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Netherlands

André Nollkaemper and Rosanne van Alebeek

1 INTRODUCTION

The Netherlands is often paraded as the prime example of a legal order that is exceptionally open to international law. All international law binding on the Netherlands is, *ipso facto*, part of the national legal order,¹ the Constitution provides that directly applicable international rules can be invoked by State organs against individuals and *vice versa*, and that national law which conflicts with directly applicable provisions of treaties and decisions of international organizations (IOs) is not applicable.² The influence of international human rights treaties in the Dutch legal order has moreover been fostered by the constitutional prohibition of judicial review of the constitutionality of Acts of Parliament.³ In court, fundamental rights challenges to formal legislation are hence in principle formulated in terms of incompatibility with international human rights law, most commonly the

¹ Supreme Court, 3 March 1919, *NJ* 1919, p. 371. See for an explicit confirmation of this position by the government in the context of the 1983 amendment of the Constitution: *Kamerstukken II* 1977/78 15 049 (R 1100), nr. 3, p. 12.

² Articles 93 and 94 Grondwet voor het Koninkrijk der Nederlanden (Constitution of the Kingdom of the Netherlands, hereinafter Constitution). For the English translation of the provisions mentioned in this introduction see below Section 2.1 and more generally at <https://www.rijksoverheid.nl/documenten/brochures/2008/10/20/the-constitution-of-the-kingdom-of-the-netherlands-2008>.

³ Article 120 Constitution. The prohibition, which dates back to the Constitution of 1848, extends to unwritten fundamental principles, Supreme Court, 14 April 1989, ECLI:NL:HR:1989:AD5725; Supreme Court, 20 March 2009, ECLI:NL:HR:2009:BG9951. Article 120 is considered by many to be an “anomaly”, see e.g. P. P. T. Bovend’Eert and C. A. J. M. Kortmann, *Constitutional Law in the Netherlands* (Deventer: Wolters Kluwer, 2012) 2nd ed., p. 133. In 2002 a proposal was tabled to amend the Constitution to allow for judicial review of the compatibility of laws with certain constitutional rules (the Halsema-proposal), *Kamerstukken II* 2001/02, 28 331. The proposal is still pending and not likely to be successful any time soon. Discussions on this issue are outside the scope of this chapter, see for more information G. van der Schyff, ‘Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far?’ (2010) 11 *German Law Journal*, pp. 275–290; E. Mak, ‘Constitutional Review and Democracy in the Netherlands: Balancing Legislative and Judicial Powers in an Internationalized Legal Order’, in M. Jovanovi (ed.), *Constitutional Review and Democracy* (The Hague: Eleven international Publishing, 2015), pp. 185–205.

European Convention on Human Rights (ECHR).⁴ And even where courts *can* rely on the Constitution, they often prefer to reason in terms of the ECHR.⁵ As a consequence, the judicial constitutional vocabulary has remained decidedly underdeveloped.⁶

Dutch courts, unlike some of their foreign counterparts, have never expressed *Solange*-type limits to the supremacy of EU law. Admittedly, in constitutional law doctrine there has been some discussion as to whether courts are mandated to set aside constitutional rules in the case of clashing obligations under international law, but the general understanding is that courts are competent to do so, and the issue has never been openly litigated. An abundant trust in and commitment to the international legal order and its institutions underlie the acceptance of supremacy of international and European law.

It was mainly the vexed issue of United Nations Security Council Resolutions imposing sanctions on individuals without due process guarantees, epitomized by the *Kadi* saga, that eventually sparked a political and academic debate in the Netherlands as to the (desired) scope of the constitutional rule that preferences directly applicable treaties and IO decisions over conflicting domestic law.⁷ In 2008 the Council of State advised the government to explore how to prevent erosion of the national legal order by international law.⁸ The State Commission on Constitutional

⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms and its Eight Protocols, Rome, 4 November 1950, in force 3 September 1953, ETS 5, 213 UNTS 222.

⁵ T. Barkhuysen, M. van Emmerik and W. Voermans, *De Nederlandse Grondwet geëvalueerd: anker-of verdwijnpunt?* (Alphen aan den Rijn: Kluwer, 2009), pp. 75–76 and 78; M. Claes and J. Gerards, ‘The Netherlands’, in J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* (Reports of the XXV Fide Congress, Tallinn, 2012) (Tartu: Tartu University Press, 2012), pp. 613–677; J. Gerards and J. Fleuren, ‘The Netherlands’, in J. Gerards and J. Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law, a Comparative Analysis* (Cambridge: Intersentia, 2014), pp. 236–237. According to Claes and Leenknegt this preference extends to the legislature: “alleged incompatibility with treaties or European law seems to carry more weight in the legislative procedure, than an alleged unconstitutionality”, M. Claes and G.J. Leenknegt, ‘The Netherlands, A Case of Constitutional Leapfrog, Fundamental Rights Protection under the Constitution. The ECHR and the EU Charter in the Netherlands’, in P. Popelier, C. Van de Heyning and P. Van Nuffel (eds.), *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts* (Cambridge: Intersentia, 2011), p. 292.

⁶ Peters writes in this regard that “fundamental rights treaties such as the ECHR [have taken] the stage in Dutch jurisprudence, arguably at the expense of the fundamental rights in the Constitution”, A. Peters, ‘Supremacy Lost: International Law Meets Domestic Constitutional Law’ (2009) 3 *Vienna Online Journal on International Constitutional Law*, p. 183. Oomen refers in this context to the “lack of constitutional patriotism,” B. Oomen, *Rights for Others, The Slow Home-Coming of Human Rights in the Netherlands* (Cambridge: CUP, 2014).

⁷ The debate was also influenced by nationalist tendencies. See Claes and Leenknegt, above n. 5, at 294 and especially the increasing criticism on the influence of the ECtHR.

⁸ Advies van de Raad van State inzake de opdrachtverlening aan de staatscommissie Grondwet, 14 April 2008, Advies W04.08.0031/1/B, *Kamerstukken II* 2007/08, 31 570, nr. 3, par. 4.2.3 c.

Reform (the State Commission⁹) that was subsequently set up to study the issue turned out to be deeply divided on the question whether the Constitution needed to be amended to include “counter-limit-type safeguards.”¹⁰ The government eventually sided with those members that did not consider such amendment necessary.¹¹

In this chapter we assess to what extent the Dutch legal order leaves room for the protection of fundamental constitutional principles in the face of conflicting international law. In Section 2 we will analyze the formal relationship between the fundamental constitutional principles and international law in the Dutch legal order, and discuss the debates of the last decade on the possible amendment of the Constitution in this respect. In Section 3 we will then explore one argument that was particularly influential in warding off proposals to limit the scope of the supremacy of international law: the principle that national fundamental principles may be protected by interpreting and applying international law equivalents taking into account domestic circumstances and preferences. In effect, that argument might qualify blind trust in international law, by a more substantively inspired principle that prioritizes human rights obligations. We will argue that international law, and most pertinently the ECHR, leaves some, though limited, latitude in this respect, but that Dutch courts have not used such latitude and moreover are unlikely to do so.

2 INTERNATIONAL LAW IN THE DUTCH LEGAL ORDER¹²

2.1 *The Rules*

The monistic tradition of the Netherlands is rooted in a long-standing unwritten constitutional rule that all international law binding on the Netherlands forms automatically part of the national legal order.¹³ After WWII the government felt the need to firmly anchor the commitment to the rapidly developing international legal order in the Constitution as well as to clarify certain issues in regard to the conclusion of treaties and the operation of international law in the Dutch legal order. In 1953 the Constitution was amended to that effect¹⁴, and with some minor

⁹ Established by KB 3 July 2009, *Staatscourant* 2009, nr. 10354.

¹⁰ Rapport Staatscommissie Grondwet, 11 November 2010, at <https://www.rijksoverheid.nl/documenten/rapporten/2010/11/11/rapport-staatscommissie-grondwet>, *Kamerstukken II* 2010/11, 31570, nr. 17, hereinafter Report State Commission on Constitutional Reform.

¹¹ Kabinetsreactie advies staatscommissie Grondwet, 24 October 2011, *Kamerstukken II* 2011/12, 31570, nr. 20.

¹² For a more extensive discussion see A. Nollkaemper, ‘The Netherlands’, in D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge: CUP, 2009) 326–369; J. Fleuren, ‘The Application of Public International Law by Dutch Courts’ (2010) 57 *NILR*, pp. 245–266.

¹³ Above n. 1.

¹⁴ For an overview of these amendments see H.F. van Panhuys, ‘The Netherlands Constitution and International Law’ (1953) 47 *AJIL*, pp. 537–558.

changes processed in 1956 and 1983 the relevant provisions are by and large still applicable today.¹⁵

The relevant section of the Constitution starts with Article 90, which provides that the government “shall promote the development of the international legal order.”¹⁶ Article 92 of the Constitution provides that “legislative, executive, and judicial powers may be conferred on international institutions by or pursuant to a treaty [...]” Article 93.3 deals with the direct effect of treaty provisions and binding decisions of international organisations. It provides that “[p]rovisions 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.” The courts have clarified that individuals may also seek to rely on such provisions before the courts, at least, when they are the addressee of the underlying norm. They have moreover ruled that the possibility of direct effect equally extends to customary international law. Provisions are considered to be “binding on everyone” when they are sufficiently clear to function as “objective law” in the domestic legal order without further implementation by the legislature.¹⁷

Article 94 then specifically deals with the question of supremacy. It provides that “[s]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.” On its face, Article 94 provides for an unequivocal affirmation of the supremacy of international law.

While it is common to refer to Article 94 as the formal basis for supremacy in the legal order of the Netherlands, in fact it was not this Article that introduced a hierarchy of norms. In fact, the precedence of *all* international law over national law was considered to be inherent in the monist tradition of the Netherlands even before the introduction of the provision.¹⁸ The superior status of all international law in the Dutch legal order was also confirmed in the context of the 1956 and 1983

¹⁵ For our purposes, the most relevant change introduced by the 1956 amendment was the addition of “that are binding on all persons” to current Article 94. The 1983 amendment was limited to rephrasing that did not affect the content or scope of the relevant provisions, see E. A. Alkema, ‘Foreign Relations in the Netherlands Constitution of 1983’ (1984) 31 *NILR*, pp. 307–331.

¹⁶ All translations are taken from: *The Constitution of the Kingdom of the Netherlands 2008*, translated by the Ministry of the Interior and Kingdom Relations, at <https://www.rijksoverheid.nl/documenten/brochures/2008/10/20/the-constitution-of-the-kingdom-of-the-netherlands-2008>. See on Article 90 generally L. F. M. Besselink, ‘The Constitutional Duty to Promote the Development of the International Legal Order: The Significance and Meaning of Article 90 of the Netherlands Constitution’ (2003) 34 *NYIL*, pp. 89–189.

¹⁷ Supreme Court, 30 May 1986, ECLI:NL:HR:1986:AC9402.

¹⁸ See in this sense J. G. Brouwer, *Verdragsrecht in Nederland* (Zwolle: Tjeenk Willink, 1992), p. 316; J. C. de Wit, *Artikel 94 Grondwet toegepast. Een onderzoek naar de betekenis, de bedoeling en de toepassing van de woorden ‘vinden geen toepassing’ in artikel 94 van de Grondwet* (The Hague: Boom Juridische Uitgevers, 2012), p. 36; J. W. A. Fleuren, *Een ieder verbindende bepalingen van verdragen* (The Hague: Boom Juridische uitgevers, 2004). Cf. however H. G. Hoogers and M. Nap, ‘Het Statuut, de Grondwet en het Internationale Recht’, *50 Jaar Statuut voor het Koninkrijk der Nederlanden* (Rotterdam: Erasmus Universiteit Rotterdam, 2004), pp. 53–86.

amendments of the Constitution. In 1956 Minister Luns declared that “all international agreements binding on our country, self-executing or not, precede as higher law over national law.”¹⁹ And in the deliberations on the 1983 amendments the government clarified that also customary international law is hierarchically superior to national law since the State was equally bound by all international law in force, even though that assessment is reserved to Parliament.²⁰ In other words, the hierarchy of all international law over all national law was considered an inherent, unwritten constitutional rule.

What Article 94 *did* introduce, was judicial review²¹ as an exception to the hitherto ruling principle of “sanctity of law.”²² This power of judicial review had not been part of the original bill proposed by the government.²³ When the bill was discussed in Parliament, however, a motion to include the rule now contained in Article 94 was supported by a (slim) majority.²⁴ The government did recognize that international law was hierarchically superior to national law, but was of the opinion that time was not yet ripe for the judiciary to be given power of review to effectuate that hierarchy.²⁵ This position did not prevail.

However, in practice the disapplication of domestic law on the basis of Article 94 is rare.²⁶ Several factors combine to explain the fact that the claim to supremacy of Article 94 exists more on paper than in practice. Since Dutch courts are expected to “as far as is possible, interpret and apply Dutch law in such a way that the State meets its treaty obligations,”²⁷ the conflict rule of Article 94 is a measure of last resort.²⁸

¹⁹ *Handelingen II* 1955/56, p. 802.

²⁰ *Kamerstukken I* 1980/81, 15049 (R 1100), nr. 19 pp. 1–2.

²¹ Although according to some, the rule was already part of the Dutch legal order. Van der Zanden, for example, argued that since the International Court of Justice would give precedence to international law over national law and since lower courts should follow higher courts, Dutch courts should take the same position. He also adduced that another position would lead to the violation of international law, see J. W. Van der Zanden, *Verdrag gaat voor wet, ook in nationale rechtsbetrekkingen* (Zwolle: Tjeenk Willink, 1952).

²² Then Article 124(2) Constitution.

²³ See on adoption Article 94 and relevant developments in its regard J. C. de Wit, *Artikel 94 Grondwet toegepast. Een onderzoek naar de betekenis, de bedoeling en de toepassing van de woorden ‘vinden geen toepassing’ in artikel 94 van de Grondwet* (The Hague: Boom Juridische Uitgevers, 2012), pp. 13–44.

²⁴ *Kamerstukken II* 1951/52, 2374, nr. 32, gewijzigd amendement ter vervanging van nr. 17, adopted by 46 to 40 votes.

²⁵ *Memorie van Antwoord, Kamerstukken II* 1951/52, 2374, nr. 10, p. 28.

²⁶ L. F. M. Besselink and R. A. Wessel, *Ontwikkelingen in de internationale rechtsorde en Nederlands constitutioneel recht* (Alphen aan den Rijn: Kluwer, 2009), p. 52.

²⁷ Supreme Court, 16 November 1990, ECLI:NL:HR:1990:ZC0044. Also when the Statute was adopted after the international rule, Council of State, 14 September 2011, ECLI:NL:RVS:2011:BS8847; Council of State 24 July 2002, ECLI:NL:RVS:2002:AE5780. See G. Betlem and A. Nollkaemper, ‘Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation’ (2003) 14 *EJIL*, pp. 569–589.

²⁸ Also because in the preparation of the approval procedure it is examined whether the ratification requires amendment of existing legislation, and in principle the proposed amendments will be put to Parliament together with the bill of approval, *Aanwijzingen voor de Regelgeving, Aanwijzing 311, Stert.* 1992, 130, zoals gewijzigd bij de vierde wijziging, *Stert.* 2000, 191.

Moreover, in accordance with the terms of Article 94, courts can only give precedence to treaty provisions and binding decisions of international organizations when they are directly applicable.²⁹ And the Supreme Court has held that Article 94 does not extend to rules of customary international law.³⁰ The courts hence have to apply domestic law in situations where that conflicts with non-directly applicable international law, as well as where that conflicts with directly applicable customary rules. Finally, the courts cannot always apply the preceding international rule instead of the domestic rule: where there are legal-political choices to be made as to how the rule should be implemented domestically, Dutch courts will hold back and leave it to the legislature to solve the conflict by enacting new legislation.³¹ There may in that case be ground to order the State to pay damages to the individual, but this does not result in supremacy of international law.³²

Even if it is acknowledged that Article 94 in practice plays a limited role, it is obvious that in those cases where it will play a role, a potential conflict may emerge with the principle of democratic control of law-making. The Constitution therefore counterbalances the openness of the Dutch legal order to international law by a (comparatively) firm grip of Parliament on the conclusion of treaties. Article 91.1 provides that “[t]he Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General.”³³ Parliament can moreover require the government to include an interpretative declaration or reservation to the instrument of ratification. And specifically in relation to treaties that (potentially) conflict with the Constitution, the Constitution provides that such treaties “may be approved by the houses of the States General only if at least two-thirds of the votes cast are in favour.”³⁴ Article 6 of the Law on Treaties further clarifies that in that case the bill of approval has to specify that the approval is given in accordance with Article 91.3 of the Constitution.³⁵ Only in a handful of cases has

²⁹ Supreme Court, 6 March 1959, NJ 1962, 2.

³⁰ Supreme Court, 6 March 1959, NJ 1962, 2; Supreme Court, 18 September 2001, ECLI:NL:HR:2001:AB1471, paras. 4.4.1–4.4.2 and 4.6.

³¹ E.g. Supreme Court, 12 May 1999, ECLI:NL:HR:1999:AA2756.

³² E.g. Supreme Court, 18 September 2015, ECLI:NL:HR:2015:2723 para. 3.4.2.

³³ Rijkswet Goedkeuring en Bekendmaking Verdragen (Law on the Approval and Promulgation of Treaties), *Stb.* 1994, 542 [hereinafter Law on Treaties], provides several exceptions to the general requirement that all treaties require parliamentary approval. An English translation is contained in J.G. Brouwer, ‘The Netherlands’, in D. B. Hollis (ed.), *National Treaty Law and Practice: Dedicated to the Memory of Monroe Leigh* (Leiden: Nijhoff, 2005), p. 483, annex C. For more information see J. Klabbers, ‘The New Law on the Approval of Treaties’ (1995) 44 *ICLQ*, pp. 629–643.

³⁴ Article 91.3 Constitution. The second chamber of Parliament can however delete or add the reference to Article 91.3 by simple majority. The first chamber does not have this option: the reference to Article 91.3 is binding and when a bill does not contain such reference but the first chamber is of the opinion that it should, it can only reject the proposal to make that point. See for more information on Article 91.3, J. W. A. Fleuren, ‘Verdragen die afwijken van de Nederlandse Grondwet’, in D. Breillat, C. A. J. M. Kortmann, J. W. A. Fleuren, *Van de constitutie afwijkende verdragen* (Deventer: Kluwer, 2002), pp. 43–78.

³⁵ Article 6.2 Law on Treaties.

it been deemed necessary to follow this procedure, with the approval of the Statute of the International Criminal Court as the most recent example.³⁶

While Parliament thus can extend its control to the conclusion of treaties, and thereby ascertain that international obligations that trump national law have been subject to democratic control, this power does not extend to decisions of international organizations. Constituent treaties of international organizations, and hence the attribution of power to take binding decisions,³⁷ are subject to parliamentary approval. But the actual decisions of organizations that bind the Netherlands³⁸ penetrate the Dutch legal order in the manner laid down in Articles 93 and 94 and are without national democratic control.³⁹ In the context of the European Union, this lack of formal control by Parliament over binding decisions has led to discussion, especially in the realm of the third pillar of justice and home affairs, where the role of the European Court of Justice and the European Parliament was comparatively weak.⁴⁰ In the bills of approval of the 1990 Convention implementing the Schengen Agreement,⁴¹ the 1992 Treaty of Maastricht,⁴² the Treaty of Amsterdam⁴³ and the Treaty of Nice⁴⁴ it was stipulated that the government could only consent to decisions regarding justice and home affairs after prior approval of Parliament. Consequently, draft decisions had to be made public and submitted to Parliament, and the Netherlands would have to block decision-making in the Council (and the Schengen Executive Committee) until Parliament had studied and approved the decision. With the adoption of the Treaty of Lisbon, reinforcing the position of the European Court of Justice and the European Parliament, the procedure was abolished.⁴⁵

³⁶ Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force on 1 July 2002, UN Doc. A/CONF. 183/9, 2187 UNTS 90. Bill of approval *Stb.* 2001, 343.

³⁷ Article 92 Constitution provides: Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3.

³⁸ This includes judicial decisions binding on the Netherlands.

³⁹ The requirement of publication does apply: Article 16 and 18 Law on Treaties.

⁴⁰ Nollkaemper, above n. 12, at 330–331.

⁴¹ Convention implementing the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (Schengen Agreement), Schengen, 14 June 1985, OJ L 239 of 22 September 2000, P. 0013 – 0018, 42000A0922(01), Bill of approval *Stb.* 1993, 138, Article 2.

⁴² Treaty on European Union (Treaty of Maastricht), Maastricht, 7 February 1992, in force 7 February 1993, OJ C 325/5, 24 December 2002, Bill of approval *Stb.* 1992, 692.

⁴³ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (Treaty of Amsterdam), Amsterdam, 2 October 1997, in force 1 May 1999, [1997] OJ C 340/1, Bill of approval *Stb.* 1998, 737.

⁴⁴ Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, Nice, 26 February 2001, in force 23 February 2003, OJ C 80 of 10 March 2001; 2001/C 80/01, Bill of approval *Stb.* 2001, 677.

⁴⁵ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon), Lisbon, 13 December 2007, in force 1 December 2009, [2007] OJ C 306/1, *Trb.* 2008, 11.

2.2 *The Relation between International Law and Constitutional Law: The Application of Article 94 to the Constitution*

The conflict rule of Article 94 is widely agreed to extend to the provisions of the Constitution.⁴⁶ When the rule was first discussed in Parliament in 1952 it was generally assumed that the proposal would also allow the courts to assess whether the Constitution was compatible with directly applicable rules in treaties and decisions of international organizations.⁴⁷ This was also the position of the State Commission, that wrote in its 2010 Report that “[i]n principle the supremacy of directly applicable provisions applies also in relation to fundamental constitutional rules and principles.”⁴⁸

Still, that position has over the years been called into question in constitutional law doctrine. The scope of Article 94, the heretical argument goes, is circumscribed by other rules in the Constitution that define the balance of powers between judiciary, legislature and executive.⁴⁹ The starting point of what has been called a systemic interpretation of the Constitution is the fact that the Netherlands can only be bound by treaties that (potentially) deviate from the Constitution if the procedure of Article 91.3 is followed. Unconditional precedence of the rules of international law covered by Article 94 over conflicting constitutional rules would undercut that rule since constitutional rules would also be set aside by treaties that were not adopted in conformity with the procedure of that provision. Moreover, the argument continues, Article 120 of the Constitution prohibits courts to pronounce on the constitutionality of treaties (since treaties are approved by an Act of Parliament). That assessment is reserved to the legislature and the courts may not substitute that assessment with their own judgment. Consequently, the courts can only review whether a treaty is compatible with the Constitution when Parliament has approved the treaty in conformity with Article 91.3; if not, they have to abstain from passing

⁴⁶ C. A. J. M. Kortmann, *Constitutioneel Recht*, P. P. T. Bovend’ Eert, J. L. W. Broeksteeg, B. P. Vermeulen and C. N. J. Kortmann (eds.) (Deventer: Kluwer, 2016), 7th ed., p. 179; Gerards and Fleuren, above n. 5, at 221; J. G. Brouwer, ‘The Netherlands’, in D. B. Hollis, M. R. Blakeslee and L. B. Ederington (eds.), *National Treaty Law and Practice* (The Hague: Martinus Nijhoff, 2005), pp. 498–499.

⁴⁷ *Handelingen II 1951/52*, p. 1958. See also H. F. van Panhuys, ‘The Netherlands Constitution and International Law’ (1953) 47 *AJIL*, p. 557.

⁴⁸ Report State Commission on Constitutional Reform, above n. 10, at 126.

⁴⁹ While there are nuances in the way in which authors formulate their positions, the gist of their reasoning is very similar: see C. B. Schutte, ‘De stille kracht van de Nederlandse Grondwet. Beschouwingen rond het verbod aan de rechter om verdragen aan de Grondwet te toetsen’ (2003) 164 *RMThemis*, pp. 26–40; L. F. M. Besselink and R. A. Wessel, *De invloed van ontwikkelingen in de internationale rechtsorde op de doorwerking naar Nederlands constitutioneel recht, een ‘neomonistische’ benadering* (Alphen aan den Rijn: Kluwer, 2009), p. 53; J. W. A. Fleuren, ‘Verdragen die afwijken van de Nederlandse Grondwet’, in D. Breillat, C. A. J. M. Kortmann and J. W. A. Fleuren, *Van de constitutie afwijkende verdragen* (Deventer: Kluwer, 2002), p. 76.

judgment.⁵⁰ Under this “holistic” interpretation of the relation between international and national law, courts would have to apply the Constitution at all times if the legislature has not indicated that the treaty was unconstitutional.⁵¹

However, the above argument is not easy to follow. While Articles 91.3 and 120 may indeed be seen to reserve the assessment of constitutionality of provisions of treaties to Parliament, the consequence of that, it seems, would be the sanctity of treaties, *not* the sanctity of the Constitution. Courts have to proceed from the fiction that a treaty that was adopted without relying on the procedure of Article 91.3 is in conformity with the Constitution. If the constitutionality of the treaty obligation is challenged, courts have to dismiss that challenge without engaging with it on the merits and apply the treaty. The same is true in respect of directly applicable decisions of international organizations (including judgments of international tribunals interpreting treaty obligations).⁵² The prohibition of constitutional review consolidates the prevalence of international law over the Constitution, since the courts are to refrain from ruling on the constitutionality question and proceed from the assumption that international law does *not* violate the Constitution where Parliament has apparently not seen reason to rely on Article 91.3. In other words, the sanctity of (treaty) law only seems to reinforce the obligation to apply international law in disregard of constitutional principles.

Admittedly, there may be situations where the fiction is untenable. One scholar arguing in favor of systemic interpretation of the Convention used a fictitious example relating to Article 24 of the Dutch Constitution, which vests the title to the Throne in the “legitimate descendants of King William I, Prince of Orange-Nassau.” What if the European Court of Human Rights (ECtHR) would rule that Article 24 of the Constitution conflicts with the non-discrimination principle laid down in Article 1 of Protocol 12 to the ECHR?⁵³ Or what if, we may add, the Netherlands ratifies a treaty that grants individuals the right to elect the head of State, with Parliament approving the treaty without resorting to the procedure of Article 91.3? When individuals would invoke their right before the Dutch courts, challenging the hereditary nature of the Throne, it is difficult to see how the judge can decide the claim without acknowledging the incompatibility of the international and the constitutional norm. This hypothetical quandary is however not unique to Article 94; it could also play out in a completely domestic setting. What if Parliament were to adopt a law granting individuals the right to elect the head of State, in complete disregard of Article 24 and the procedure prescribed by Articles

⁵⁰ L. F. M. Besselink and R. A. Wessel, *De invloed van ontwikkelingen in de internationale rechtsorde op de doorwerking naar Nederlands constitutioneel recht, een ‘neo-monistische’ benadering* (Alphen aan den Rijn: Kluwer, 2009), pp. 53–54.

⁵¹ *Ibid.*, p. 54.

⁵² If Parliament approves a treaty that confers legislative, executive or judicial powers on an international institution that may potentially interfere with the Constitution, it has to approve in accordance with Article 91.3. Above n. 34. In practice, however, that has never happened.

⁵³ Schutte, above n. 49, at 37.

137 and 138 of the Constitution?⁵⁴ In other words, the prohibition of Article 120 would in these utterly unlikely hypothetical circumstances be difficult to maintain anyway, since application of the law perforce entails disapplying the Constitution.

In conclusion, the arguments against the application of the principle of supremacy of Article 94 to the Constitution itself are not persuasive, and the better position remains that the supremacy of directly applicable treaty provisions and binding decisions of IOs applies equally to statutes and to the Constitution itself.

2.3 *The Debates on the Amendment of Article 94 of the Constitution*⁵⁵

In 2009 the Dutch government asked the State Commission on Constitutional Reform to formulate an advice on “the relation between fundamental Dutch constitutional values and decisions of IOs or provisions of treaties.”⁵⁶ The Commission understood this as a request to assess the desirability of the introduction of a constitutional provision that would bar the supremacy of international law over domestic law in case of incompatibility with fundamental values of the Dutch Constitution.⁵⁷ The issue split the members of the State Commission evenly. The Commission’s Report therefore did not formulate an advice on this point but rather briefly set out the two opposing points of view. The debate, and the eventual decision of the government not to pursue a limitation of the principle of supremacy, is instructive as it exposes the arguments that pull to different sides, and above all demonstrates the firm trust in the international legal order.

This section will map the arguments that were advanced on either side in the debates. We will do so by setting out the various positions in chronological order, starting with the question put by the government to the Council of State in January 2008.⁵⁸

The idea of setting up a State Commission to advise on a range of issues related to the Constitution dates back to the 2007 Coalition agreement between three political parties forming a new government.⁵⁹ The Coalition agreement listed several of these issues, but did not mention Article 94. However, when the government asked the

⁵⁴ These articles lay out the procedure for amendment of the Constitution.

⁵⁵ The discussion on the preferred relation between national law and international law has played out in the context of Article 94. Since the precedence of international law over national law is a rule of unwritten constitutional law, while Article 94 only regards the scope of judicial review, it is however questionable whether a change in the relation between international law and national law can be achieved through amendment of Article 94.

⁵⁶ Besluit van 8 juli 2009 houdende instelling van een staatscommissie voor de herziening van de Grondwet (Instellingsbesluit staatscommissie Grondwet), Article 2f, *Stert* 10354.

⁵⁷ Report State Commission on Constitutional Reform, above n. 10, at 97.

⁵⁸ Adviesaanvraag Raad van State inzake opdrachtverlening aan staatscommissie Grondwet, 17 January 2008, at <https://www.rijksoverheid.nl/documenten/kamerstukken/2008/08/26/adviesaanvraag>.

⁵⁹ Coalitieakkoord tussen de Tweede Kamerfracties van CDA, PvdA en ChristenUnie, 7 February 2007, *Kamerstukken II* 2006/07, 30 891, nr 4.

Council of State to help formulate an agenda for the future State Commission, it explicitly pressed the Council to include other topics that could “contribute to the strengthening of the Constitution” as well.⁶⁰

It was upon suggestion of the Council of State that the international dimension of the issue of the resilience of the democratic rule of law was included in the discussions on the agenda of the State Commission.⁶¹ In broad strokes the Council sketched the development of the international legal order post-WWII. It noted that while any democratic legal order can only be sustained through ever increasing cooperation with other States, it is important to ensure that the core of the Dutch democratic legal order will not be eroded by the international legal order.⁶² According to the Council, the risk is negligible as far as the EU is concerned, but real in respect of other forms of international cooperation, citing the UN terrorism blacklists in support. It pointed out that the information on which these lists are based is partially confidential, that there is no judicial review of the listing and questioned the democratic and rule of law character of these directly applicable IO decisions. The Council was of the opinion that there was reason to explore whether the prevalence of international law over domestic law as laid down in Article 94 should be made conditional on compatibility with fundamental constitutional values (which it defined as principles with a safeguard character that are sufficiently concrete to be at the basis of judicial review) *if effective legal protection against those shortcomings is not available*.⁶³ Notably, the Council of State was of the opinion that the Government should *first* itself decide whether it wanted to introduce such a limit to Article 94 since the issue was a relatively straightforward one. The State Commission should only be asked advice on how to formulate the counter-limit when a positive decision to this effect was taken.⁶⁴

The government embraced the Council’s suggestion, albeit with some important nuances. Contrary to the Council’s suggestion, the government included the question *whether* the scope of Article 94 needed to be limited into its request for advice to State Commission; it did not include the reference to the absence of effective legal protection at the international level as a condition for the counter-limit to take effect; and it expressed some doubts as to whether the limit to the precedence should be subject to judicial review.⁶⁵

The State Commission presented its report in 2010.⁶⁶ The Commission underlined at the outset that the traditional openness of the Dutch Constitution towards

⁶⁰ Adviesaanvraag Raad van State inzake opdrachtverlening aan staatscommissie Grondwet, above n. 58.

⁶¹ Council of State, Advies Wo4.08.0031/I/B, 14 April 2008, para. 4.2.3, at <https://www.raadvanstate.nl/adviezen/zoeken-in-adviezen/tekst-advies.html?id=8154>.

⁶² *Ibid.*, para. 4.2.3, sub a.

⁶³ *Ibid.*, para. 4.2.3, sub c, ad. iii.

⁶⁴ *Ibid.*, Conclusies en aanbevelingen, sub 1.

⁶⁵ Advies Raad van State en nader rapport, 9 September 2008, *Kamerstukken II 2007/08*, 31 570, nr. 3.

⁶⁶ Report State Commission on Constitutional Reform, above n. 10.

the international legal order should be maintained.⁶⁷ Sketching the context of the Article 94 issue, the Commission noted that the relation between international and national law was increasingly characterized in terms of constitutional pluralism, and that there are no mutually recognized rules concerning hierarchy and priority in case of conflict.⁶⁸ The task to ensure that international rules that are laid down in treaties or decisions of IOs comply with fundamental constitutional rules and principles falls, according to the Commission, first and foremost to the government, and Parliament has a task to control the government in this respect.⁶⁹ The Commission also noted that preventing conflicts at the international level is to be preferred over national counter-limits since the latter would lead to international responsibility for non-compliance with an international obligation.⁷⁰

The Commission did not agree, however, on the question whether the scope of Article 94 needed to be limited. Half of the members of the Commission were of the opinion that in view of the already prevalent practice to interpret international obligations in light of fundamental constitutional rules and principles adding counter-limits to Article 94 would have little added value.⁷¹ These members were also of the opinion that such counter-limits would overemphasize the role of the judiciary in the protection of constitutional principles, where this is first and foremost a task for the government and Parliament.⁷² The other half of the members disagreed. They proposed to add a second paragraph to Article 94 along the following lines: “Provisions of treaties and decisions of international organizations do not apply when this is incompatible with [the democratic rule of law, human dignity, fundamental rights and fundamental legal principles].”⁷³ They pointed out that government and Parliament cannot always foresee at the time of conclusion and approval of the treaty whether the organs of an international organization will always exercise the mandate provided for by the treaty in accordance with core constitutional values.⁷⁴ The international responsibility that ensues the non-application of an international rule due to incompatibility with these values does not, they argued, differ significantly from the responsibility that follows from the already existing practice of giving preference to one international rule over another one.⁷⁵ These members furthermore

⁶⁷ *Ibid.*, p. 103.

⁶⁸ *Ibid.*, p. 100.

⁶⁹ *Ibid.*, p. 127.

⁷⁰ *Ibid.*, p. 128.

⁷¹ *Ibid.*, pp. 128–129 referring to Court of first instance The Hague, 3 February 2010, ECLI:NL:RVS:2009:BJ1862.

⁷² *Ibid.*, p. 129.

⁷³ *Ibid.*, p. 130. The proposal would have Article 94 refer back to a new to introduce “general provision” which would be included at the beginning of the Constitution and which would read (p. 40 Report): 1. The Netherlands is a democratic State governed by the rule of law; 2. The administration respects and safeguards human dignity, fundamental rights and fundamental legal principles; 3. Public authority is exercised only on the basis of the Constitution, or the law.

⁷⁴ *Ibid.*, p. 129.

⁷⁵ *Ibid.*, pp. 129–130.

pointed out that domestic counter-limits could contribute to international decision-making in conformity with these domestic values, and hence contribute to the constitutionalization of the international legal order.⁷⁶

The government sided with the members that did not consider amendment of Article 94 necessary. It stressed the importance of a well-functioning international legal order and compliance with international agreements, also in the national interest. It also pointed out that there was little practical relevance to the discussed amendment since there had not yet been problems in this regard. In addition, it questioned the expediency of judicial review on the basis of such an open norm. The government embraced the position of the State Commission that it is up to the government and Parliament to ensure compatibility between international and domestic law at the international level.⁷⁷

In the Report, the proponents of a counter-limit provision in the Constitution did not refer to developments and case law from other jurisdictions. There was no reference to the *Kadi* case, no reference to the *Bosphorus* doctrine and no reference to counter-limits developed in other domestic legal orders. In fact, not one single reference to Article 103 UN Charter is to be found in the Report. In the absence of concrete examples supporting the need for amendment of the Constitution on this point, the arguments of the opponents of the introduction of a counter-limit gained strength. Their opposition was cast in terms of Article 27 VCLT, in terms of skepticism as to the concept of judicial constitutional review, and in terms of lack of practical relevance. A dominant argument that appeared to support the position of the opponents was the idea that (rare) conflicts between international and constitutional law can be construed in terms of conflicts between international legal norms, which may, moreover, be addressed within the international legal order itself. In this context, the increasing constitutional character of the international legal order was considered relevant. In the next section we critically examine this argument and its possible relevance to the protection of constitutional values in the Dutch legal order.

3 DOMESTIC INTERPRETATION AND APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN CASE OF CONFLICT WITH OTHER RULES OF INTERNATIONAL LAW

Upon closer analysis, the arguments in the report of the State Commission opposing the need for a change in the scope of Article 94 of the Constitution can be unpacked in three interrelated grounds. The first argument is that since constitutional rules most often have an equivalent under international law, a clash between international law and constitutional law can in many instances also be framed in terms of a clash between two international law norms.⁷⁸ The second argument is that judges

⁷⁶ *Ibid.*, p. 130.

⁷⁷ Above n. 11, para. 3.3.

⁷⁸ Report State Commission on Constitutional Reform, above n. 10, at 127.

are set on avoiding clashes through harmonious interpretation; only where that is not possible will they resort to international law conflict rules. The third argument is that if these rules do not settle the issue, the court decides which rule should prevail on the basis of a weighing of interests.⁷⁹ According to the State Commission, Dutch courts that are confronted with incompatible rules of international law tend to—when interpretation and conflict rules do not remedy the conflict—attach particular importance to fundamental rights of individuals when deciding which rule should prevail.⁸⁰ Coupled with the belief, espoused elsewhere in the Report, that an “international constitutional order” is developing in which fundamental rules and principles take precedence over other international rules,⁸¹ the advice of the Commission is drenched in the traditional trust of the international system.

While the faith in the international legal order corresponds to a long held trust that has shaped the Dutch constitutional order, the arguments do not convince on all points. It is surprising that the Report did not acknowledge the limits of protection of fundamental values through international law in any way. While the “commonality of constitutional values at the international and the domestic level”⁸² is evident, the Commission arguably sketched an overly optimistic picture of the pull of human rights law in situations of norm conflict at the international level. For one, despite extensive academic criticism, in practice there are no limits to the trumping power of Article 103 UN Charter. In view of the fact that the debate in the Netherlands on counter-limits was triggered by the practice of UN blacklisting, it is at least remarkable that the report does not even refer to it, but uncritically beats the “constitutionality-drum” instead.

Moreover, also when we leave aside Article 103 UN Charter, the argument is not fully compelling. The “precedence” of fundamental rules over other rules in the international legal order is not corroborated by actual practice: the trumping power of *jus cogens* rules is limited,⁸³ and the jurisprudence of the ECtHR, for one, proves that the principle of harmonious interpretation may in fact result in a very minimalistic reading of the human rights norm in order to give way to other rules of international law.⁸⁴ While the Strasbourg court is known for its boldly progressive interpretations of Convention rights, it is much less inclined to do so when it

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, p. 100.

⁸² P. A. Nollkaemper, ‘Rethinking the Supremacy of International Law’ (2010) 65 *ZöR*, p. 76. See also J. E. Nijman and P. A. Nollkaemper, ‘Beyond the Divide’, in J. E. Nijman and P. A. Nollkaemper (eds.), *New Perspectives on the Divide between International and National Law* (Oxford: OUP, 2007), pp. 341–360.

⁸³ ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment of 3 February 2012, paras. 92–97.

⁸⁴ See, for example, ECtHR (Grand Chamber), *Al-Adsani v The United Kingdom* (Application no. 35763/97), Judgment of 21 November 2001; and ECtHR (Grand Chamber), *Hassan v the United Kingdom* (Application no. 29750/09), Judgment of 16 September 2014.

interprets their scope in the face of clashing rules of general international law.⁸⁵ For one, the Court has not dared challenge the scope of Article 103 UN Charter. While it has taken the “presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights”⁸⁶ to extremes in the *Al-Dulimi* case,⁸⁷ the relevant case law can no longer fairly be said to eschew the Article 103 question, but rather implicitly acknowledges the provision’s trumping power.⁸⁸ Also in the context of the debates on the relation between human rights law and international humanitarian law, the Court has evaded treading on “sovereign toes”.⁸⁹ And while in relation to the immunity of international organizations the Court’s “reasonable alternative means” doctrine⁹⁰ has contributed to the protection of fundamental rights, the Court has not wanted to extend that doctrine to the immunity of States and their officials, ruling instead that “measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6(1).”⁹¹ According to the Court, the Convention “cannot be interpreted in a vacuum” and “should so far as possible be interpreted in harmony with other rules of international law of which it forms part.”⁹²

Domestic courts wishing to protect domestic fundamental principles in the face of competing international law rules, by interpreting and applying international law equivalents of domestic fundamental principles taking into account domestic circumstances and preferences, are not bolstered by this Strasbourg jurisprudence.⁹³ The question then is what leeway States have to *deviate* from the limited reading of the ECHR in cases of alleged clash with other rules of international law. Could the Netherlands for example fence off international legal rules on the basis of Article 8 ECHR when it considers them incompatible with the right to marry of same-sex couples, even though the ECtHR has held that there is no obligation to provide for same-sex marriage under Article 8? Or could it rule that the international rule of

⁸⁵ See e.g. V. P. Tzevelekos, ‘The Use of Article 31(3)(c) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology – Between Evolution and Systemic Integration’ (2010) 31 *Michigan Journal of International Law*, pp. 621–690.

⁸⁶ ECtHR (Grand Chamber), *Al-Jedda v the United Kingdom* (Application no. 27021/08), Judgment of 7 July 2011, para. 102.

⁸⁷ ECtHR (Grand Chamber), *Al-Dulimi and Montana Management Inc. v Switzerland* (Application no. 5809/08), Judgment of 21 June 2016, paras. 140–149.

⁸⁸ See ECtHR (Grand Chamber), *Nada v Switzerland* (Application no. 10593/08), Judgment of 12 September 2012; ECtHR, *Stichting Mothers of Srebrenica and others v the Netherlands* (Application no. 65542/12), Decision of 11 June 2013.

⁸⁹ ECtHR (Grand Chamber), *Hassan v the United Kingdom*, above n. 84.

⁹⁰ ECtHR (Grand Chamber), *Waite and Kennedy v Germany* (Application no. 26083/94), Judgment of 18 February 1999, para. 68.

⁹¹ ECtHR (Grand Chamber), *Al-Adsani v The United Kingdom*, above n. 84, para. 56.

⁹² *Ibid.*, para. 55. See also ECtHR (Grand Chamber), *Hassan v the United Kingdom*, above n. 84, para. 102.

⁹³ More generally Nollkaemper, above n. 82, at 77–79.

State immunity may at times be incompatible with Article 6 fair trial requirements, even though the Strasbourg court has ruled they are not? And *if* there is indeed room to maneuver, how likely is it that Dutch courts would make use of it?

Article 53 ECHR states that the Convention cannot detract from higher levels of protection granted in domestic law⁹⁴ and does hence not uniformize human rights across Europe but rather sets common minimum standards. The Court has addressed this principle only in a handful of cases and its precise reach remains open for discussion. However, we would argue that the provision only mandates States to provide for higher levels of protection in domestic law; it does not mandate States to read higher levels of protection into *the Convention* domestically.⁹⁵ The position that States are free to read the Convention differently than the ECtHR as long as the protection granted to individuals *exceeds* that found in the interpretation of the Court and as long as it does not detract from the protection of other Convention rights is problematic. The ECHR sets out to define common standards that States can also rely on to call each other to account. According to the preamble fundamental freedoms “are best maintained [...] by a common understanding” of human rights. It is exactly that common understanding that is indispensable for the treaty to have normative effect in the relations between States. As Lord Bingham of Cornhill put it in the *Ullah* case: “It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it.”⁹⁶

Discretion *is* of course available through the margin of appreciation doctrine. The question to what extent it is necessary to interfere with certain rights and freedoms in order to protect other public or private interests is one which will have a different answer in different Council of Europe countries. The doctrine developed by the ECtHR recognizes that local meaning can be attributed to universally formulated human rights and that domestic authorities are in principle better placed to assess the appropriate balance between the various public and private interests at stake.⁹⁷ The ECtHR has underlined that “[t]his margin is given

⁹⁴ Article 53 ECHR: “Nothing in this Convention shall be construed as limiting or derogating from any of the rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.”

⁹⁵ See for discussion of this argument R. Lawson, ‘Beyond the Call of Duty? Domestic Courts and the Standards of the European Court of Human Rights’, in Vogenauer and Snejders, *Content and Meaning of National Law in the Context of Transnational Law* (München: Sellier, 2009), p. 25; C. Van de Heyning, ‘No Place like Home: Discretionary Space for the Domestic Protection of Fundamental Rights’, in P. Popelier, C. Van de Heyning and P. Van Nuffel (eds.), *Human Rights Protection in the European Legal Order: the Interaction between the European and the National Courts* (Cambridge: Intersentia, 2011), p. 74.

⁹⁶ *Regina v Special Adjudicator ex parte Ullah*, UKHL 26, 17 June 2004 [2004].

⁹⁷ See S. Besson, ‘Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights’ (2016) 61 *the American Journal of Jurisprudence*, p. 81.

both to the domestic legislator [...] and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.”⁹⁸

The jurisprudence of the ECtHR makes clear that the Court expects domestic courts use their margin of appreciation also to progressively interpret the Convention in accordance with the “living instrument doctrine.”⁹⁹ It has been argued that domestic courts have an obligation to “anticipate [developments in the ECtHR’s case law] in their own (evolutionary) interpretation and application of the ECHR” and “where feasible, conduct a comparative analysis to establish whether a European consensus” has developed, or is in the process of being developed, on a certain matter that supports the adoption of an evolutionary interpretation. Hence, domestic courts should deviate from the Strasbourg case law, if they believe that the ECtHR would overturn that case law if the case came before it.¹⁰⁰

It has become clear that the margin is wider when courts are asked to strike a balance between two clashing Convention rights,¹⁰¹ or even more broadly between competing public and private interests,¹⁰² and the exceptional circumstances of the *A v UK* case prompted the Court to say that where the highest domestic court had found that a particular measure was not proportionate and violated the Convention, the Court “would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court’s jurisprudence under that Article or reached a conclusion which was manifestly unreasonable.”¹⁰³ Arguably, this means that States should similarly have a wide margin of appreciation whenever they are confronted with an alleged clash between relative ECHR rights and other rules of international law.¹⁰⁴

However, for the margin to be operative, it must have been granted by the ECtHR in the first place. For example, had the Court found in *Al-Adsani* that interferences

⁹⁸ ECtHR *Handyside v United Kingdom* (Application no. 5493/72), Judgment of 7 December 1976, para. 48. See also ECtHR (Grand Chamber), *A and others v United Kingdom* (Application no. 3455/05), Judgment of 19 February 2009, para. 174.

⁹⁹ See also A. Müller, ‘Domestic Authorities’ Obligations to Co-develop the Rights of the European Convention on Human Rights’ (2016) 20 *IJHR*, pp. 1058–1076.

¹⁰⁰ This position is not uncontroversial. Lord Brown of Eaton-under-Haywood, for example, cautioned against broadening the scope of the Convention by domestic courts: “There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual can have the decision corrected in Strasbourg.” *Al-Skeini and others v Secretary of State for Defence*, UKHL 26, 13 June 2007, para. 106.

¹⁰¹ ECtHR, *Eweida and others v United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10, 36516/10), Judgment of 15 January 2013. See also ECtHR (Grand Chamber), *Hannover v Germany No. 2* (Application no. 40660/08), Judgment of 7 February 2012, para. 107.

¹⁰² ECtHR (Grand Chamber), *Evans v United Kingdom* (Application no. 6339/05), Judgment of 10 April 2007, para. 77.

¹⁰³ ECtHR (Grand Chamber), *A and others v United Kingdom*, above n. 98, para. 174.

¹⁰⁴ Nollkaemper, above n. 82, at 82.

with the right of access to court that reflect generally recognized rules of public international law on State immunity fall within the margin of appreciation of the State, that would have opened domestic courts to litigation as to the necessity of the interference and the weight of the respective interests in the local circumstances. But that is not what it did; it said that such interferences *are not a disproportionate restriction*. Now that the ECtHR has failed to use the margin-vocabulary setting out the requirements of the Convention in this field, a domestic court wishing to rely on Article 6 ECHR to fence off these immunity rules will have to openly contest the ECtHR in an exercise of judicial dialogue.

Arguably this was an area where contestation would well have been justified—if domestic organs are accorded a margin of appreciation in other areas, it is not obvious why that would not apply to situations where domestic authorities are faced with competing international obligations. More generally, there is an increasing practice in various areas of international law and various regions that indicates recognition that domestic court can, in a process of contestation, foster the values of liberal democracy¹⁰⁵ and moreover contribute to the development of international law.

However, while it could be argued that within certain limits national courts could engage in contestation, it is unlikely that Dutch courts would resort to such contestation. In contrast, Dutch courts pay exceptional heed to Strasbourg jurisprudence. They even feel bound by judgments of the Strasbourg Court beyond the obligation laid down in Article 46.1 ECHR, effectively recognizing their *erga omnes* authority.¹⁰⁶ There are no examples of overt contestation—to the contrary, Dutch courts have been criticized for slavishly following the Court.¹⁰⁷

Dutch courts also are not likely to interpret the Convention beyond the established obligations set out by the ECtHR. The Supreme Court has explained that since under Article 94 Constitution domestic law is set aside when it clashes with the ECHR, Dutch courts cannot interpret the ECHR beyond the unequivocal obligations identified by the ECtHR. The liberty to provide protection beyond the ECHR as laid down in Article 53 ECHR, the Supreme Court also explained, is vested in the legislature.¹⁰⁸ It is in principle the prerogative of Parliament to push fundamental

¹⁰⁵ A. von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law' (2008) 6 *Journal of International Constitutional Law*, p. 412: "There should always be the possibility, at least in liberal democracies, to limit, legally, the effect of a norm or an act under international law within the domestic legal order if it severely conflicts with constitutional principles. This corresponds to the state of development of international law and the sometimes debatable legitimacy of international legal acts [...]."

¹⁰⁶ Gerards and Fleuren, above n. 5, at 237.

¹⁰⁷ E.g. J. Peters and L. A. Kapper, 'Eurohof beschermt tegen overheid', NRC 15 November 2010.

¹⁰⁸ Supreme Court, 10 August 2001, ECLI:NL:HR:2001:ZC3598 para. 3.9, translation in (2004) 35 NYIL, p. 446 and Supreme Court, 22 November 2013, ECLI:NL:HR:2013:1212, para. 3.3.1. It has also been argued that broader interpretations of the obligations would be incompatible with Article 120: J. H. Gerards, 'Samenloop van nationale and Europese grondrechtenbepalingen – hoe moet de rechter daar mee omgaan?' (2010) 1 *Tijdschrift voor Constitutioneel Recht*, p. 253. It is furthermore

rights issues forward, as is also clear from the prohibition of constitutional review in Article 120 of the Constitution. When in 1990 the Supreme Court was asked to rule that Article 12 ECHR should now be read as also entailing a right to marry for same-sex couples, the Court held that it was not at liberty to interpret the provision more broadly than the ECtHR did in 1986.¹⁰⁹ But also where the ECtHR has *not* yet ruled on a certain issue (only the EComHR in cases of a decade old), Dutch courts feel they cannot interpret the Convention as entailing obligations where there is controversy among States on this issue and the ECtHR has not yet taken position.¹¹⁰ And even where the ECtHR position only transpires *after* the Dutch courts had interpreted the provision more broadly, the courts will feel that they have to reverse that earlier, broader, interpretation.¹¹¹

Dutch case law on UNSC smart sanctions and the relation between Article 103 UN Charter and international human rights law in principle reflects the ECtHR approach. When individuals have challenged the implementation of UNSC Resolutions by the Dutch authorities before the Dutch courts, arguing that their fundamental rights are violated, the courts have where possible interpreted obligations flowing from the UN Charter harmoniously with human rights standards¹¹² — in the spirit of the interpretative presumption developed by the ECtHR judgments in *Al-Jedda*, *Nada* and *Al-Dulimi*.¹¹³ However, the reasoning of the courts does at times reveal resistance against the idea that obligations flowing from the UN Charter preclude fundamental rights review of the implementing act. The dispute on the access of Iranian students to certain programs offered by Dutch higher education is a case in point. In 2006 the UN Security Council issued a chapter VII Resolution calling “upon all States to exercise vigilance and prevent specialized teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran’s proliferation sensitive nuclear activities and development of nuclear weapon delivery systems.”¹¹⁴ This was followed by a Common Position by the Council of the EU which stated that “Member States shall, in accordance with their national legislation, take the necessary measures to prevent specialised teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran’s proliferation sensitive nuclear activities and development of nuclear weapon delivery systems.”¹¹⁵

notable that Parliament, when it adopted the same-sex marriage law in 2001, expressly stipulated that this was not considered an obligation under the ECHR.

¹⁰⁹ Supreme Court, 19 October 1990, ECLI:NL:HR:1990:AD1260, para. 3.4, referring to ECtHR *Rees v United Kingdom* (Application no. 9532/81), Judgment of 17 October 1986.

¹¹⁰ Supreme Court, 10 August 2001, above n. 108.

¹¹¹ Supreme Court, 10 November 1989 ECLI:NL:HR:1989:AC1692.

¹¹² Supreme Court, 14 December 2012 ECLI:NL:HR:2012:BX8351, ILDC 1959 (NL 2012); Council of State, 2 July 2015, ECLI:NL:RVS:2015:2100.

¹¹³ Above nn. 86–88.

¹¹⁴ UN Doc. S/Res 1737 (2006).

¹¹⁵ Council Common Position 2007/140/CFSP of 27 February 2007 concerning restrictive measures against Iran, Article 6.

The Netherlands implemented these obligations in the “Sanctieregeling Iran” [hereinafter Sanction Regulation],¹¹⁶ which prohibited educational institutes to take in Iranian students if the program could contribute to the gaining of knowledge on nuclear weapons. An exemption from the ban could conditionally be given. When the measure was challenged as being discriminatory, the Dutch government asserted that it was obliged to make the distinction based on nationality under the UNSC Resolution.

The three court decisions that were initiated by this challenge are instructive for the uneasy relationship between the formal rule of supremacy of international law on the one hand, and the weight attached to human rights protection on the other. The Court of First Instance admitted that *if* the UNSC had obliged the State to adopt the Sanction Regulation in this form, Article 103 UN Charter would give prevalence to that obligation—even though the State itself had not reasoned in Article 103 terms.¹¹⁷ But since the Resolution did not oblige States to impose the ban, and hence did not oblige to make a distinction on the basis of nationality that is not necessary and justified, the Sanction Regulation could be reviewed in light of Article 26 ICCPR, and a violation was found.¹¹⁸ The Court of Appeal agreed, but added a remarkable *obiter dictum*.¹¹⁹ Even if the Resolution *had* obliged the State to make the distinction based on nationality, the Court argued, the Sanction Regulation could still have been reviewed in light of fundamental rights laid down in the ECHR and Union law. The power of review recognized by the ECJ in the *Kadi* case would *a fortiori* apply.¹²⁰ The State objected to the reasoning of the Court of Appeal and appealed to the Supreme Court, arguing *inter alia* that the ECJ *Kadi* case does *not* mean that *Dutch courts* have the same power of review. The national judge, the State argued, is bound by Article 103 UN Charter.¹²¹ The Advocate-General in this case sided with the Court of Appeal, stating that Article 103 is but an integral part of the review process, which also entails review in light of other international rules and

¹¹⁶ Regeling van de Minister van Buitenlandse Zaken van 17 oktober 2007, nr. DJZ/BR/0916–07 betreffende beperkende maatregelen ten aanzien van Iran (Sanctieregeling 2007). The Regulation underwent several amendments during the proceedings. The case before the Supreme Court addressed Regeling van de Minister van Buitenlandse Zaken van 17 april 2012, nr. Minbuza-2012.7941, houdende beperkende maatregelen jegens Iran (Sanctieregeling Iran 2012).

¹¹⁷ Court of First Instance The Hague, 3 February 2010, ECLI:NL:RBSCR:2010:BL1862, para. 4.6.

¹¹⁸ *Ibid.*

¹¹⁹ Court of Appeal The Hague, 26 April 2011, ECLI:NL:GHSGR:2011:BQ4781.

¹²⁰ *Ibid.*, para. 5.5. Notably, the Court only referred to international law standards, more particularly general principles of EU law, not domestic constitutional principles. Also the Court of First Instance that had to rule on the amended Sanction Regulation later, followed the Court of Appeal in this reasoning: Court of First Instance The Hague, 28 March 2012, ECLI:NL:RBSCR:2012:BW3098. In an unrelated case also the Council of State once intimated that there is nothing in principle that precludes Dutch courts from taking the *Kadi* approach: Council of State, 3 March 2010, ECLI:NL:RVS:2010:BL6245.

¹²¹ Conclusie A-G P. Vlas, 14 December 2012, ECLI:NL:PHR:2012:BX8351, para. 2.21, with Supreme Court, 14 December 2012, ECLI:NL:HR:2012:BX8351, ILDC 1959 (NL 2012).

constitutional review.¹²² The Supreme Court attempted to avoid squarely addressing the issue.¹²³ It navigated around it by focusing on the fact that the Resolution did not impose an obligation to make the vexed distinction, conveniently ignoring the hypothetical *what if* question, even though the State had specifically asked its opinion on the matter. In the course of the analysis of the obligations of States in respect of domestic implementation of the discretion left to States, the Court did however include the seemingly more general statement that, in light of the ECJ *Kadi* case, domestic courts had to review implementation measures in light of fundamental rights that are part of EU law.¹²⁴ While the Supreme Court limited the ambiguous statement to EU law, the reliance on the *Kadi* precedent in the monist legal order of the Netherlands is obviously problematic. The separation of EU law from UN law may work within the EU legal order, but such a dualist approach cannot be transposed to courts operating within the Dutch legal order.¹²⁵

4 CONCLUSION

The counter-limit debate in the Netherlands has been shaped by two interrelated phenomena: the traditional faith in the international legal order and an underdeveloped domestic fundamental rights discourse. The debate largely brushed over the shortcomings of fundamental rights protection on the international level, and how the need for such protection is rising in light of the changing nature of international law.

The above assessment can be rephrased in terms of the three Working Hypotheses underlying the volume of which this chapter is a part. First, the openness of the Netherlands to international law, the wide space allotted to the principle of supremacy in Article 94, and perhaps above all the practice to prevent reliance on Article 94 by resorting to international law-friendly interpretation, have removed the edge of the potential conflicts between supremacy of international law and the supremacy of national fundamental principles. At least in formal terms, the conflict rarely presents

¹²² *Ibid.*, para. 2.22.

¹²³ Supreme Court, 14 December 2012, ECLI:NL:HR:2012:BX8351, ILDC 1959 (NL 2012).

¹²⁴ *Ibid.*, see esp. paras. 3.6.1–3.6.2. See M. Busstra, ‘The Thin Line Between Deference and Indifference: The Supreme Court of the Netherlands and the Iranian Sanctions Case’ (2013) 44 *NYIL*, p. 216; S. Hollenberg, reporting on the case for *ILDC*, above n. 23, at A3 and A5. In another, unrelated, judgment earlier that year, the Supreme Court unequivocally stated that as a consequence of Article 103 UN Charter, the immunity of the United Nations preceded over Article 6 ECHR: Supreme Court, *Stichting Mothers of Srebrenica and others v Netherlands and United Nations*, 13 April 2012 ECLI:NL:PHR:2012:BW1999, ILDC 1760 (NL 2012), paras. 4.3.4–4.3.6. Also in this case the Court of Appeal was less deferential, stating that Article 103 UN Charter did not preclude review of the immunity of the UN under Article 6 ECHR, Court of Appeal The Hague, 30 March 2010, ECLI:NL:GHSGR:2010:BL8979, para. 5.5.

¹²⁵ See for a similar disregard of the consequences of a monist approach to international law Council of State, 3 March 2010, ECLI:NL:RVS:2010:BL624, para. 2.4.6., at <https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=43467>.

itself. But this does not mean that the supremacy of international law could not conflict with fundamental principles. Though practice is limited, there is little basis in constitutional doctrine to solve such a conflict in favor of the latter.

This leads us directly to the second point. The fact that fundamental national values are susceptible to be internationalized is in the Netherlands not relied on to justify the formulation of national counter-limits, quite the contrary. The debate in the Netherlands has vested much faith in the protection of national values through their international law equivalents. However, the courts and the government may well overestimate the ability of the international legal order to solve conflicts between human rights law and other rules of international law in favor of the former, potentially leading to a conflict between the supremacy of international law and fundamental constitutional rights. The debate proceeded from an overly optimistic assessment of the pull of human rights law in cases of conflict with other international rules.¹²⁶ It disregarded the fact that international human rights treaties contain minimum standards that cannot replace the domestic constitutional protection. This fundamental and persistent disregard for the independent role of the Constitution also transpired from the State Commission Report where it held that the incorporation into the Constitution of fundamental rights as laid down in directly applicable treaties would not strengthen the position of the individual.¹²⁷ It has been pointed out before that “[p]aradoxically, the ECtHR’s case law may thus have a chilling effect on fundamental rights protection.”¹²⁸

Thirdly, precisely because of its, perhaps misplaced, faith in international law to solve conflicts of norms in favor of human rights, Dutch courts have not articulated a strategy of “reasonable resistance” by identifying national fundamental principles whose safeguarding entails a deviation from international law. The debate in the State Commission, that could have led to the formulation of such a principle, eventually came to nothing. Arguably, the counter-limit debate in the Netherlands was launched, and closed, too hastily—with the ink on the *Kadi* judgment barely dry. The dynamics which caused “contestation of international law” to be seen as “reasonable resistance” or “constructive”,¹²⁹ a prerequisite even of a liberal democracy¹³⁰ were still shifting and were hard to grapple with for a country with a legal culture so entrenched in monism and openness towards the international legal order.

¹²⁶ Notably, the State Commission did not include an international lawyer amongst its members.

¹²⁷ Report State Commission on Constitutional Reform, above n. 10, at 57. On p. 59 it becomes clear however that “part of the Commission” does think that the protection in certain treaties is insufficient. It is unclear how that relates to the apparently unanimous opinion that inclusion of those rights in the Constitution would not strengthen the position of individuals.

¹²⁸ Claes and Leenknecht, above n. 5, at 302.

¹²⁹ Nollkaemper, above n. 82; Peters, above n. 6; F. M. Palombino, ‘Italy’s Compliance with ICJ Decisions vs. Constitutional Guarantees: Does the ‘Counter-Limits’ Doctrine Matter?’ (2012) 22 *Italian Yearbook of International Law*, pp. 187–200.

¹³⁰ Von Bogdandy, above n. 105.