 30 May 1986, NJ 1986 688 (ESH and the right to strike); ABRvS *Spoedwet wegverbreding* 15 Sept. 2004, LJN AR2181 (International E-road network Agreement). See also Fleuren 2004, p. 309 (referring to the parliamentary history to Articles 93, 94 Constitution); Brouwer 1992, citing HR *Portalon* 8 Nov. 1968, NJ 1969 10 as the indicative authority.

[458] The standard examples given are HR *Spoorwegstaking* 30 May 1986, NJ 1986 688 and *Militaire Dienst* 18 April 1995, NJ 1995 619.

[459] See, e.g., HR 24 Jan. 1984, NJ 1984 538; *Spoorwegstaking* 30 May 1986, NJ 1986 688; *Knesevic (No.2)* 11 Nov. 1987, NJ 1998 463; *Harmonisatiewet* 14 April 1989, NJ 1989 469 (Article 13(1, 2c) ICESCR not directly applicable); *BOA* 25 Sept. 1992, NJ 1992 750; *USA v Havenschap Delfzijl* 12 Nov. 1999, LJN AA3368; *Douwe Egberts* 28 Jan. 2000, NJ 2000 292 (ESH and the right to strike); *Bouterse* 18 September 2001, NJ 2002 559 (Article 16 Constitution on non-retroactivity of criminal law); *Heram* 8 July 2007, LJN BC 7418; and CRvB 8 Aug. 2005, LJN AU0687 (Convention of the Rights of the Child).

[460] See, e.g., *Spoorwegstaking* 30 May 1986, NJ 1986 688 (ESC Committee of Experts); 10 Nov. 1989, NJ 1990 623; CRvB 4 July 2003, LJN AI0140 (Article 13 EConvHR and ECtHR); Rb The Hague 25 June 2007, LJN BA9575.

[461] CRvB 21 July 2006, LJN AV5560.

distinction made in survivor's benefits legislation between children born within and outside marriage. It was claimed to violate the equality provisions of Article 26 ICCPR, notwithstanding the Court's prior consistent rulings to the contrary. The HRC had released an opinion indeed finding such to be an unjustifiable discrimination. But such an opinion was not binding, and the government further cited a ECtHR decision finding no discrimination contrary to the EConvHR. Moreover, the HRC had misdirected itself generally on the law of the Netherlands. Distinguishing the ECtHR case, the Administrative High Court reversed itself, finding a violation of Article 26 ICCPR. It held that the HRC opinion—although not binding—was nonetheless authoritative and could not be disregarded except where pressing reasons would justify. The views of the government on the law and the ICCPR, while not unreasonable, were not decisive as against the HRC views. Admittedly, it cannot be said of the Hoge Raad that it is similarly adventurous and accommodating. Its more cautious and reserved approach is grounded principally upon parliamentary materials (including government position statements).

That the courts have the final say on the meaning of treaty terms (unlike until recently the situation in France) can produce, and has indeed led to, some confusion and inconsistency on the nature of self-executing treaty terms. It has appeared that such terms, most notably Article 26 ICCPR, could be directly applicable in one case and then not so in another.[462] I do not intend to pursue herein the criteria and techniques by which the various courts determine whether a given treaty term is directly applicable or not, nor examine which courts tend to more liberal or more reserved approaches. This is better explicated elsewhere.[463] And to reiterate, "self-executing" and "directly applicable" are creations of national law. It is a characterisation of treaty terms arising out of national law (including the legal effect accorded the "intention of the parties"), and not out of international law. Instead I would highlight a separation of powers underpinning, which goes far to explaining the divergences in the cases and in the apparent reserve and caution exercised by some courts in recognising direct applicability. Fleuren distinguishes "contextual" and "dichotomous" approaches.[464] The former allows the treaty a variable legal character depending upon the circumstances of the case. The latter, on the other hand, gives a treaty a consistent character of direct applicability. But it would restrict to what extent a court might supplement or supplant a statutory scheme to bring it in perceived accord with treaty obligations. In other words, the "dichotomy" arises because the court cannot fulfil substantively its duty to apply a self-executing treaty provision with a concrete remedy. The court's jurisdiction under the Netherlands' separation of powers does not extend into a substantive reform of a conflicting statute.

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[462] Woltjer 2002 reviews the divergent Netherlands case-law on common Article 26 ICCPR and ICESCR, pp. 280–284 (summarising judicial approaches ICCPR), p. 467ff (general conclusions).

[463] Most notably, Fleuren 2004, esp. Chaps. V and VI; and see also Brouwer 1992, VII §8 and VIII §§7 and 8.

[464] Fleuren 2004, pp. 362–364.

Just because a treaty provision is held to be directly applicable does not itself entail that it prescribes a particular outcome. As an easy and frequently occurring example, both Article 26 ICCPR and Article 14 EConvHR prohibit unjustifiable discrimination and differentiated treatment. But in doing so, they do not mandate how equality of treatment ought to be achieved in any given circumstances. Inasmuch as a judge holds such treaty terms as self-executing and the statutory scheme as irreconcilable or inconsistent with the treaty provision, the judge may face any number of remedies sought by the parties. I would group them for convenience into four categories. First a judge might discount the application of the statutory provision or scheme on the party affected.[465] Such an option is not necessarily desirable when the law in issue confers benefits, such as tax credits. Second, the party might be added into the scheme, where otherwise unlawfully excluded.[466] Third, a judge might seek to adjust or revise the scheme to account for the irregularity ("interpretative amendment"). This option of course draws the courts perilously close to a perception of acting as a legislator, and to the outer limits of the judicial role under the Netherlands' reading of the separation of powers.[467] An extreme, and rare, example of this is a 1972 decision of the Hoge Raad, where to avoid an inconsistency with Article 6 EConvHR (presumption of innocence), the Court redefined the extension of criminal liability in motoring accidents to the owner, but not driver, of the car.[468] It recognised in effect the (novel) offence of a "negligent bailment", of the owner's failing to take care that the drivers were suitable and responsible, and one punishable by the relevant statutory penalties. Being attentive to and conscious of this, a judge may instead prefer the fourth way. This is to refer the matter to the Estates General, the selection or fashioning of a solution out a multitude of options being a clear matter of policy, not law.[469] Indeed this fourth option may even recommend itself to a court where discounting a scheme appears as a too fundamental or widespread change, amounting in effect to a full statutory amendment.[470]

The 1999 *Arbeidskostenforfait* decision of the Hoge Raad has provided some guidance how the courts ought to approach the issue. The case involved an appeal against a disallowance of certain tax credits on costs associated with employment.

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[465] See, e.g., CRvB 24 Jan. 2006, LJN AV497 (non-application of Article 16(2) *Work and Social Assistance Act* as inconsistent with the directly applicable Article 2(1) *Convention on the Rights of the Child* and Article 14 EConvHR and Article 26 ICCPR), and *Rijnvaartakte* caselaw.

[466] See, e.g., HR 17 Aug. 1998, NJ 2000 169; HR *SGP/Wichmann* 9 April 2010, NJ 2010 388.

[467] See, e.g., HR 2 Dec. 1983, NJ 1984 306; 22 Feb. 1985, NJ 1986 3, and 21 March 1986, NJ 1986 585, referred to in Brouwer, *Verdragsrecht*, 277–8.

[468] HR 21 Nov. 1972, NJ 1973 123.

[469] See, e.g., HR *Naamrecht* 23 Sept. 1988, NJ 1989 740; *Arbeidskostenforfait* 12 May 1999, NJ 2000 271.

[470] See, e.g., HR 12 October 1984, NJ 1985 230 (Netherlands' citizenship available only to women through marriage contrary to Article 26 ICCPR; remedy for discrimination a question for the legislature); CRvB 23 Sept. 1988, NJ 1989 740 (legislative remedy required for the unjustified denial of taking the man's last name in adoption matters).

These had been altered and increased, with the result of an uneven effect over the class of taxpayers, and thus a discernible disadvantage to a small percentage of them (15% or so). The courts held that to entail a breach of Article 26 ICCPR and Article 14 EConvHR. The problem was in the remedy. Striking the statutory provisions was not an option, since that would remove the benefit of tax credits, if only to the minority group. The Appeal Court had revised the credits prescribed by the statute to effect an equality. This was overturned by the Hoge Raad, as representing an unjustifiable judicial intervention in the legislative role. The courts had to leave the matter for a legislative resolution.[471] The kernel of the Court's reasoning articulates the point clearly in separation of powers terms.

> 3.14 …This raises the question whether a judge can offer an effective legal remedy by filling in another way the gap created in the law or must for the time being leave the matter to the legislator. In such situations, with regard to the area of law where the issue arises, two considerations need to be weighed against one another. In support of supplying of a remedy for the violation, is argued that it is the judge who can offer a direct and effective remedy to the interested parties. But against that, it is argued that in the given constellation of constitutional powers, the judge must exercise reserve when interfering with statutory schemes.
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> 3.15 This balancing will generally lead to the situation that the judge will provide a remedy if it is sufficiently clear and certain from the nature of the statutory scheme, the cases regulated thereby and the underlying principles there, or the legislative history and background, what remedy ought to issue. In those cases where different solutions are conceivable and the choosing from them is dependent upon general considerations of public policy or if important choices of legislative policy need to be made, it is for the judge to leave the choice for the time being to the legislator, such reflecting the constitutionally recommended exercise of judicial reserve indicated in 3.14 as much as the limited judicial resources in this domain. It is not discounted however that the balancing may turn out otherwise in the case where the legislator knew that a particular legislative scheme would lead to an unjustifiable differentiated treatment within the meaning of the aforementioned treaty provisions [Art. 26 ICCPR, Art. 14 EConvHR], but has refrained from instituting measures to relieve the discrimination.

And the Court naturally declines further to speculate on the potential issue of the legislature failing to correct such a problem signalled by the courts. It merely assumes that the legislator will respond duly and without delay in such a case.

These criteria can be read to favour judicial reserve, consistent with a more conservative understanding of the separation of powers in the Netherlands. They would appear to restrict the available remedies to those directly and clearly envisioned (already) by the statutory scheme, akin, perhaps, to elucidating statutory powers "by necessary implication". Yet the overall framework is one of a balancing exercise, a discretionary appreciation of what the statutory arrangement might reasonably support. The criteria can also be read to allow the courts some leeway in fashioning a remedy providing it remains within the limits of the statutory scheme. So there arguably still remains a margin for judicial "interpretative amendment" prompted by international law. But whichever construction prevails,

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[471] This raises another issue, relevant to further rights under, *inter alia*, the ICCPR and EConvHR, whether a successful litigant has actually received an effective legal remedy: see, e.g., *Arends v Netherlands* 29 Jan 2002 ECtHR (°45618/99) (cited by Fleuren 2004, p. 362, n. 166).

it undeniable that the context and the two options are defined by and through a national constitutional optic. It is not the function or role of the courts which is definitive, but their place within the constitutional framework. That national structure defines the interpretation and application of international law, even within a monist system, instead of the inverse. The significance is naturally an inescapable dualism brought on by the separation of powers. The validity of international law within the domestic system cannot supplant or sidestep the legitimation facet to law-making drawn from the national constitutional order.

It bears recalling that case was not a situation where the treaty prescribed a specific concrete (quantitative) outcome, but rather a qualitative one, where it served as an evaluative measure. This is typical for matters involving judicial review, characteristically a quality control exercise rather than a straightforward application of provisions of law. Thus the reference to the constellation of constitutional powers, one which recurs in other judgments, particularly in those concerned with the length and breadth of judicial powers when measuring domestic legislation against constitutional, general or international principles of law.[472] It might therefore be argued that the treaty obligation (here, Articles 26 ICCPR and 14 EConvHR) pulled the courts out of their defined role as appliers of law, and sought to readjust the constitutional balance under the separation of powers. It did not involve a treaty provision which merely conferred straightforward rights and obligations, but one which also required the courts to arrogate certain powers not otherwise held or exercised on a national basis in order to do so, namely far-reaching powers of judicial review and statutory reconstruction. So as long as a treaty obligation does not require, in its application, the courts to go beyond their constitutionally prescribed roles or powers, its validity as a rule of law is accepted. Exceeding or testing those constitutional limits, however, provoke concerns of legitimacy. Indeed as with any application of public power which puts into question the criteria for its valid exercise, the concerns quickly revert to core issues of sovereignty, the separation of powers, and the constitutional settlement more broadly. And the framework and metric for that debate remains the national constitution.

This represents the view of the Hoge Raad, as articulated for example in the 1989 *Harmonisatiewet* case, which rejected a broadly "civil rights" challenge to legislation readjusting financial assistance to postsecondary students and its preconditions.[473] The Court reaffirmed its understanding of the prohibition in

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[472] See, e.g., HR *Landbouwvliegers* HR 16 May 1986, NJ 1987 251 (regulations *etc.* (not primary legislation) subject to judicial review as against general legal principles); *Harmonisatiewet* 14 April 1989, NJ 1989 469 (nothing in EConvHR to confer general power of judicial review); *Waterpakt* 21 March 2003, NJ 2003 691. See also HR *Staat en SGP/Clara Wickmann* 9 April 2009, NJ 2010 388.

[473] HR *Harmonisatiewet* 14 April 1989, NJ 1989 469. In addition to the grounds reviewed here, the Court also rejected arguments relying on the *Statuut*; found no breach of Articles 14 EConvHR and 26 ICCPR; and held Articles 2(1) and 13(1, 2) ICESCR to be not directly applicable.

Article 120 Constitution on a general jurisdiction for judicial review of primary legislation for constitutional compliance (in fine, compliance with "fundamental principles of law"). The three factors of (i) an evolution in jurisprudence which permitted courts to relieve certain inequities resulting from a strict and formalist application of statutes, and (ii) a review of secondary legislation for compliance with fundamental principles of law, as well as (iii) the constitutional permission to discount primary legislation inconsistent with directly applicable treaty provisions, did not outweigh the need for express constitutional authority consistent with the constitutional tradition and structure of the Netherlands, and the rejection of a proposal to exempt such jurisdiction from Article 120. Moreover, notwithstanding the priority given to directly applicable treaty terms, the EConvHR (here, Article 6) could not be read to expand indirectly the jurisdiction of the court into judicial review of primary legislation. Nothing therein suggested such a power arose or directed same. It could not be otherwise, given that the legal and constitutional systems of the state parties themselves showed them to be diverse, inconsistent, and uncertain on that point. Likewise, in the leading case *Waterpakt,*[474] the Court denied that the powers exercised by the judiciary relating to directly applicable treaty terms extended to compelling or directing the government to implement those terms or implement them in a particular way.

Whatever the nature and perception of judicial power in the brief period 1953–1956 when no explicit constitutional limit existed, certainly since 1956 the Constitution has interposed itself between the international legal order and the national one. It has highlighted the dualism—even if generously considered a "monism by permission"—which exists between the two legal orders as the inevitable result of the boundary created by a constitution.[475] On this view, the situation of the Netherlands resembles closely that of the US, with the signal differences being merely the active role taken by the US Senate in defining the legal character of treaty terms in advance, and the supremacy in the Netherlands of directly applicable treaties over prior and subsequent primary legislation. The creeping dualism in the Netherlands comes further into view in the treatment of treaties which are not directly applicable.

3.6.3.3 Non-Self-Executing Treaty Terms

Treaty terms which are not self-executing do not benefit from what is in effect a rule of recognition established by Articles 93 and 94. Inasmuch as the Constitution there expressly provides directly applicable treaty provisions to have binding force and to prevail over conflicting national law, it would follow that, by default, there is no national, constitutionally authorised recognition of binding legal force for

[474] HR *Waterpakt* 21 March 2003, NJ 2003 691.

[475] A characterisation strongly suggested by (or notwithstanding) the recent review of Besselink and Wessels 2009.

non-self-executing treaty terms.[476] Whatever the effect of an international compact in the international legal order, it would not translate directly into the national order, as given by a monist understanding. Indeed, as is characteristic of the dualist system, the rule of recognition for such treaty provisions would regard their incorporation or implementation by and as domestic legislation as a condition precedent.[477] As a consequence, judges in the Netherlands will—like their dualist colleagues in the UK for example—be asked to recognise the persuasive, if not binding, effect of such treaty terms indirectly. The courts will also be asked to expand or restrict and limit the statutory cover in accordance with that treaty or other international law.

The courts will in principle construe a statute and statutory scheme implementing a treaty so as to give best and full effect to the treaty. Consistent with their role in the separation of powers, the courts will give effect to the manifest will of the Legislative Branch and therefore will be attentive to any clear and certain intention to alter the scope and effect of the treaty-based obligations in the national legal system. This broadens out to the general position that the courts may still read statutes in conformity with a treaty, but only insofar as the terms of the statute allow.[478] Whether this represents merely an opportunity for self-congratulation on the coherence of national law with international treaty obligations, or for judicial adjustment of national law, depends in part on the equities of the case and judicial attitude. More importantly, the elasticity of the statutory language and statutory scheme will determine the allowable margins for the courts. Thus in the *Nederlandse Volksunie* case, the Hoge Raad ascertained the meaning of "race" in the implementing legislation of the ICERD by reference to the wider meaning given in the Convention.[479] Although the implementing Act had not exactly transposed Convention language, the Court rejected arguments that this was to narrow the range of application and grounds of prohibited discrimination. There was no legislative evidence to that effect. Instead, the Court read in the single statutory term "race" all the other race/ethnicity grounds expressed in the ICERD. This broadening of the statutory catchment area must nevertheless be read in conjunction with the limitations articulated in the *Harmonisatiewet* and *Waterpakt* cases.

The position of the Netherlands legal system is that non-self-executing treaty terms remain binding on public organs and officials, the courts included, to be given effect within the limits of valid domestic law. The self-executing character

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[476] To apply the "*a contrario*" style of reasoning from the Hoge Raad, as per HR *Nyugat (No. 2)* 6 March 1959, NJ 1962 2.

[477] Under the *Courts Act* (*Wet op de rechterlijke oranisatie*) *of 18 April 1827,* Stb 20 (as amd.), non-self-executing treaty terms would not constitute grounds for appeal to the Hoge Raad: HR *Portalon* 8 Nov. 1968, NJ 1969 10 reading "law" (*recht*) to be limited to national primary and secondary legislation, and directly applicable treaty terms; see also HR 23 Nov. 1984, NJ 1985 604 (id., relating to non-self-executing Articles 2 and 7 Universal Declaration of Human Rights.)

[478] See, e.g., ABRvS *Spoedwet wegverbreding* 15 Sept. 2004, LJN AR2181.

[479] HR *Nederlandse Volksunie* 15 June 1976, NJ 1976 551.

does not go to a treaty's bindingness in law, national or international, but to the manner of its enforcement by and against individual, private litigants. In the leading example of *Portalon*, the Hoge Raad read the Convention on Uniform Terms for Bills of Lading as not directly applicable, and requiring the government (according to the evidence led) to implement the Convention with such adjustments to Netherlands law as needed.[480] Holding the Convention as not directly applicable meant only that the courts had no jurisdiction to rule on Convention provisions as between private parties, but this did not mean that the Convention lacked legal force in general. The government still had a duty to see its treaty obligations duly carried into domestic legal force. The Hoge Raad affirmed its stance shortly thereafter in the *AOW* case, holding the government bound to observe Article 13 EConvHR even though it was non-self-executing.[481]

A treaty may thus constrain or restrain the exercise by a public authority of its statutory mandate, even though its provisions are not self-executing (inherently or by default of publication) and cannot be invoked by or against a private party.[482] Rather, the treaty will factor into the defence of and justification for a particular administrative act. Hence civic authorities were correct to justify their licensing—despite environmental protests—of a large logging operation on an approach to Rotterdam Airport based on the standards and requirement issuing out of the 1944 (Chicago) Convention on International Civil Aviation.[483] Even though not self-executing for want of timely publication, the Convention could still bind public authorities so as to constrain, consistent with applicable law, the direction of their decisions. Likewise, the Municipality of Delfzijl could not ignore the restrictions and limitations imposed by Article 48 of the 1960 Ems–Dollard Treaty with Germany in planning permission granted for land covered by that treaty.[484] The Treaty did not itself confer or form an active, enforceable right. Rather, it constituted a relevant and necessary factor in the composite of the administrative decision process. It bears note that, here too, no conflicting primary legislation existed. Hence both cases allowed the courts to avoid the more troublesome issue whether that authority of a non-self-executing treaty would ever have a chance of surviving a clearly inconsistent legislative duty on the public authorities. Since Article 94 arguments would never be far from hand, it is questionable whether the invocation of the treaty can serve as anything more than supplemental or adjunct grounds to the actual decision which remains rooted in the national legal order.

The state's duty to respect and comply with its treaty commitments—the ones not directly applicable—within the domestic legal system does not ground an

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[480] HR *Portalon* 8 Nov. 1968, NJ 1969 10 (in loss of cargo action, bill of lading sought to incorporate Convention terms). This position had already been foreshadowed in HR *Bols* 24 May 1958, NJ 1958 455: see Brouwer, 1992, pp. 209–211.

[481] HR *AOW* 24 Feb. 1960, NJ 1960 483, cited by Brouwer, 1992, p. 193, and see also the cases cited there at 194.

[482] Strongly recalling the 'ond pillar described above in 3.5.1.

[483] Rb. Rotterdam 27 Nov. 2000, LJN AA7335.

[484] KB *Ems–Dollard Treaty* 19 Feb. 1993, AB 1993 385.

actionable right against the state for its failure duly to implement those commitments. The Civil Code of the Netherlands, specifically Article 6:162 and Article 6:106, can sustain the state's liability for damages (in negligence/tort) as a result of an invalid administrative act.[485] The argument made is that a failure to implement non-self-executing treaty commitments allows the state to purse such action otherwise limited or restricted thereby, and by virtue of the breach of that duty, the state conduct in issue has led to actionable injury to property, interest, or person. Indeed, the argument has also extended to obligations in customary international law as well. The courts have not been receptive to these claims. On the one hand, they assume for the purposes of argument that the claimants may invoke non-self-executing international law, only to dismiss the claim in substance. Such was the result in both challenges to stationing nuclear weapons in the Netherlands. The 1989 *Cruise missiles* case, I reviewed above. The issue was revisited again in the 2001 *NATO Nuclear Weapons* case, this time in connection with the Netherlands' commitments to NATO and its deployment of strategic nuclear weapons.[486] While the court was prepared to accept the standing of the special interest groups,[487] and their invocation of international law, their claim failed in substance principally because they had not demonstrated a sufficient degree of specific and actual risk necessary to ground a Civil Code Article 6:162 cause of action, nor could they demonstrate on the (international) authorities that the use of nuclear weapons was prohibited in each and every circumstance.

On the other hand, the courts may also deny standing to the individual, private claimants, on the basis that non-self-executing treaties, or their provisions, apply only as between states and therefore do not indirectly create rights as between private parties. This has been the position of the Hoge Raad certainly since its *Cognac (No. 2)* decision. There it rejected a cause of action in a tort/negligence via the Civil Code predecessor Article 1401 between private parties, for breach of standards set by a treaty held to be non-self-executing.[488] In the 2002 *Kosovo* decision, the Hoge Raad rejected a damages action brought by Serb soldiers against the Netherlands for its participation in the 1999 NATO bombing of the Federal Republic of Yugoslavia.[489] The claimants failed to demonstrate an interest necessary and sufficient under Civil Code Article 6:106; the substance of the claim addressed political and defence questions which fell outside the purview of the courts, and could not elicit any relevant, enforceable private rights out of the international law and the UN Charter cited. Inasmuch as the international instruments were relevant, they were not directly applicable by and for private parties.

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[485] See, e.g., HR *Van Gog/Nederweert* 31 May 1991, AB 1992 290. In the case of treaties, Fleuren 1995, p. 260 also suggests Article 6:168 BW.

[486] HR *NATO Nuclear Weapons* 21 Dec. 2001, NJ 2002 217.

[487] The State had not challenged their standing at the right time or in the right way: HR *NATO Nuclear Weapons* §3.8.1.

[488] HR *Cognac (No. 2)* 1 June 1956, NJ 1958 424.

[489] HR *Kosovo* 29 Nov. 2002, NJ 2003 35.