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### The Constitutional Duty to Promote the Development of the International Legal Order

*The Significance and Meaning of Article 90 of the Netherlands Constitution*

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**THE CONSTITUTIONAL DUTY TO PROMOTE THE DEVELOPMENT  
OF THE INTERNATIONAL LEGAL ORDER: THE SIGNIFICANCE  
AND MEANING OF ARTICLE 90 OF THE NETHERLANDS  
CONSTITUTION\***

**Leonard F.M. Besselink\*\***

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## 1. INTRODUCTION

The Constitution of the Kingdom of the Netherlands is marked by its low degree of ideological content. It even lacks a preamble. This is intentional. The Constitution was viewed as unsuitable for making assertions of which the practical value is unclear. Yet there are a few exceptions to the non-ideological character of the Constitution. In 1983, some of the already present social objectives were ex-tended into a series of provisions on social rights which are largely programmatic in nature.<sup>1</sup> Another notable exception is found in Article 90:

The Government shall promote the development of the international legal order.<sup>2</sup>

This article explores the meaning of this provision. The provision is clearly about law. Yet, this article raises the central question to what extent it is a legal provision, that is to say, to what extent it has a particular legal meaning and substance. On the basis of the analysis which follows, I submit that Article 90 opens up the possibility of political discourse concerning the desirability of developments and tendencies in international society, and focuses on the reinforced role of law.

After some introductory remarks of comparative and methodological nature (Sections 1.1 and 1.2), I will trace the history of the provision's text (Section 2) and its more general constitutional context (Section 3). In order to delineate the meaning of the provision, I examine the intentions of successive framers of the Constitution; intentions which ranged from a duty to pursue peaceful means of dispute settlement to Article 90 as the foundation and constitutional embodiment of actual foreign policies as pursued by the government (Section 4). On the basis of these constitutional intentions, I analyse the substantive terms of Article 90 by discussing the partly overlapping notions of defending and of promoting international law, of international society and the international legal order, of the international legal order's and national interests, and of the attributive or regulative nature of Article 90 of the Constitution (Section 5). I will describe the uses to which Article 90 has been put in the case-law. We will see that it has first been used to connote the idea of abidance by the law as it is, which suggests that Article 90 is a justiciable provision, while more recently its programmatic nature

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1. Already in 1848 two programmatic provisions were introduced, with regard to education and the care for the poor, both of which were declared to be the constant concern of the government.

2. '*De regering bevordert de ontwikkeling van de internationale rechtsorde.*' Previously, Article 90 was translated as: 'The government shall promote the development of the *international rule of law*.' This was a mis-translation, which, however, still circulates. A translation of the Constitution by the Ministry of Foreign Affairs can be found on <[www.ministerdegraaf.nl/uk/constitution\\_and\\_publications/the\\_constitution\\_of](http://www.ministerdegraaf.nl/uk/constitution_and_publications/the_constitution_of)>.

has become recognized by courts, which limits its justiciability (Section 6). The conclusion sums up the findings and briefly assesses the role the provision can play under present day conditions of international relations and international law.

### 1.1 A brief comparison with other constitutions

Article 90 of the Netherlands Constitution is not entirely unique, at least if we take a bird's-eye view of constitutional provisions. Many national constitutions make ideological allusions of a somewhat similar nature in their preamble or in other provisions.<sup>3</sup> Most of these mention in some form or other the aim of serv-

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3. Other countries with constitutional provisions similar to Art. 90 are the following. The French preamble states: 'La République française, fidèle à ses traditions, se conforme aux règles du droit public international. Elle n'entreprendra aucune guerre dans des vues de conquête et n'emploiera jamais ses forces contre la liberté d'aucun peuple'; The German preamble states: '... moved by the purpose to serve world peace as an equal partner in a unified Europe ...', Art. 26: '(1) Activities tending and undertaken with the intent to disturb peaceful relations between nations, especially to prepare for aggressive war, are unconstitutional. They shall be made a punishable offence'; The Greek constitution, in Art. 2 (2): 'Greece, following the generally accepted rules of international law, seeks consolidation of peace and justice and fostering of friendly relations among Peoples and States'; The Irish constitution, in Art. 29: '1. Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality. 2. Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination. 3. Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States'; The Italian Constitution, in Art. 11: 'Italy shall repudiate war as an instrument of offence against the liberty of other peoples and as a means for settling international disputes; it shall agree, on conditions of equality with other states, to such limitations of sovereignty as may be necessary to allow for a legal system that will ensure peace and justice between nations; it shall promote and encourage international organizations having such ends in view'; The Portuguese Constitution, in Art. 7: '1. In international relations, Portugal shall be governed by the principles of national independence, respect for human rights, the rights of peoples, equality between States, the peaceful settlement of international disputes, non-interference in the internal affairs of other states and co-operation with all other peoples for the emancipation and progress of mankind. 2. Portugal shall advocate the abolition of imperialism, colonialism and any other form of aggression, domination and exploitation in relations among peoples, as well as the achievement of simultaneous and controlled general disarmament, the dissolution of political-military blocs and the setting up of a collective security system, with a view to the creation of an international order capable of safeguarding peace and justice in relations among peoples. 3. Portugal recognises the right of peoples to self-determination, independence and development, as well as the right to rebel against all forms of oppression'; The Spanish preamble states: 'The Spanish Nation ... in the exercise of its sovereignty proclaims its will to: (...) collaborate in the strengthening of peaceful relations and effective cooperation among all the peoples of the earth'; The Brazilian preamble states: 'We, ... committed, in the internal and international spheres, to the peaceful solution of disputes, promulgate ... this Constitution'; The Japanese preamble states: 'We, the Japanese people, ... determined that we should secure for ourselves and our posterity the fruits of peaceful cooperation with all nations ... We desire to occupy an honoured place in an international

ing international peace, the repudiation of war as a normal instrument in international relations and, to the extent that law enters into this, they can be said to be exhortations to abide by public international law as it stands (e.g., France, Germany, Greece, Ireland, Italy, Spain, Brazil, Japan, India). Sometimes constitutional provisions are much more specific so as to include the objective of fostering European integration (Germany), fostering international organizations (Italy), disarmament, the abolition of imperialism and colonialism and the right to rebel against all forms of oppression (Portugal), or the freedom of want and fear (Japan). These types of objectives tend to be extrapolations of constitutional values which have been articulated as a consequence of specific historical experiences of these states. Mostly they are of an ideological nature, but depending on the legal strength of the constitutional document, they may also be meaningful in construing the constitution, as is particularly the case in Germany, where the relevant norms are used by the Constitutional Court [*Bundesverfassungsgericht*] in adjudicating the constitutionality of treaties and other instruments of foreign relations, such as the deployment of the armed forces in international conflict and international cooperation in general.

Yet with two exceptions, none of these provisions are quite like the one in the Netherlands Constitution, in as much as this provision does not refer to international relations as such, nor to public international law as it stands, but much more specifically to the ‘development of the international legal order’ – as we will have occasion to emphasise throughout this article.

A provision which comes close to the Dutch one is Article 2(4) of the Swiss Constitution, alongside the objective of the preservation of natural resources, the striving ‘to promote a just and peaceful international order’. But this provision differs from the Dutch provision in referring to the ‘international order’, instead of the ‘development of a legal order’, giving it a different, less ‘juridical’ flavour to the provision. This may explain the paucity in writings on the meaning of this Swiss provision.

There are only two other constitutions which have a provision similar to the Dutch one: the Surinam Constitution and the Draft Constitution for the European

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society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression, and intolerance for all time from the earth. We recognise that all peoples of the world have the right to live in peace, free from fear and want’, Art. 9(1): ‘Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes’; The Swiss Constitution, in Art. 2(4): ‘[The Swiss Federation] strives to safeguard the long-term preservation of natural resources and to promote a just and peaceful international order’; The Indian Constitution, in Art. 51: ‘The State shall endeavour to – (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organised people with one another; and (d) encourage settlement of international disputes by arbitration.’

Union proposed by the Convention on the Future of Europe. The provision the Constitution of Surinam is an exact copy of Article 90 of the Netherlands Constitution – which is small wonder for a former colony of the Netherlands, which clearly sought inspiration for its own constitution in that of its former mother country.<sup>4</sup> The Draft EU Constitution is more interesting because no lineage exists with the Dutch provision. In Article 3 of the Draft Constitution, entitled “the Union’s objectives” we find the following:

‘4. In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children’s rights, *as well as to strict observance and development of international law*, including respect for the principles of the United Nations Charter.’ [emphasis added]<sup>5</sup>

To my knowledge this provision has not received much attention either during the Convention or the intergovernmental conference, nor has it been discussed in the presently available literature, which is curious because it formulates a new EU objective which is absent in the presently valid constitutional texts of the European Union.<sup>6</sup> As the provision has not (yet) entered into force, no legislative, judicial and academic materials are available which could make comparisons possible, though this particular provision shares, at least at the textual level, many characteristics with its Dutch equivalent. Under these circumstances only limited comparisons to the Draft EU Constitution in the section on conceptual analysis (Section 5) will be made. The specific differences between the Dutch provision and other constitutions (other than the Draft EU Constitution) make it less useful to engage in an exercise of comparative constitutional law. Moreover, there is a great dearth of accessible materials on those other foreign provisions. Because the primary aim is to establish the meaning of the Dutch provision, this essay focuses on this one provision in the Netherlands, hoping that it may inspire other authors to make contributions on those more or less similar provisions in the constitutions of other countries.

## 1.2 A methodological note

A historico-linguistic approach is used to trace the origins of the Dutch provision followed by the uses to which it has been put in the light of those origins. This

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4. Constitution of Surinam of 1987, Art. 7(2): ‘The Republic of Suriname promotes the development of the international legal order and supports the peaceful settlement of international disputes.’

5. The text of the provision as proposed by the Convention on the Future of Europe is followed. In the intergovernmental conference, it has now been proposed to refer to the Articles of Part I of the Constitution in this case as Article I-3, to which no further amendments have been proposed.

approach is legitimate for two reasons. Firstly in Dutch constitutional law, ‘original intent’ is a predominant consideration in constitutional interpretation. Secondly, this is an essay in constitutional semantics. Discussing semantics is often viewed in a derisory manner, but all interpretation of legal provisions is about semantics. Thirdly, an exploration of the meaning of a provision such as Article 90 has its own problems due to its relative obscurity. Obscure though the provision may seem, this exercise should not usher in some gratuitous post-modern fantasising. It is on a precise linguistic and historical basis that we should base our endeavours: linguistic in as much as law is about how to do things with words, and historic because of the context in which the relevant locutions were articulated.

Part of the historical basis to be employed in this essay is the body of references which in public discourse and debate, in legislation and in case-law, has been made to Article 90. In practice, a mass of references has also been made to concepts which, at least from a distance, seem similar to those which form part of Article 90, such as: ‘the interests of the international legal order’, ‘the development of the international legal order’, simply ‘the international legal order’, or ‘the international community’ and ‘international society’. In what follows, I have to abstain from discussing many of these uses even though they seem to be categories which directly or indirectly have some connection with Article 90 or its phraseology; I restrict myself mainly to contrasting them with the precise terms of Article 90.

## 2. THE CONSTITUTIONAL ORIGINS: AN OUTLINE OF THE PROVISION’S THREE HISTORICAL VERSIONS

Article 90 acquired its present content in 1953 (then numbered Art. 58, second paragraph). However, it had a predecessor in Article 57 of the Constitution of 1922, which was introduced as part of a more general revision of – amongst other things – the constitutional provisions concerning foreign relations.<sup>7</sup> This revision was prompted by the new situation brought by the end of the Great War

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6. The Dutch Convention member Van der Linden, supported by four other members, had proposed to insert as a reference ‘contributes to building international justice’. But we owe the wording of the text to an amendment by the very prominent Convention member, Andrew Duff, who proposed the words ‘and the development of international law’; see CONV 574/1/03 REV 1, of 26 February 2003.

7. Some of the other proposed changes concerned a limitation of the succession to the throne (for nationalist democratic reasons), removing obstacles for greater autonomy of the colonies, introducing the possibility of interim elections at the dissolution of the Senate, and the introduction of the referendum (these last two failed to acquire sufficient support in Parliament).

– a period of renewal, expectation and optimism after the terrors and atrocities of the war. During the Great War the Netherlands remained neutral, but had been the host and patron of the Hague Conferences in 1899 and 1907, and now became a member of the League of Nations. The early twenties were the age in which internationalist idealism was rekindled, the age of a Cornelis van Vollenhoven, Leyden Professor of Public International Law and Grotius scholar who conceived of *De iure belli ac pacis* as the great precursor of international peace through law.<sup>8</sup>

The key in which the 1922 revision was set, was that of ‘democratisation’. As regards the provisions on foreign affairs, this took the form of enhancing the parliament’s influence on the conduct of foreign policy – that at least was the intention of the introduction of parliamentary approval of treaties and of the declaration of war. Whether this aim was achieved, particularly with regard to the parliamentary approval of treaties, can be doubted<sup>9</sup> – but this need not concern us here.

In order to prepare a constitutional revision, an official State Commission had been appointed in 1918, named the Ruijs de Beerenbrouck-Commission after its chairman. In its report, this Commission had proposed to abolish the provision which attributes the ultimate authority over foreign relations to the King (this is the ‘constitutional king’, i.e., the king acting under ministerial responsibility). It argued that this provision had been used several times to curb perceived encroachments on the government’s prerogatives; in this view, it was an obstacle to democratization. Moreover, if understood in a more correct manner, it was superfluous because there was already a general provision which attributed the executive power to the King. The Commission also proposed the introduction of prior consent of the parliament, the *States General*, for the declaration of war – although it found it ‘of perhaps not very great practical importance’.<sup>10</sup>

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8. See van Vollenhoven’s preface to *Hugonis Grotii De iure belli ac pacis libri tres, in quibus jus naturae et gentium, item juris publici praecipua explicantur cum annotatis auctoris*, Edidit P.C. Molhuysen, praefatus est C. van Vollenhoven (Leiden, Lugduni Batavorum 1919) (BG 615); also many of his works collected in *Mr. C. van Vollenhoven’s Verspreide Geschriften I*, F.M. van Asbeck, ed. (Haarlem, Tjeenk Willink/The Hague, Nijhoff 1934).

9. See already F.J.A. Huart, *Grondwetsherziening 1917 en 1922* (Arnhem, 1925) pp. 69-72, who is, after careful analysis, generally negative as to the question whether the constitutional amendments have programmatic meaning for the democratization of foreign policy through participation of the States General. On the issue of approval of treaties, he was rightly negative. The impracticality of approving every and all possible type of international agreement led to the introduction of a distinction between treaties and other agreements, which made it possible for the government to circumvent parliamentary approval by giving the international instrument another name than ‘treaty’.

10. *Verslag van de Staatscommissie ingesteld bij Koninklijk Besluit van 20 December 1918, No. 78, aan welke is opgedragen de voorbereiding van eene herziening van de Grondwet* [Report

In a minority report, a Social Democrat member of parliament, Schaper<sup>11</sup>, explained that only to introduce a provision on the declaration of war would suggest that war is the normal course of affairs in the conduct of foreign relations. It was his conviction that if international conflicts arise, these should first of all be resolved by arbitration, and only if this should fail would the question arise as to what should happen as *ultimum remedium*. He therefore proposed a reading in which the declaration of war would be preceded by the words that ‘the King shall attempt to resolve conflicts with other nations by arbitration ...’:

‘It would suit us well, as a peace-loving nation, if our Constitution would thus bear witness to the nation’s determination to prefer law above violence. Other nations, remembering ‘the work at The Hague’, will no doubt appreciate this constitutional confession and may possibly follow suit. And although this legislative witness is not decisive in matters of war and peace, a Constitution must reflect what a nation takes as guidance in important political fields.’<sup>12</sup>

The government did not take up the commission’s proposal for abolishing the provision on the ultimate authority of the constitutional King over foreign affairs, but it did adopt the proposal on the declaration of war, and proposed to introduce the following text:

‘The King will not declare war unless the States General give their prior assent.’<sup>13</sup>

The Social Democrat leader in the Lower House, Troelstra, introduced an amendment along the lines proposed by Schaper, which after some further changes came to read:

‘The King shall attempt to resolve conflicts with foreign powers through judicial and other peaceful means. He shall not declare war unless the States General give their prior assent.’<sup>14</sup>

This amendment was, in the end, adopted by the legislature and became the text of Article 57 of the Constitution of 1922.<sup>15</sup>

As we noted, the constitutional revision of 1953 brought the next and crucial textual stage of the provision in question. Its amendment was part of a larger revision of the provisions on foreign relations. The general background instigating the revision was again found in the fundamental changes in international rela-

of the State Committee established by Royal Decree of 20 December 1918, No. 78, which has been commissioned to prepare a revision of the Constitution] (The Hague, 1920) p. 4.

11. J.H.A. Schaper, 1868-1934, member of the Social Democrat Labour Party SDAP and at the time member of the House of Representatives.

12. Minority report by Schaper, p. 3.

13. Art. 58; see Bijl. Hand. 451, No. 3, p. 2.

14. See Bijl. Hand. 90 No. 7, V, para. 21; and Hand. II, 1921-1922, p. 429.

15. Hand. II, 1921-1922, p. 441.

tions. The end of the Second World War, to which this time the Netherlands had fallen victim and in which the government-in-exile had been an active participant, meant a major change in foreign policy. Neutrality was abandoned. Primarily, the fast development of international cooperation as witnessed by the establishment of the United Nations and the attempts at European integration, was reason to rethink the constitutional framework of foreign relations.

Again commissions were set up by the government to tender their advice on relevant constitution amendment. It is in their proposals that the text of the provision which concerns us originated. Firstly, there was the Van Eysinga Commission on the cooperation between government and parliament in foreign policy.<sup>16</sup> This commission took – as far as our provision is concerned – its point of departure in the illegality of the instrument of wars of aggression. It proposed to dispense with the declaration of war altogether. It found it appropriate to articulate more fully than the 1922 Constitution did the duty to develop the international legal community. It thus proposed the following text:

‘The King shall have supreme authority over foreign affairs. He shall promote as far as possible the development of the international legal community [*internationale rechtsgemeenschap*]. Except in urgent cases, the armed forces shall not be put at the disposition for the collective maintenance of law until after consultation of the States General.’<sup>17</sup>

A subsequent State Commission for the revision of the Constitution, appointed by Royal Decree, endorsed the first two sentences of the provision proposed by the Van Eysinga Commission, but with a minor amendment: the words ‘as far as possible’, inserted by the Van Eysinga Commission in order to express that things are not within the exclusive power of the Kingdom of the Netherlands, were deleted as it might suggest a reservation to the idea of developing an international legal community.<sup>18</sup> The State Commission did not endorse the last sentence on making available armed forces for the purpose of enforcement action in this particular constitutional provision. It considered it more appropriate to deal with this in the chapter on Defence in the Constitution. However, contrary to the Van Eysinga Commission, it did think it useful to retain parliamentary approval for declaring the Kingdom ‘at war’.

The government in turn took over the proposal of this latter State Commission, yet changing the expression ‘international legal community’ to ‘interna-

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16. Commissie nopens de samenwerking tussen regering en Staten-Generaal inzake het buitenlands beleid, established by Ministerial Decree in 1950, chaired by W.J.M. van Eysinga, emeritus professor of public international law in Leiden.

17. *Eindrapport van de Commissie nopens de samenwerking tussen regering en Staten-Generaal inzake het buitenlands beleid, 9 juli 1951* (The Hague 1951) pp. 13-14.

18. *Eindrapport van de Staatscommissie tot herziening van de Grondwet ingesteld bij Koninklijk Besluit van 17 april 1950*, No. 25, p. 154.

tional legal order'. It preferred the word 'legal order' [Dutch: *rechtsorde*] above 'legal community' [Dutch: *rechtsgemeenschap*], as the latter seemed to refer to the community of nations which is at the basis of the legal order, rather than to that legal order itself. 'What is meant is that the King shall promote the development of the legal order within the community of nations';<sup>19</sup> '[t]he task attributed to the King here, is not to promote the development of this community, but more specifically of the legal order which has this community as its object.'<sup>20</sup>

The provision thus proposed and subsequently accepted by Parliament read:

'Article 58

The King shall have supreme authority over foreign affairs.

He shall promote the development of the international legal order.'

The third step in the evolution of our provision is the overall revision of the Constitution which took effect in 1983. At first the government proposed to remove Article 58 entirely, both the supreme authority of the government over foreign affairs *and* the duty to promote the development of the international legal order. Without this provision, the government would still do its utmost to promote that development, in line with established tradition. Pressure from the House of Representatives, forced the government to relent and retain this latter duty after all, proposing only to delete the provision on the supreme authority of the King over the conduct of foreign affairs. As we shall see<sup>21</sup> this deletion was of considerable consequence. This was the more so since even the general provision attributing the executive power to the government was retained – it was considered superfluous. The term 'King', which was used in earlier constitutions and which – as we already remarked – meant the King acting under ministerial responsibility, was replaced by the term 'government',<sup>22</sup> but otherwise the provision remained unchanged to become Article 90:

The Government shall promote the development of the international legal order.

### 3. THE PROVISION'S GENERAL CONSTITUTIONAL CONTEXT

Particular constitutional texts can only be understood in their context, in other

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19. Bijl. Hand. 2374, No. 3, p. 2.

20. Hand. I, Memorandum of reply to the relevant parliamentary committee, 2374, No. 10, p. 28.

21. Paras. 5.4 and 5.4.1.

22. The constitutional term 'government', incidentally, in the Netherlands still comprises both ministers and the King as head of state – unlike this term in most other countries; see Art. 42(1) of the Constitution: 'The Government shall comprise the King and the Ministers.'

words, in the context of the general characteristics of the relevant constitution. A few remarks on the general constitutional context of Article 90 will be made.

### 3.1 **The purpose and nature of constitutional provisions**

There are many functions which constitutional provisions may have. As the very origins of this provision reveal, our provision had from its inception a certain ‘ideological’ meaning. Schaper, proposing the present provision’s predecessor, had few illusions about the difference such a provision would make if international conflicts came to a head. As we saw, he considered it ‘a constitutional confession’, a matter of ‘bearing witness’ to the peace-loving nature of our nation. It was precisely this that was sharply criticised during the debates on the 1922 Constitution. The Liberals, in particular, were of the opinion that constitutions are not meant for the expression of sentiments. At the background of the debates, one senses the ideological sore point of the Social Democrats’ older leanings towards pacifism as against more realist approaches. Even the earlier personal antagonism between the leader of the progressive Liberals, Marchant, and the leader of the Social Democrats, Troelstra, seemed to flare up; though this time it was Schaper, in defending his own brainchild, who was the object of criticism by Marchant’s sharp polemical approach. Others also voiced objections against including ‘confessions of faith’ in the constitution.

Rutgers, a prominent protestant member of the House of Representatives argued:<sup>23</sup>

‘I am thinking of those who have to study the Constitution. Let us not make the Constitution unnecessarily hefty and not increase the number of its provisions, the commentaries on which will have to tire the students. Those same students will have to learn that this provision really does not have any meaning, and has only ended up in the Constitution because one afternoon the House was in a certain munificent mood not properly befitting legislative labour.’<sup>24</sup>

The government initially shared such objections. The Constitution is primarily concerned with powers and competence; mere ‘guidelines’ should not be part of it.<sup>25</sup> As the parliamentary debate progressed, however, the government gradually began to drop this objection.

It was not only the nature of the constitution that was in play. Rutgers was by no means the only one, nor the last one, to object to the vagueness of the provi-

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23. V.H. Rutgers, 1877-1945, member of the Anti-Revolutionary Party, member of the House of Representatives 1912-1925, of which since 1919 leader of his parliamentary group, minister of Education, Culture and Sciences 1925-1926, professor of Roman law and criminal law at the Free University of Amsterdam 1928-1945, active as prominent member of the resistance during the German occupation, died in German captivity in 1945.

24. Rutgers, in Hand. II, 11 November 1921, p. 427.

sion. In 1953, during the second reading of the proposal to introduce the present version of our provision, the Catholic Senator Sassen<sup>26</sup> continued to voice objections:

*'Promoting the development of the international legal order has been chosen as the Leitmotiv, which however to my opinion has the objection that it is insubstantial, difficult to determine and therefore holds the danger of being too broad.'*<sup>27</sup>

This is still a pertinent criticism, as we shall see in the course of this article. But it also will be shown that the provision is sometimes understood in a much narrower sense than is warranted by its text.

### 3.2 The scope of the provision and constitutional culture

Vague provisions have their own merits as far as constitutions are concerned. Some people maintain that a constitution should be short and obscure. The elusiveness of a constitutional text enhances the aura and elevated nature of a constitution. In the Netherlands, this idea seems to have faded into a very distant background in the course of time.<sup>28</sup>

And yet a provision such as Article 90 partakes of the elusiveness and elevated sense which constitutional provisions should have. Its ring is almost moral, probably because of the nobility implicit in the combination of the words *international*, *order* and *law*.

The use to which Article 90 has been put evinces this, and as becomes all the more apparent when one is reminded that the constitutional culture in the Neth-

25. Bijl. Hand. 451 No. 17, p. 7 and 17.

26. E.M.J.A. (Maan) Sassen, 1911-1995, was a member of the Catholic People's Party, KVP; entered the House of Representatives as a spokesman on legal matters in 1946, was Minister for Colonial Affairs (1946 to 1948), member of the Senate (1952 -1958), member of the *Central Appeals Court of the Public Service and for Social Security Matters* [*Centrale Raad van Beroep*] (court of highest instance for civil service and social security matters) (1950 to 1958), member of the European Parliament and its predecessor the Common Assembly of the ECSC from 1952 until 1958 (from 1953 till 1958 as leader of the Christian Democrat group), Member of the Euratom Commission (1958-1967) and of the EEC Commission, commissioner for competition (1967-1971), and Permanent Representative at the EEC (1971-1977).

27. Hand. I, 1952-1953, p. 469.

28. Only one provision which lives up to the old criteria of constitutional aesthetics has survived the iconoclastic onslaughts of legalistic constitutionalism in the permanent process of constitutional amendment. That is Art. 42(2): 'The king is inviolable, the ministers are responsible.' This is brief and obscure, particularly as the only provision on the subject in the Constitution, it is intended to cover nearly the whole of the doctrine of ministerial responsibility and accountability. Translators have problems with obscure provisions. The semi-official translation of the Constitution into English has turned the original of Art. 42(2) into a shallow lesson in constitutional law – and not even a very good one for that matter: 'The Ministers, and not the King, shall be responsible for acts of government.' This is infinitely more boring than the original and aesthetically debases it.

erlands is extremely weak. Within law faculties constitutional law has been (and where it was not, it has become) a marginalised subject. The Constitution is hardly ever invoked in political discourse, not even when its provisions would seem to be most directly at stake. On the contrary, in political circles, it is ‘not done’ to employ ‘legal’ arguments if a political point is to be made – which is all the more curious because, in the Netherlands, parliament together with the government is the only constitutional body which is allowed to review the constitutionality of acts of parliament; courts are constitutionally forbidden to do so.<sup>29</sup>

Whereas politics remains deficient, Article 90 has caught the attention of public opinion, which seems to have found in this provision one of the few constitutional principles it can put to use – or so it seems when we look at the very frequent mention of this provision in opinions, editorials and letters to the editors of newspapers in times of controversy over such issues as deploying American cruise missiles during the last years of the Cold War, ousting Iraq from Kuwait, bombing Serbia and Kosovo, and invading Iraq to overthrow the bloodthirsty regime of Saddam Hussain. The general strain of the argument usually is that all these things are controversial in light of the constitutional task of promoting the development of the international legal order.

Although the arguments may not always be very sophisticated from a legal point of view, the use to which Article 90 is so frequently put by fairly large sectors of public opinion, demonstrates that it serves the purpose of rallying public discourse concerning the right course and conduct of foreign policy. This function of fostering the debate on what foreign policy should be and how the international legal order is to be promoted, and whether a certain policy option fosters the development of that order or not, would seem to be appropriate to a constitutional provision, if one conceives of the constitution in its political sense as providing a given political society with a means of articulating itself. This, I submit, is the most important function and meaning of Article 90.

But can we go further and derive from Article 90 also some more concrete normative content? A further analysis of this provision can tell us a few things which can serve to delimit some of its contents. I can do so in two parts: first an historical analysis of the three layers of which our provision consists (Section 4) is presented, followed by a conceptual analysis of its terms (Section 5).

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29. Art. 120 Constitution: ‘The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.’

4. THE HISTORICAL OUTLINES OF ARTICLE 90: FROM A PREFERENCE FOR PEACEFUL DISPUTE SETTLEMENT TO PURSUIT OF ACTUAL FOREIGN POLICIES

4.1 **The first historical layer: the duty to attempt peaceful dispute settlement**

The oldest layer, Article 57 of the Constitution of 1922, was placed entirely in the context of war and peace, and enjoined the pursuit of peaceful means in case of international dispute. This reflected values which found expression in the Kellogg-Briand Pact and the establishment of the League of Nations. The original proposal had only spoken of ‘arbitration’ as a means of such peaceful resolution, but in its final version the 1922 provision uses the words ‘judicial and other peaceful means’. This would certainly comprise arbitration, but also other means, such as negotiation, mediation, conciliation and other forms of international cooperation towards settlement of a disagreement or dispute.

It has been submitted that, instead of being an expression of a policy of vain illusion, a mere *sententia declaratoria*, the provision of 1922 imposed an obligation on the government first to pursue peaceful means before resort could be had to war.<sup>30</sup> In this view the fact that the provision states that such means should be ‘attempted’ does not qualify this duty, but is merely a recognition that it takes also the other international party (or parties) to accept such means, which does not detract from the constitutional obligation to seek a peaceful resolution first. This interpretation is quite right.

The later version of 1953, retained this element. In its proposal for the relevant constitutional amendment, the government took over in its entirety the view of the Van Eysinga Commission, that apart from the peaceful settlement of international disputes there should be a ‘more comprehensive’ obligation to develop the international legal order.

‘Thus, in accordance with the progressive development in the direction of international cooperation and integration, the idea which was at the basis of the provision inserted in 1922 is further enhanced.’<sup>31</sup>

Although the formulation of 1953 is broader, adding a ‘thicker’ layer of meaning, underneath there has remained the constitutional obligation first to seek

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30. This is argued most forcefully by Huart, *op. cit.* n. 9, at pp. 48-49.

31. Bijl. Hand. 2374, No. 3, p. 3; the Van Eysinga Commission also spoke of a ‘more comprehensive obligation’, *Eindrapport van de Commissie nopens de samenwerking tussen regering en Staten-Generaal inzake het buitenlands beleid*, 9 juli 1951, at p. 14.

peaceful resolution of international conflict before resort to arms is allowed. The government conceded this in so many words when introducing the new formula:

‘The obligation to promote the international legal community [sic] implies the duty to attempt to resolve disputes with foreign powers in a peaceful manner.’<sup>32</sup>

Of course one may wonder when this obligation is fulfilled: how long does the peaceful road need to be followed if the prospect of resolution remains remote? In none of its versions, the provision forbids the legal use of armed force. It therefore leaves many questions unanswered which are impossible to ignore in the present political conditions. When can the government of the Netherlands begin to support enforcement action? How easily should it accept the doctrine of ‘humanitarian intervention’? When should it resort to the use of force (or support the use of force) if the international community fails to correct serious infringements of fundamental rules of international law?

As to the nature of the peaceful means to be used, already in commentary on the 1922 provision it was remarked that arbitrations rarely occur.<sup>33</sup> This could *a fortiori* be said about judicial means of dispute settlement, notwithstanding the better filled docket of the ICJ. On the whole public international law does not seem to be the preferred means of foreign policy of states; the language of public international law is not a predominant language of international relations, probably even less so than fifty years ago. Under these circumstances, promoting the international legal order begs the question how peaceful that order is, or is supposed to be. Here, retaining the core principle of first attempting peaceful means of dispute settlement becomes important. Its importance can best be grasped if we remind ourselves that resort to non-peaceful means was to a very large extent open in 1922. The provision’s cutting edge is that even under circumstances in which resort to armed force is allowed, peaceful means should be pursued. This is perhaps a core element of our provision, even though these actual words have been superseded by the more general wording which we now find in Article 90.

#### 4.2 The second layer: promoting the development of the international legal order

By speaking of the obligation ‘to promote the development of the international legal order’ the Constitution added an extra layer to that of 1922. These words broadened the provision to international cooperation and integration in general, beyond that of war and peace only. Presumably, this also means that this duty is

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32. Ibid.

33. F.J.F.M. Duynstee, *Grondwetsherziening 1953: de nieuwe bepalingen omtrent de buitenlandse betrekkingen in de Grondwet* (Deventer, Kluwer 1954) sub voce *Artikel 58*, at p. 49.

not exhausted by having to attempt to resort to peaceful dispute settlement. But it proved very hard to formulate with any precision what the added element is which it does involve. Three things were said in an attempt to adumbrate this surplus.

Firstly, during the debates leading to the constitutional amendment of 1953, the government quoted the words of the Van Eysinga Commission, saying:

‘That development [of the international order] means maintaining what has already been achieved, to the extent that the legal development is served thereby.’<sup>34</sup>

Secondly, it added – as we just saw – that the new formulation enhances the idea which was at the basis of the provision of 1922 ‘in accordance with the progressive development in the direction of international cooperation and integration’.

Thirdly, the minister of the Interior (on behalf of the government) explained the idea of the development of the international legal order, saying that:

‘... one cannot speak of “the” international legal order as already perfect and in reality already a unity, but of an international legal order for the factually existent international community which is in need of ever more cooperation and integration, an international community of whose legal order the development, that is to say an *évolution créatrice* into an ever greater and more intensive social bond, must be promoted.’<sup>35</sup>

#### 4.3 **The third layer: the 1983 revision**

The revision of 1983, after the initial rejection of a formula as we now find in Article 90, was marked by the particular historical circumstances of the moment. The Cold War and the relaxation of the tensions between the West and Eastern Europe seemed to have led to a paradoxical sense of security and stability, in which all idealist efforts of improvement in foreign relations were aimed at issues of development and human rights.

In these circumstances the initial meaning of the provision – the duty to resort first to peaceful means of dispute settlement – remained at best an old archeological, somewhat fossilised bedding at the bottom of the provision. The only thing which was said about it (also by members of parliament), was that the new formula went well beyond the ‘traditional’ understanding of it as ‘peaceful dispute settlement’.<sup>36</sup> Thus, it was actually not just the wording of 1922, which was

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34. Bijl. Hand. 2374, No. 3, p. 3 (*Eindrapport van de Commissie nopens de samenwerking tussen regering en Staten-Generaal inzake het buitenlands beleid, 9 juli 1951*) at p. 14.

35. Bijl. Hand. I 1951-52, Memorandum of reply, 2374, p. 7.

36. This is the meaning which the government had primarily attached to the provision of 1953 in the Explanatory Memorandum to the proposal to abolish that provision; for the references to that meaning in the subsequent debate, see the parliamentary documents in *Naar een nieuwe Grondwet*, Vol. Vb, at pp. 50, 63 and 140.

limited to peaceful dispute settlement, that was superseded in 1953, but also its meaning. As an archeological left-over it remained somewhere at the bottom; but in the historical circumstances of that moment, armed conflict seemed, in the minds of the framers of a revised constitution, who were intent on ‘renewal’, to exist only at the distant fringes of the world. And in those circumstances the historical meaning seemed almost eclipsed.

The prevailing idea was that the provision was befitting a constitution which was to include several other policy objectives. It would express any or all of the following ideas and values: the idea that ‘in the Netherlands’ constitutional order national sovereignty was not the ultimate norm’, the ‘value of an international order based on universally valid legal norms’, the undertaking to pursue such an order ‘through the conclusion of treaties’, and a policy of ‘promoting the universal realisation of human rights’ in the broadest sense, including economic, social and cultural rights, the promotion of ‘the well-being of the world population’ and ‘global solidarity’ as expressed in a policy of development cooperation and promoting a New International Economic Order.<sup>37</sup> All in all, the provision was seen as a foundation of the actual policies pursued, but perhaps even more as the embodiment of those various policies themselves.

In the following section we will explore the further contours and substance of Article 90 against the background of these three phases of constitution making. The following, partly overlapping, pairs of ideas: the observance of international law versus the development of the international legal order; the international legal order and international society; the interests of the international legal order versus national interests; and, finally, the question whether the duty to promote the development of the international legal order is intended as a policy objective for the government or is an attribution of new powers to the government.

## 5. THE SUBSTANCE OF ARTICLE 90

### 5.1 Observing international law or developing the international legal order

A first important conceptual issue concerns the term ‘*promoting the development* the international legal order’ and its relation to the idea of abiding by international law (often summed up too concisely as *pacta sunt servanda*). If we take the words ‘promoting the development’ of the international legal order literally, these would not seem to be tantamount to saying that one should ‘abide by inter-

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37. See the recurrent summing up in *Naar een nieuwe Grondwet*, *supra* n. 36, at pp. 48-50, 63, 113, 127, 140, 172 and 176.

national law'. The words 'promoting' and 'development' suggest something more dynamic, going beyond what is already there. Article 3 of the Draft Constitution for the European Union, which was quoted in the introduction, neatly distinguishes the observance of international law from its development by juxtaposing them as objectives of the Union:

[The Union] shall contribute to... *strict observance and development of international law ...*'

If observance were the same as development, it would not have been necessary to juxtapose them. Yet, at a textual level the Draft EU Constitution seems more bent towards observance than to development of international law. This is evident from the elaboration on this EU objective in Article 193 of part III of the Draft Constitution.<sup>38</sup> It says that the Union's external action 'shall be guided by, and designed to advance *respect* for [...] international law, in accordance with the principles of the United Nations Charter' (para. 1); the Union shall act in order to '*consolidate and support* democracy, the rule of law, human rights and international law' (para. 2 sub b).

The difference and tension between the concepts of 'developing the international legal order' and 'abiding by existent international law' is more intriguing in the discourse on Article 90 of the Netherlands Constitution.

As noted, in 1953 the government, following the Van Eysinga Commission suggested the supreme paradox that 'development means maintaining what has already been achieved ...'. But this paradox was crucially qualified by adding: '... to the extent that the legal development is served thereby.' Reading this, it is tempting to think that promoting a development is not a matter of conserving, or of conserving only, but also – or perhaps more so – a matter of changing. Are *pacta sunt servanda* and observance of the law part of the constitutional obligation? And if so, are we dealing with progressive conservatism – or is it conservative progressivism? This also raises a more disturbing question: does the qualifications that the duty to abide by the law exists only to the extent that it serves the development of the international legal order, threaten to undermine the observance of law?<sup>39</sup>

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38. The text produced by the Convention on the Future of Europe is used. Although there are no such proposals, it is not certain whether eventual changes will be made during the intergovernmental conference; cf., CIG 60/03, ADD 1, 9 December 2003.

39. This question arises particularly as there are no explicit limitations on the duty to promote the development of the international legal order, such as those contained in the Draft Constitution of the EU, which not only in Art. III-193 explicitly enunciates the principle 'to preserve peace, prevent conflicts and strengthen international security, in conformity with the principles of the United Nations Charter', but also in Art. 3 speaks of the objective of 'strict observance and development of international law, *including respect for the principles of the United Nations Charter*', presumably intending that the development of international law is to be pursued in accordance with the prin-

In many cases in which reference is made to Article 90, little more is asserted than that this provision implies abidance by the law as it stands, or as it is alleged to stand. It is an invocation of international law when some infringement or divergence from international law is perceived: the deployment of cruise missiles<sup>40</sup> or of nuclear weapons in general,<sup>41</sup> removing the Taliban regime in Afghanistan,<sup>42</sup> the bombing of Serbia and Kosovo,<sup>43</sup> the ousting of the regime of Saddam Hussain<sup>44</sup> – or for that matter allowing entrance to the Netherlands to persons bearing responsibility for cases of torture in Argentina,<sup>45</sup> allowing political parties which refuse female candidates to stand in election for their party,<sup>46</sup> or a

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principles of the Charter. This is a substantive limitation on the means of promoting that development, which is absent from the Dutch Constitution. One should recall that in the 1920s the provision in the Netherlands Constitution involved not making use of rights (notably the right to resort to armed force). But if one assumes (in my opinion incorrectly) that the NATO and WEU treaties involve an automatic duty to assist the attacked with the use of armed force (as has been suggested in governmental circles in the aftermath of 11 September), the question arises whether Art. 90 can be used as a basis for refraining from fulfilling this treaty obligation.

40. For the *Cruise Missiles* cases, see President District Court The Hague [Rechtbank 's-Gravenhage], 20 May 1986, AB 1986, 445, 18 *NYIL* (1987) p. 417; Pres. District Court The Hague, 5 November 1985, AB 1986, 41; Supreme Court 10 November 1989, NJ 1991, 248; 22 *NYIL* (1991) p. 453 and 106 *ILR* p. 400; see particularly also P.J. Kuyper and K.C. Wellens, *Cruise Missiles in Europe*, 18 *NYIL* (1987) p. 169.

41. Supreme Court 21 December 2001, No. C99/355HR, NJ 2002, 217, 34 *NYIL* (2003) p. 383 <www.rechtspraak.nl> LJN No. ZC 3693 (*Nuclear Weapons*), plaintiff stressed throughout the proceedings that Art. 90 of the Constitution should be applied.

42. President of the District Court The Hague, 26 October 2001, *KG* (2001) No. 287 <www.rechtspraak.nl> LJN No. AD 4855 (*Afghanistan*), Vereniging van Juristen voor Vrede, De Groenen, Vrouwen voor Vrede, Haags Vredesplatform, Nieuwe Communistische Partij against the State of the Netherlands, where plaintiffs claimed that cooperation or support to the military actions by the US and its allies, or the use of military force by the Netherlands was an infringement of peacemaking principles and norms of public international law and 'as a consequence an infringement of Article 90 of the Constitution and therefore unlawful'.

43. Culminating in a judgment of the Supreme Court, 29 November 2002, C01/027 HR, *NJ* 2002, 35 <www.rechtspraak.nl> LJN No. AE 5164 (*NATO bombardments of Yugoslavia*).

44. See numerous interventions in the press; also District Court The Hague 31 March 2003, *KG* 03/331, <www.rechtspraak.nl> LJN No. AF 6540 (*Iraq*), para. 3 in which plaintiffs, inhabitants of Iraq, complain that the State of the Netherlands, by giving political, diplomatic and military support to military operations in Iraq, is co-responsible for an infringement of the prohibition of the use of force and aggression, and hence infringes Article 90 of the Constitution.

45. R. van Elst, *NJB* (2001) at p. 260: 'Finally a provision of national law: Article 90 [...] The international legal order (i) prescribes that those who are responsible for torture and crimes against humanity are to be prosecuted, (ii) condemns regimes whose policy fosters such crimes, (iii) ostracises also those who are politically responsible. The Netherlands does not promote the international legal order by giving hospitality to persons who may possibly have criminal but certainly have political responsibility for the most serious offences against human rights' [translation LB].

46. R. Holtmaat, *NJB* (2001) p. 1800: 'The arguments which the government gives [for not complying with the views of the CEDAW committee] for not undertaking anything against the SGP [Politically Reformed Party] are identical to those in its reports and oral views to the CEDAW com-

member of parliament talking lightly of parental castigation of children.<sup>47</sup> All these cases are conceived of as involving so many infringements of the various rules of public international law adduced. Supporting these ‘objectionable’ things is an infringement of public international law and hence amounts to an infraction of the constitutional obligation to promote the development of the international legal order.

This invocation of Article 90 seems to be of a radically conservative nature, as indeed it is in some respects. This is ironic because in the cases mentioned, Article 90 is primarily invoked by pressure groups which consider themselves utterly progressive. Yet on further reflection also in these cases the argument often has a ‘promotional’ aspect, although usually this is not put forward prominently. This ‘promotional’ aspect arises from the fact that the provision is invoked in controversial questions. The arguments based on Article 90 usually have the following unarticulated, underlying structure:

- (a) in reality, the government is already under a certain international obligation; public international law already binds it to a certain position, though the government may fail to be aware of this,
- (b) but even if this existing obligation under public international law may not in all respects be considered a perfect obligation, the development of the international legal order is served by accepting and carrying out this obligation as if it were perfect and binding;
- (c) and if the obligation does not exist in actual fact, the development of the international legal order is promoted by creating such an obligation, and this promotion is best served by already taking that obligation *de lege ferenda* upon oneself.

Stage (a) is, so to say, the conservative element – which rhetorically it is always wise to begin an argument with, particularly if in reality one wishes to criticise and change present situations – whereas stages (b) and (c) are the increasingly progressive elements; and here, in these two last stages, is where Article 90 comes in.

Let us compare what was said by the framers of the constitution with this argumentation in public discourse. It is evident that they also start off from the idea of abiding by the law that exists, and hence incorporate the principle *pacta sunt*

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mittee. That the Committee nevertheless arrives at the opposite conclusion, does not seem to be reason for reconsidering its own views. Thus, in my opinion, the government infringes Art. 90 of the Constitution. This provision says that the government of the Netherlands exert itself to promote the international legal order. That means that it has to cooperate in concluding international treaties and that it has to apply them to the best of their ability’ [translation LB].

47. J.C.M. Willems, *NJB* (2001) at p. 2091: ‘A plea for the ‘corrective smack’ by a member of the House of Representatives illustrates how easily – almost light-heartedly – in our country, even in the highest circles, one thinks of the rights of the child. These are law of the land also in the Netherlands, pursuant to Art. 93 of the Constitution. Art. 90 adds to this with the task for the government to promote the international legal order, and therefore also the international rights of the child’ [translation LB].

*servanda*; but they finally add a critical component which goes beyond existent international law. This latter component is necessarily critical with regard to existent substantive norms of public international law.

If this is to be taken as the true meaning of Article 90, one must take care not to identify the ‘international legal order’, whose development Article 90 enjoins to promote, with the body and substance of actually existent international agreements. But this critical meaning also implies that the ‘international legal order’ of Article 90 is not (or not necessarily) the *existent* ‘international legal order’.

These distinctions and the truly dynamic meaning of Article 90 can be illustrated by looking at other provisions of the Constitution and of acts of parliament which speak of the international legal order.

The first constitutional provision is Article 97(1) which speaks of the existence of armed forces ‘for the defence and protection of the interests of the Kingdom, and in order to *maintain and promote the international legal order*’.

On a strictly conservative understanding of the notion of the international legal order, which equates it with the actually existent rules of public international law, the words ‘to maintain’ overshadow and outweigh the words ‘to promote’ in this provision. This would be, a safe interpretation of this provision. But if, ‘to promote’ is understood by the international legal order more strictly, military interventions would be allowed in order to ‘promote’ the international legal order. This is – hopefully – not intended to make it possible for the army to be called in for avenging and enforcing simply any treaty clause at the expense of other rules and principles of international law (though it might indeed be called in to protect fundamental norms of the international legal order when they are at stake – here the ‘meta-norm’ and the substantive norms may coincide).<sup>48</sup> It could be highly dangerous if ‘the international legal order’ to which Article 97(1) refers, were to be some desirable international legal order which is radically different from the present legal order.<sup>49</sup> That might put the country beyond the pale of the present international order. Thus, the whole emphasis in Article 97(1) should be placed not on promoting *a development* of the international legal order, but on *promoting and maintaining* the international legal order as it is – and that is quite the opposite of the essence of Article 90.

Two Acts of Parliament, the Act on International Sanctions 1977 [*Sanctiewet*] and the Imports and Exports Act [*In- en Uitvoerwet*], neatly distinguish between

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48. See also Art. 100(1): ‘The Government shall inform the States General in advance if the armed forces are to be deployed or made available to maintain or promote the international legal order. This shall include providing information concerning the deployment of or making available the armed forces for humanitarian aid in cases of armed conflict.’ This last sentence seems to be a specification of a legitimate interest of promoting the international legal order.

49. See also n. 79.

‘the international legal order’ and the international obligations and instruments of that legal order.

The Act on International Sanctions 1977 speaks of ‘treaties, decisions or recommendations by international organisations, or international agreements, which concern maintaining or restoring international peace and security *or* promoting the international legal order’, which can induce the passing of national legislation imposing sanctions.<sup>50</sup>

The Imports and Exports Act distinguishes between ‘an interest of the international legal order in itself’ and ‘an international agreement with regard thereto’. The latter implies a concrete treaty norm (or decision of an international organisation), whereas the former presumably refers to maintaining the legal framework of international society – presumably, because the legislative history does not reveal what is to be understood by ‘an interest of the international legal order in itself’.

We cannot exclude that in fact the legislature here confused (or to put it more kindly: identified) the *international legal order* with *international society*. And in fact, whenever the words ‘maintaining or promoting the international legal order’ are used, doubt creeps in as to whether ‘the international legal order’, or only any particular legal norm or, different again, merely international society, is meant. This identification of the international legal order with international society is unwarranted as far as Article 90 is concerned. That is the issue to which we now turn.

## 5.2 The international legal order or international society?

A brief comparison with the relevant provisions in the Draft Constitution of the EU may highlight the relevant differences. Firstly, Article 3 refers to contributing to ‘the development of *international law*’, just like Article III-193 refers to ‘respect for international law’ (para. 1), the consolidation and support for ‘democracy, the rule of law, human rights and international law’ (para. 2 sub b). However, Article III-193 also refers to the objective to ‘promote an international system based on stronger multilateral cooperation and good global governance’ (para. 2 sub h); interestingly, here the reference is – and different from Article 90 of the Netherlands Constitution – to ‘the *international system*’, not to ‘the *international legal order*’.

Dutch constitutional history makes it quite clear that the framers of the provision – in contrast to the Van Eysinga Commission – were adamant in not speaking of promoting the development of the *international community*, but of the *international legal order* in Article 90 of the Netherlands Constitution. The inter-

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50. Sanctiewet 1977, Art. 2.

national community, or international relations, logically precede the international legal order. The first was considered to be an empirical fact, the second to be present only in a more embryonic stage.

This implies that the constitutional duty of Article 90 is *not* one concerning the particular form which international society should take in a politico-institutional sense, but is about the basis on which international society should function: this should be, according to Article 90, on the basis of law. The development of *the legal basis* of international society is what it has in view, *not international society itself*. So the inescapable conclusion must be that Article 90 is about the role of law in international relations, not about international relations as such.<sup>51</sup>

What the minister said, alluding to Henri Bergson, about *une évolution créatrice* of this legal basis, expressed his understanding of the international legal order as being of an integrative and unifying nature, binding states together within international society.

Two types of remarks should be made regarding this understanding, firstly regarding its historical context at the time, and secondly regarding the present conditions of international society.

Whatever the merits of this distinction from the point of view of legal theory, the slant towards law and legalism versus that of socio-political reality may be understood as expressing a feature of Dutch foreign policy, which is closely related to the moral undertones which have been one of the two constant factors in Dutch foreign policy, symbolically characterised as the merchant and the vicar.<sup>52</sup> The choice by a smaller power like the Netherlands for law as the basis for engaging in international relations, is inspired by a desire for a normative mutuality which is lacking when relations are based on naked power. In this sense law creates a form of respect among states, which can be expressed in terms of normative equality, an equality which is absent if international relations are pursued only on the basis of relative power relations. According to this understanding the law is ideally to be conceived of as equal for all, the legal framework which is strived after as the basis of international society has a unifying effect, and tends towards relations of international cooperation and even integration.

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51. Hence, when the jungle of advisory bodies and committees surrounding the government was tidied up very drastically, it was decided by way of exception that a separate Advisory Committee on Issues of Public International Law, *Commissie van Advies voor Volkenrechtelijke Vraagstukken*, was to be retained next to the Advisory Council on International Affairs, *Adviesraad Internationale Vraagstukken* – which was inspired by Art. 90; see Bijl. Hand. II 25460, 3, pp. 1-2.

52. J.J.C. Voorhoeve, *Peace, Profit and Principles: a Study of Dutch Foreign Policy* (The Hague, Nijhoff 1979); B. de Graaff and D. Hellema, *De Nederlandse buitenlandse politiek in de 20e eeuw* (Amsterdam, Boom 2003); D. Hellema, *Neutraliteit en Vrijhandel: de geschiedenis van de Nederlandse buitenlandse betrekkingen* (Utrecht, Spectrum 2001).

The emphasis on the unifying and integrative force of law is historically understandable in the context of the early 1950s in Europe, when the movement towards regional integration was immense. It held great appeal in governmental circles; the Council of Europe and similar initiatives were viewed as preludes to possibly full political integration of the countries of Western Europe. Likewise in broad layers of society there was support and enthusiasm for these ideas. It was the heyday of the Societies for the United Nations and the European Federalist Movement, which had countless active local branches throughout the Netherlands.<sup>53</sup>

Rapid developments in the organisation of international society were very much at the background of our constitutional provision. The final report of the Van Eysinga Commission was written entirely in the key of the great changes in the structures of foreign relations and instruments of foreign policy due to the huge increase in international cooperation, not least through all forms of international organisation in and outside the framework of the UN.<sup>54</sup> Yet this provision – contrary to the proposals of Van Eysinga, which concerned ‘the development of international society’ – was *not* aimed at this, but at the instruments on which it should be based and by which it should be guided. This brings us to our second remark, concerning the present state of international society and international law.

It may seem paradoxical, but the large increase in the scope, size and intensity of international relations and above all the proliferation of international fora, have spilt over in the legal infra-structure (or as the government of 1953 would call it: the ‘super-structure’) of public international law. No longer is public international law considered to provide an overarching, common and unifying framework, but has become itself characterised by fragmentation.<sup>55</sup> The fragments can only be held together by the most general of principles and norms, which often are emptied of concrete substance and merely procedurally regulate interests which are to be reconciled on the basis of ‘soft law’ or by the delegated action of the subjects of those interests themselves. This has led to a decrease in the prominence of states and state-dominated international organisations to the benefit of sub-state and non-state actors. This, in turn, reflects a relative eclipse of the relevance of public international law.

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53. See the *Jaarverslagen* 1954-1955 and 1955-1956 and *Jaarboekje* of the *Vereniging voor Internationale Rechtsorde*, the *Vereniging voor de Verenigde Naties* respectively for an impression of the number and spread of such associations.

54. *Eindrapport*, pp. 3-12, et seq.

55. See Report of the ILC from its 55th session (A/58/10), pp. 270-271 (para. 419). See also M. Koskenniemi and P. Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, 15 *Leiden JIL* (2002) pp. 553-579.

Does this mean that the government is under the constitutional obligation to counteract this tendency in as much as it runs counter to the tendency enunciated by Article 90 of the Constitution?

In answering this question, one should not overestimate the substantive meaning of Article 90 in this context. It may be useful to recall once again that Article 90 is not intended to be about international politico-institutional structures. Therefore, it does not imply a substantive view of desirable structures of global governance, transnationalism, supranational approaches or good old inter-governmentalism. It simply states that the development of the law underlying these structures, whatever their type, should be promoted.

Article 90 opens up the possibility of political discourse concerning the desirability of developments and tendencies in international society, and focuses on the reinforced role of law. This discourse is branded as a matter of constitutional concern, by imposing a duty on the main state actor on the international scene, the government, to promote the development of the international legal order. It does not hold any particular views, nor could it, of what that international legal order should consist of in terms of substantive legal norms, beyond expressing certain historical preferences such as that of peaceful means over the use of armed force (and since 1983 values such as human rights, a just distribution of material and immaterial goods, and other values which induce warm feelings).<sup>56</sup>

### 5.3 The interest of the international legal order or the national interest?

In line with the emphasis on the role which law is to play in international relations, there is an implied sense of the high importance of international law as such. Together with the introduction of the idea of promoting the development of the international legal order, the constitutional system entrenched the openness of the domestic legal order to binding rules of international law in a set of provisions, adopted in 1953:

‘Article 65

Statutory regulations in force within the Kingdom shall not be applicable if such application is incompatible with treaties which have been published in accordance with Article 66 either before or after those statutory regulations have been made.

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56. The position of public international law is strongly dependent on the development of the international relations (international society) in which it functions, as we have just illustrated by contrasting the views which could be expressed in the course of the constitutional amendment of 1953 with those now prevailing in a politico-institutionally more fragmented international context. Undoubtedly that can be explained by the fact that legal and political discourse in public law cannot really be considered to be entirely separate and autonomous; legal discourse is itself a form of political discourse.

## Article 66

[...]

Treaties are binding on everyone insofar as they have been published.

## Article 67

(2) Articles 65 and 66 are also applicable to decisions of international organisations under public international law.<sup>7</sup>

It is true that these provisions were altered in 1956 in order to restrict the primacy of international norms over any form of national law to those which are self-executing (cf., presently Arts. 93 and 94 of the Constitution), but the point made here is that international law was accorded a higher rank than national law at all.<sup>57</sup> This at least was the undisputed view of many legislators in 1953 and intended to reveal once more the internationalist moral inclinations of Dutch foreign policy from the normative point of view.

This raises the question what the relation of the national interest is towards that of the international legal order. One might incline to the view that the national interest is always to be subjected to that of the international legal order in the sense of national interests having to give way to the international interests.<sup>58</sup> This may sometimes be so, but certainly not always and not necessarily.<sup>59</sup>

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57. On the role of international law in the Netherlands legal order, see J.G. Lammers en L.J. Brinkhorst, 'The impact of international law, including European Community law, on the Netherlands legal order', in D.C. Fokkema, J.C.M. Chorus and E.H. Hondius, eds., *Introduction to Dutch Law for Foreign Lawyers*, (Deventer, Kluwer 1978) pp. 561-584; furthermore L. Erades, 'International law and the Netherlands legal order', *International Law in the Netherlands*, Vol. 3, pp. 376-434; more extensively the part on the Netherlands in L. Erades en W.L. Gould, *The Relation between International Law and Municipal Law in the Netherlands and in the United States* (Leiden, Sijthoff/New York, Oceana 1961) and most extensively L. Erades, in M. Fitzmaurice-Lachs and C. Flinterman, eds., *Interactions between International and Municipal Law; a comparative case law study* (The Hague, TMC Asser Instituut 1993) 1037 pp. A study of the constitutional history is J.G. Brouwer, *Verdragsrecht in Nederland; een studie naar de verhouding tussen internationaal en nationaal recht in een historisch perspectief* (Zwolle, W.E.J. Tjeenk Willink 1992) 360 pp; he argues that in 1953 the Constitution changed from a dualist to a monist perspective, and in 1956 back again to a dualist approach, meaning with the terms the determination of the status of international law on the basis of public international law ('monism') or the determination of this status by national law ('dualism').

58. It can also happen, of course, that the interest of the international legal order or of international relations with foreign powers can be reduced to a balancing of national foreign policy interests with other national interests, for instance economic interests; this happens for instance in cases where on the basis of the Imports and Exports Act export restrictions are imposed, see e.g., Trade and Industry Appeals Tribunal [College van beroep voor het bedrijfsleven] 31 January 2001, No. AWB 99/495 and 99/496, *SP Aerospace and Vehicle Systems v. State Secretary of Economic Affairs*, to be found on <www.rechtspraak.nl> under LJN-No. AA9865; see earlier, Trade and Industry Appeals Tribunal 21 October 1986; Trade and Industry Appeals Tribunal 17 June 1988, AB 1989, 503, para. 6.6; 21 *NYIL* (1990) p. 460; 101 *ILR* p. 449

59. Thus the restriction of the primacy of international law to self-executing provisions of treaties and of decisions of international organisations, means that in case of conflict, provisions of Acts

To broaden our view on the matter, we can once again take our cue from a brief look at the proposed Draft Constitution for the European Union. The provision on the EU objective of contributing to the strict observance and development of international law opens by stating quite unreservedly: ‘In its relations with the wider world, the Union shall uphold and promote its values and interests.’

It is from ‘its interests’ that it next formulates the objective of observing and developing international law. Obviously, the EU’s own interest is not thought of as opposed to those of present and future international law.

As far as the Netherlands is concerned, the idea of the national interest being subjected and subordinated to that of the international legal order can at any rate not be based on Article 90. First of all, Article 90 – just like the EU Draft Constitution – makes serving the development of the international legal order into a national interest of constitutional rank: the national interest is perceived to consist in serving the development of the international legal order. Thus, we have seen that the preference for seeking peaceful conflict resolution is one of those more substantive principles which are derived from Article 90, but this merely reflects a principle which is part of that international legal order. The cutting edge of this principle though is not so much in seeking peaceful resolution as such, but in doing so when resort to armed force is allowed. It is difficult to maintain that the interest of the international legal order dictates any particular peaceful course of action if it allows the use of non-peaceful means. In other words, it is primarily a national perception of the interest to be served which determines the course of action to be taken.

Secondly, as mentioned above, the interest of promoting the development of the international legal order leaves in principle open what this international legal order should look like – apart from the fact that it should be one based on law, the precise content of that law is undetermined. This also implies that the more substantive view of the international law sought after should necessarily be based on a national perception of what is desirable. Thus, in Article 100(1), last sentence, the Constitution specifies in an indirect way that providing humanitarian aid in international conflict promotes the interests of the international legal order.<sup>60</sup> Also through legislative instruments, and of course through actual policies, clearer articulation can be given of the substance of what the international

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of Parliaments have priority over rules of customary international law and of non-self-executing provisions of written law; see Supreme Court 6 March 1959, *NJ* 1962, 2 with ft.; D.J. Veegens (Nyugat) 10 *NILR* (1963) p. 82, and for the possible implications of later case-law see L.F.M. Besselink, ‘Van stoomschip tot kruisvluchtwapen – rechterlijke toetsing aan het volkenrecht binnen de Nederlandse rechtsorde’, *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (1990) pp. 266-269 and 384-386.

60. See n. 48.

legal order should be about. Thus, one can see how the duty to promote the development of the international legal order is put into practice by the ratification policy pursued with regard to ILO-conventions. Most of these conventions contain minimum norms to which the national legal order has been living up, but – as the government has put it – this ‘is in itself no reason not to ratify. We are concerned primarily not with stimulating our own legislation, but with actually bringing about global minimum norms.’ However, ‘the Netherlands will not ratify when the convention contains an element which is undesirable or difficult to fit into the national situation’.<sup>61</sup>

Essentially, and I would say by definition, Article 90 is a matter of the pursuit of national interest. Yet, the counter-argument could be raised, that the international legal order may require divergences from national law. This may not only happen in the form of a conflict between international and national law which is at it were ‘accidental’ and concerns relatively minor legal arrangements, but also when the international legal order requires the prevalence of an international interest over a well-established and fundamental notion of national law.

Some constitutions do take such situations explicitly into account and either prohibit divergence from constitutional norms and principles<sup>62</sup> or make them conditional on substantive or formal criteria to be fulfilled, particularly as concerns the conclusion of treaties. The Netherlands Constitution is an example of the latter: at present it allows the Kingdom to become party to treaties which diverge from the Constitution if such treaties are approved with a majority of two thirds of the votes cast. Before 1983, the conclusion of such treaties was not only conditional on this formal criterion but was made conditional also on the substantive criterion that the conclusion was ‘necessary for the development of the international legal order’ – a condition which was intended to be absolute and very strict in 1953, when it was introduced at a very late stage of the proceedings for changing the Constitution. (In 1983, without much attention being paid to it at all, this criterion was deleted in a fit of realism for reasons which are hard to square with Article 90: the criterion of promoting the international legal order

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61. See Bijl. Hand. II 23900 XV, No. 44, pp. 7-8.

62. Finnish Constitution, Art. 94(3): ‘An international obligation shall not endanger the democratic foundations of the Constitution’ (note that in Finland it is permitted to pass legislation which diverges from the Constitution, which presumably also means that treaties can so diverge); Spanish Constitution Art. 95(1): ‘The conclusion of an international treaty which contains stipulations contrary to the Constitution shall require a prior constitutional revision’; Russia, Art. 79 of the Constitution: ‘The Russian Federation may participate in inter-state associations and delegate some of its powers to them in accordance with international agreements if this does not restrict human or civil rights and liberties or contravene the fundamentals of the constitutional system of the Russian Federation.’

was deemed to be too vague and also one might wish to conclude such a treaty also for other reasons.)<sup>63</sup>

Additionally the conduct of foreign affairs may diverge from constitutional principles outside the context of international law-making. One of the clearest examples of this regards the constitutionally founded principle of transparency and open government.<sup>64</sup> This conflicts with the notions of confidentiality and secrecy prevalent in international relations. As a consequence, an exception to the right of public access to information has been included in the relevant legislation, which amounts to a balancing of interests: the interest of publicity is to be balanced against the interests of 'the relations of the Netherlands with other states and with international organisations'.<sup>65</sup> This exception has given rise to a fairly large body of case-law, which in a great many cases prevented the disclosure of information.

However, two points should be made in this context. Firstly, determining what the national interest requires is not necessarily identical to determining this in a solipsist manner or in a unilateralist manner. Second, here as in other casuistry we should not confuse a particular rule or principle of international law with the international legal order as such. A particular norm of public international law should not be confused with a desired development of the international legal order. It is one thing to say that in a whole range of circumstances the pursuit of international relations should, in accordance with international law, remain confidential. Quite a different question is whether the fundamental principle of public order that governance is to be transparent and open to the public should be extended to international governance; and whether the development of the international legal order should be promoted in that particular direction that it

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63. *Naar een nieuwe Grondwet, supra* n. 36, at p. 69. Cf., for instance the Danish Constitution, Art. 20(1): 'Powers vested in the authorities of the Realm under this Constitution Act may, to such extent as shall be provided by Statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of the international legal order and co-operation between nations'; Greece, Constitution Art. 28: '(2) It shall be possible under the Constitution to recognise the competence of bodies of international organisations by virtue of treaties or agreements with a view to serving important national interests and promoting co-operation with other countries. A majority of three fifth of the total number of deputies shall be required for the passing of laws ratifying such treaties or agreements. (3) Greece shall accept restrictions on the exercise of national sovereignty by laws passed by the absolute majority of the total number of deputies, if this be dictated by important national interests, if human rights and the foundations of the democratic regime be not violated, and if this be effected on the basis of the principle of equality and on condition of reciprocity.'

64. See Art. 110 of the Constitution: 'In the exercise of their duties government bodies shall observe openness and transparency [Dutch: *openbaarheid*] in accordance with rules to be prescribed by Act of Parliament.' This provision is translated into a right of public access to information in the *Wet openbaarheid van bestuur* [Act on Public Administration].

65. Art. 10(d) *Wet Openbaarheid van Bestuur*.

should no longer be primarily based on secrecy and confidentiality, but on the same principles of openness and transparency. Given the fundamental nature of these principles as part of the rule of law under national public law, this may well be desirable. And this may mean that in case of requests of disclosure of information which may touch relations of the Netherlands with other states or international organisations, the government should at least first request the state or organisation involved to consent to or tolerate the disclosure of the relevant information before ‘the interest of relations with other states or international organisations’ can reasonably be invoked as a grounds for refusing disclosure. This has not generally been the approach of the government in these cases, nor of courts having to decide them – at any rate this has not, as far as I am aware of, been related to the duty under Article 90 of the Constitution.<sup>66</sup>

In conclusion we may say that there may be cases in which national norms and interests have to give way to the interests of the international legal order. But this is a consequence of norms other than Article 90. Article 90, after all, is about *promoting the development* of the international legal order – this means it is about an international legal order which one has to strive after, which is not identical to the international legal order as we know it now.

#### 5.4 **Promoting the development of the international legal order: policy objective or attributing powers to the government?**

After the excursions into some pertinent questions to which Article 90 gives rise, we now turn to a particular aspect of the third historical layer, which was added to the provision in 1983. In fact, the 1983 revision gave Article 90 a quite different aspect, over and about the meaning it originally had and has retained as well. In some respects this side-tracks things we have said. It has introduced almost accidentally a meaning which was never in the original.

This relates to the legal subject to whom the duty to promote the development of the international legal order is addressed: the government. This is not because the government is the only one that is to decide about how to promote or develop the international legal order, but simply because the government represents the state in international relations, and that is mainly where that international legal order is to be developed. The predecessors of Article 90 had not in the least the intention of constitutionally *establishing* that the government had this role in international affairs, because this was done already (apart from other things which were read into that provision) by the article granting supreme authority over foreign policy to the king.

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66. This is in quite stark contrast to the policy pursued by successive Dutch governments in the particular context of the principle of transparency in the EU.

All this was quite unproblematic, except that in 1983 – as mentioned above – the provision attributing supreme authority of the King over the conduct of foreign affairs was deleted. This provision had given rise to misunderstandings and misgivings. Even as late as 1916, the government had used it to object to the extension of parliamentary influence on foreign policy, when it strongly objected to the proposal to set up a parliamentary committee for foreign affairs in the House of Representatives. This would pave the way to the government having to consult parliament on foreign policy, and this, so the government argued, would be an encroachment on the constitutional powers of the government.<sup>67</sup> (As noted, this reading had become entirely obsolete by the time of the constitutional revision of 1922.) In 1983, apart from the provision on the supreme authority over the conduct of foreign affairs, also the general provision which attributed the executive power to the government was deleted from the Constitution, because it was considered superfluous.

This combination of events had the paradoxical effect that the power of the government to represent the Kingdom of the Netherlands in international relations, with concomitant powers to negotiate treaties etcetera, no longer had any clear basis in the text of the Constitution.<sup>68</sup> This basis was subsequently read into Article 90. This already occurred in the course of the revision of 1983, even though neither the members of parliament who had insisted on including (or rather: retaining) Article 90 in the Constitution, nor originally the government, had ever intended it to have that particular meaning.<sup>69</sup>

This reading has far-reaching consequences. The most important of these is that it changes the nature of Article 90. So far, we have read Article 90 as a provision which is about desirable aims of foreign policy conduct. It is of a *regulative* nature: it regulates *how* the government is to make use of the powers it has in foreign affairs, powers which have been attributed to it by *other* attributive norms. In the new reading, Article 90 *itself* attributes power to the government; it has been turned from a *regulative* norm into an *attributive* norm.

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67. This was subsequent to the passing of a resolution, the Motie-Van Leeuwen; see Hand. II 1916-1917, p. 2503.

68. It still had a basis in the Charter for the Kingdom [*Statuut voor het Koninkrijk*], which regulates the relations between the Netherlands and its autonomous overseas territories in the Caribbean, and which states that foreign affairs is a competence of the whole realm, over which the King (i.e., constitutionally: the government) exercises executive power; see Art. 3(1) sub b in connection with Arts. 2(1) and 4(1) of the Charter.

69. The origin of this change is due to a remark of a member of the Senate, see *Naar een nieuwe Grondwet*, *supra* n. 36, at p. 173, who derived from a number of remarks made in the House of Representatives (which actually concerned the old issue whether the provision would give government reason to restrict the normal rights of parliament) together with the wording of the provision and the elimination of the provision on the supreme authority of the government over foreign affairs, that Article 90 specifically attributes the power over foreign affairs to the government. The government in response took over this reading, *ibid.*, at p. 176.

This is next combined with what this power is attributed for, i.e., to ‘promote the development of the international legal order’. However, as we must conclude from the previous sections, this is a quite open norm. So by understanding Article 90 as attributing powers to the government, in fact it would attribute an entirely open and limitless power to the government.

In fact, understanding Article 90 as an attribution of powers, is turning both its meaning and historical intentions upside down. Attributive norms have by definition a demarcating effect towards other subjects than the one to which a power is attributed; attributing a power to one organ usually means that only that organ has original power to act. In this case, if a power is supposed to be attributed to the government, this has in principle the effect of not attributing it to other state institutions, for instance a decentralised authority, or a minister (as distinct from the government as a collective body, which the Constitution defines as the King and the ministers together), or, notably, to parliament. This state of affairs may give rise to exactly the kind of misunderstandings and misgivings which were reason to abolish the old attributive provision on foreign affairs which preceded the provision on the duty to promote the development of the international legal order.<sup>70</sup>

#### 5.4.1 *The use of armed force to promote the development of the international legal order*

An example may illustrate the use to which Article 90 in its attributive sense has been put. This concerns the sending of troops on international missions for maintaining and enforcing peace, when the provisions of the Constitution on the armed forces made no reference yet to international tasks, i.e., before 2000 when the Constitution was amended (maintaining and promoting the international or-

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70. In fact, one notes that in post-1983 practice that governments have used this kind of reading to oppose parliamentary influence. Thus, there has been a tremendous ‘to-ing and fro-ing’ about the question whether the government should inform parliament about the contents of a negotiated treaty before the treaty has actually been signed. Only after much hesitation, was in 1991 the House of Representatives given a promise that it will be informed of the result of negotiations on ‘politically important’ treaties before the government binds itself to them by signing the treaty. Even such an immensely important treaty as that of Maastricht establishing the European Union – negotiated under Dutch chairmanship and widely discussed and at that stage even published unofficially – the government refused to lay before the House of Representatives after the negotiations had finished but the text had not yet been signed; Bijl. Hand. II 1990-1991, 21 214, No. 8, pp. 2-3; on the incidents surrounding the Maastricht Treaty see Hand. II 1991-1992, pp. 1755-1756; there was, curiously, a motion passed by the House on 28 November 1991, which rejects certain provisions ‘in the present text of the draft-treaty’ although formally the House did not have that text at its disposition. However, the House rejected a resolution to produce the text of the Maastricht Treaty to the House in conformity with the promise of 11 January 1991, before the treaty was signed, see Bijl. Hand. 1991-1992, 22 300 V, No. 54 (motie-Van Middelkoop), Hand. II 1991-1992, p. 2035, left column.

der were included among the tasks of the armed forces).<sup>71</sup> In the older version, Article 97(1) read: ‘All Dutch nationals who are capable of doing so, shall have a duty to cooperate in maintaining the independence of the State and defending its territory’; and Article 98(1) ‘To protect the State’s interests, there shall be armed forces, which shall consist of volunteers, and which may also include conscripts.’

At the time, there was growing uncertainty on the precise legal basis for participating in peace missions, particularly when the situation concerned missions in which conscripts were sent to areas where there was considerable tension and armed hostilities prevailed. Thus already in 1980, the Supreme Court of the Netherlands, decided that sending draftees against their will on UN missions such as UNIFIL required a clear legal basis, which was judged not to be the case.<sup>72</sup> Such a legal basis could of course have been found in the Constitution, had there been a provision granting the power to engage the armed forces – which at the time constitutionally consisted of conscripts and professional soldiers – in such international peacekeeping or peace enforcement. Evidently, the Supreme Court was unable to find such a provision in the Constitution.

In various missions since then and up to the amendment of 2000, the government has had recourse to the argument that engaging in such missions is covered not only by the provisions on the armed forces mentioned above, but also by Article 90, which imposes the obligation to promote the development of the international legal order.<sup>73</sup> This claim – put forward when there was large political support for such missions – was on those occasions not contradicted by members of the House of Representatives; no member of the House of Representatives at the time discussed the issue of what legal basis is required for those missions. At the time of sending armed forces to the Gulf in the framework of ousting Iraqi forces from Kuwait, which had raised controversy in public opinion (but considerably less in parliament), the government did make clear that ‘such deployment [on the basis of Article 98 of the Constitution as it then read] can also be for the purpose of promoting the international legal order, as provided in Article 90 of

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71. See on this amendment H. van Schooten and W.G. Werner, ‘Democratic Control of the Use of Force under the Dutch Constitution’, 10 *Tilburg For. LR* (2002) pp. 43-62; also L.F.M. Besselink, ‘The Constitution and the Armed Forces’, 7 *European Public Law* (2001) pp. 365-374, and by the same author, ‘Military Law in the Netherlands’, in G. Nolte, ed., *European Military Law Systems* (Berlin, De Gruyter Rechtswissenschaften 2003) pp. 547-646.

72. Supreme Court 8 February 1980, *NJ* 1981, 334, 12 *NYIL* (1981) p. 353.

73. E.g., the deployment of military units in the second Gulf crisis in January 1991, *Bijl. Hand. 1990-1991*, 21664, 25, p. 4: ‘The legal basis for the despatch was and is the Constitution, in particular Article 90 (promotion of international legal order) and Article 98 (defence of the interests of the State).’

the Constitution. Parliament has no right of veto in this matter: government decisions are subject only to ministerial responsibility.<sup>74</sup>

There was one occasion, though, on which the point was raised outside the context of any particular mission – that is to say, under the best circumstances for a detached, dispassionate consideration of constitutional issues. The competent House of Representatives Committee discussed the matter in the context of the so-called Framework for Sending Troops, the *Toetsingskader* – a rather loose set of points of attention which play a role in deciding whether or not to place Dutch troops at the disposition of international missions. In that discussion, the government explained the constitutional grounds for sending troops abroad in terms of the interests of the State in the sense of then Article 98 (see above), and of the general provision on the development of the international legal order as a task for the government as intended in Article 90.<sup>75</sup> This construction was considered unsatisfactory by nearly all the spokesmen for the various political parties, both those supporting the government coalition and those from the opposition. In the debate with the government, the Minister of Foreign Affairs summed the matter up as follows, according to the résumé of the debate:

‘Article 98 [old version, LB] provides, so to say, the constitutional foothold to deploy the armed forces abroad in order to serve the interests of the state of the Netherlands. The question is whether this encompasses the subject matter of Article 90. The Minister thought it did, but if the majority of the House articulates that this is not the case, there is a constitutional problem.’<sup>76</sup>

The majority of the House as represented in the parliamentary committee did indeed hold an opinion different from that of the minister. The minister’s statement, made in January 1996, most probably contributed to providing a new formulation of the armed forces’ mission statement in the Constitution.

Quite strikingly, the Central Appeals Court for the Public Service and Social Security Matters [*Centrale Raad van Beroep*] the court of highest instance in civil servants’ affairs, decided entirely differently from parliament on the matter. This was in a case concerning a member of the *Koninklijke Marechaussee* [Royal Military Constabulary] who refused to join UNPROFOR in 1995.<sup>77</sup> The person involved argued that carrying out a police task in Bosnia cannot be con-

74. Bijl. Hand. II 1990-1991, 21 664, No. 25, p. 11.

75. Already in 1979 the President of the District Court at The Hague had held that under the interests of the State in the sense of the provision on the armed forces, should be counted the promotion of the development of the international legal order in the sense of Article 58 (2) of the old Constitution; see President District Court The Hague 22 February 1979, AB 1979, 162; 11 *NYIL* (1980) p. 338.

76. Bijl. Hand. II 1995-1996, 23 591, No. 6, p. 11, this author’s translation.

77. Central Appeals Court 7 September 2000 *TAR* (2000); see also L.F.M. Besselink, *De Constitutie en uitzending van militairen voor vredeshandhaving*, *TAR* (2001) pp. 295-306; with a critical response by G. Coolen and reply *TAR* (2001) at pp. 533-535.

sidered as falling within the term ‘interests of the state’ in the old Article 98 of the Constitution (now: ‘interests of the Kingdom’ in Art. 97). The Central Appeals Court held differently, and even referred without further specification to the memorandum of explanation of the bill introducing the amendment to the relevant constitutional provisions (i.e., long after the facts of the case occurred) in order to suggest that under the old provisions there was indeed a constitutional basis for sending troops abroad on these missions.<sup>78</sup>

Thus, the provision which had as its hard core the peaceful settlement of disputes, has become the vehicle for deploying the armed forces; what was meant as a critical provision for improving the international legal order, has been turned into an instrument of upholding and maintaining the existent international legal order<sup>79</sup> – one of the ironies of (legal) history.

#### 5.4.2 *Other attributions of power*

Not only has Article 90 been adduced as a provision conferring powers on the government to send troops abroad (even against the will of individual members of the armed forces). The case-law also mentions that Article 90 attributes quite different powers to the government or to one or more ministers, as the case may be: the power to negotiate the conditions on which a person can be extradited,<sup>80</sup>

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78. Close inspection of the explanatory memorandum indicates that it can hardly support the finding of the Central Appeals Court. It merely states that ‘this task of the armed forces [the maintenance and development of the international legal order] is mentioned separately, because it is true that it can be considered a facet of the interests of the Kingdom, it does not merely aim to protect these interests. [...] The proposed indication of the possibilities to deploy the armed forces is in accordance with present-day practice’ (Bijl. Hand. II 1996-1997, 25 367 (R 1593), No. 3, pp. 3-4, author’s translation) – which of course begs the question whether there was a constitutional basis for that practice; the House of Representatives, on the only occasion on which it was discussed dispassionately, thought that was not the case.

79. The government had great difficulty of explaining the deployment of the armed forces for promoting (as opposed to maintaining) the international legal order; see the tortuous and contorted explanation by the minister of Defence in response to the pertinent criticisms of member of parliament Middelkoop (Hand. II 1997-1998, 13 January 1998, 40, pp. 3244- 3245 at *ibid.*, 3268-3269).

80. District Court The Hague 9 November 1990, para. 6.3.8, quoted in *NJ* 1991, 696: ‘Such division of competence [between the government and the judiciary] is also to be based on Article 90 of the Constitution, in which promoting the international legal order is attributed *to the government*. Should the government fulfil this task in an unlawful manner with regard to the person whose extradition has been requested, this person can subsequently seize the civil court of the matter, which can impose – should the case arise – an injunction on the government to negotiate with the state requesting extradition with a view to obtaining guarantees that it will act in accordance with the norms of Art. 3 ECHR or similar treaty provisions to which the Netherlands is a party and which provides a right for the person whose extradition has been requested.’ [Emphasis added]

the power to conclude treaties,<sup>81</sup> and the attribution of the power to authenticate and verify documents.<sup>82</sup>

The last mentioned case is of particular interest, which should be read in relation to earlier case-law of the Administrative Law Division of the Council of State with respect to the power to forbid ships entrance to the territorial waters. This administrative court in highest instance had based competence of the government on the sovereignty of the state in public international law in the *Long Lin* case,<sup>83</sup> as the highest civil court, the Supreme Court, had previously done this as well.<sup>84</sup> It should be pointed out that under Dutch law in civil cases it is the state itself which is the legal entity which is sued and never a state organ, whereas in administrative courts it is the opposite. The basis for the competence of administrative courts, moreover, depends on an administrative act, which is deemed to exist only if an act has a clear basis in public law. The Council of State's decision to base the power of state officials to take decisions on entry into the territorial waters on state sovereignty under public international law was received critically in the literature and doctrine on the law of administrative procedure.<sup>85</sup>

This may be why in the case on the authentication and verification of legal documents, the Council of State sought a basis for such competence not only in public international law but also some link in domestic law, though it did agree that a specific basis in a national attributive norm was lacking. The international basis was sought in the Convention abolishing the requirement of legalisation for foreign public documents of 1961 (paradoxically, because this Treaty aims to do away with authentications and verifications). As links to national law it pointed to the task of the minister as head of the ministry of foreign affairs and Article

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81. District Court The Hague 28 October 1987, *M&R* (1988) p. 40, *Eems-Dollard*; see also the same court 21 May 1984, *AB* (1985) p. 12; 16 *NYIL* (1985) p. 506; 96 *ILR* p. 338.

82. Administrative Law Division of the Council of State, 18 February 1999, *AB* (1999) p. 143.

83. Administrative Law Division of the Council of State, 10 April 1995, *AB* (1995) p. 498, 27 *NYIL* (1996) p. 354, *Long Lin*.

84. Supreme Court 7 February 1986, *NJ* (1986) 477; 18 *NYIL* (1987) p. 402; *ILR* (1990) p. 436, *Attican Unity*.

85. The power of the State to intervene to salvage a shipwreck as based on its sovereignty as dealt with in *Attican Unity* can be construed as a form of *dominium eminens*. It then concerned a civil court case. Under Dutch law it is not decisive whether it is one state organ rather than another which has acted on a specific legal basis, but it suffices that it concerns an act which must be imputed to the legal person under civil law, which in the Netherlands is never a state organ but the state itself; moreover, in this case the Supreme Court decided that there was no legal basis for competence in any national legislative norm, so not in Art. 90 of the Constitution either. Some commentators have argued that also in *Long lin* the power to refuse entrance to the territorial waters is to be understood as based on state ownership. This is then transformed into a public law basis with a view to construing the admissibility of the case, rather than as a true attribution of power to a particular state organ. Thus, e.g., G.A. van der Veen, annotation in *AB* (1995) p. 498.

90. It stated: 'We cannot fail to notice that according to Article 90 of the Constitution the government promotes the development of the international legal order, and it is the minister's task to take responsibility for foreign affairs. There is therefore an effect of the basis in public international law within domestic law'. In this manner, a legal competence of the state is via Article 90 funnelled (or rather: fumbled) into the national legal order as a legal basis for specific state organs.

In reality, public international law rarely creates powers for national organs – let alone attributes these to one national authority rather than another (after all, under public international law what matters is that powers of particular state organs are attributed to the international legal person, i.e., the state) – public international law rather acknowledges such powers and regulates them. Under normal circumstances it recognizes without further formalities that a minister of foreign affairs can act on behalf of a state and represent that state. This of course cannot prejudice the question whether a minister (or any other state organ) is competent under national law to act, either internally or in international relations. If the acknowledgment under public international law of state sovereignty implies that there is a legal basis for the government to claim such powers via Article 90, that would be the end of one of the foundations of the modern rule of law, to wit the principle of legality, which holds that authority can only be exercised by a particular public authority if it has a specific basis in law. We would truly be pushed back in history to the times when governments claimed *plena potestas* to do as they wished on the basis of their sovereignty. This is the essential objection against turning a regulative norm on how *existent* powers are to be exercised, into an attribution of powers, i.e., a norm which *creates* powers for a particular state organ. Promoting the development of the international legal order would then indeed become a zero sum game, in which promoting the development of the international legal order would detract from national principles at the basis of the national legal order in a democratic state based on the rule of law.

This kind of confusion can only arise out of a casual and haphazard reading of Article 90, which intentionally or unintentionally once again skims over the text and skips the words which refer to promoting a *development* of the international legal order. In none of the cases discussed, is it explained how the conferral of the relevant power *promotes the development* of the international legal order. To be honest, it is very hard to see any development at all in the cases mentioned.

## 6. JUSTICIABILITY: THE COURTS AND ARTICLE 90

For decennia, the promotion of the development of the international legal order was the fairly harmless hobby of associations of academic international lawyers, federalists and world government proponents, who did or did not have a leverage on politics and politicians. However, since the 1980s groups of peace activists have relied on this provision, not only in public debate and political demonstrations, but also in court as interest litigants. As we intimated above, these also relied on Article 90 of the Constitution. As a consequence, apart from the case-law in which courts search for a conferral of powers which they think they have found in Article 90, there is a spate of further case-law in which courts refer to this provision.

This raises the issue of the justiciability of Article 90: is it a provision which can be enforced or even invoked in court? Is not Article 90 a policy objective which does not lend itself to enforcement through courts, similar to the policy objectives contained in the economic, social and cultural rights provisions of constitutions and human rights treaties? Isn't Article 90 a directive addressed primarily to the government, which in turn has the task to carry this out through its policy, legislative and executive initiatives, only thus creating rights, claims and duties which can be upheld in court, but this not without such implementing decisions?

The issue was discussed in the debates surrounding the constitutional revision of 1983 in the context of abolishing the provision which stated that the supreme authority over foreign affairs resides with the government. This discussion was triggered by a publication by the eminent academic Flinterman. He had argued that the provision attributing the supreme authority over foreign affairs to the government could serve as an indication for answering the question to what extent and under which circumstances courts must refrain from adjudicating issues which touch upon foreign affairs.<sup>86</sup> In this he had explicitly taken his cue from the American political question doctrine and the appropriate restraint of courts in answering such questions. The government however, when questioned by a series of members of parliament on the issue, found this too little reason to retain the provision. It held that the courts already showed appropriate wisdom in adjudicating politically sensitive issues, and anyway there was no reason to curtail their powers. This left the particular issue whether Article 90 of the Constitution was justiciable, and if so to what extent, in suspense.

At this juncture, it is necessary to examine the manner in which courts have dealt with the invocation and adjudication of Article 90.

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86. C. Flinterman, 'Het opperbestuur der buitenlandse betrekkingen', *NJB* (1978) p. 802

In the Dutch judicial context, there are two fora in which judicial means exist to enforce relevant rights. Administrative courts can adjudicate whether an administrative decision is unlawful because of a conflict with Article 90. In civil courts there is the possibility to sue the state for an unlawful act or the threat of an unlawful act, which in our case would exist in the infringement of the government's duty under Article 90 of the Constitution. In these proceedings one can ask a court for damages or an injunction preventing the act from occurring. The unlawfulness would in our case usually not so much involve actual damage, but rather requests for an injunction.

### 6.1 Administrative courts: Article 90 as interpretative guidance

The main cases in which interests similar to Article 90 of the Constitution have been raised in administrative courts of highest instance against an administrative decision, concern the Act on International Sanctions 1977 [*Sanctiewet*] and the Imports and Exports Act 1962 [*In- en Uitvoerwet*]. As noted in this legislation the criteria of 'promoting the international legal order' and 'the interest of the legal order in itself' are formulated as (two of the) possible conditions for imposing administrative sanctions, and for refusing import or export licenses. Only once have these criteria been expressly related to Article 90 of the Constitution in court in highest instance. This concerned the refusal of an export licence for submarines ordered by Taiwan for reasons of friendly relations with the People's Republic. This led to considerable political controversy, during which the government had to defend itself in intensive and protracted debates in parliament. In the course of these debates the government also referred to Article 90 of the Constitution in defence of its refusal. When it came to court proceedings, the government similarly relied not only on the criteria of the Imports and Exports Act, but also on Article 90 of the Constitution.

The judgment of the Trade and Industry Appeals Tribunal contains a very interesting set of views on the concept of international legal order and the question to what extent it coincides with international law and international relations. The Tribunal itself found that Article 90 of the Constitution provides clues as to the meaning of 'the interest of the international legal order' in the sense of the Imports and Exports Act, and derived from the history of the 1983 revision that, in the absence of effective global organs with legislative, executive and judicial powers, promoting good and friendly relations with other states promotes the interests of the international legal order (paras. 3.12-16):

<sup>4</sup>3.12. Neither the legislative history of the Imports and Exports Act, nor the preamble of the Decree on Exports of Strategic Goods 1963 provide any insight in what the legislature intended with the term "the interest of the international legal order".

3.13. Points of reference for the meaning of the legislature can, however, indeed be found in the parliamentary history of the present Article 90 of the Constitution, which reads: “The government promotes the development of the international legal order”.

3.14. A nearly identical text was contained in the Article 58 (2) of the previous Constitution. The government had initially proposed to drop that text in the new Constitution, but at the initiative of the Lower House of the States General that text was reinstated in the text of the bill. In the memorandum of reply to the Upper House to the bill, stating that an amendment to the Constitution shall be considered concerning the provisions on foreign relations [...], the government remarked the following: “... We also see in the [proposed text] a task for the government to strive after good relations of the Kingdom with other states, the promotion of peace and security, of the application of human rights and of the honest distribution of immaterial and material goods under the world population. We consider it to be in the interest of this, to promote good international legislation through the conclusion of treaties.”

3.15. This passage can only lead to the conclusion that the framers of the Constitution were of the opinion that striving for good relations with other states must be considered as promoting the interest of the international legal order.

3.16. There is no indication that the legislature in the Imports and Exports Act and the government in the Decree on Exports of Strategic Goods 1963 held differently: for, as defendant [the minister of economic affairs] has rightly remarked, in the absence of effective universal legislative, executive and judicial organs, good international relations are a precondition for the existence of an international legal order; and it is therefore no accident that both Article 1 of the Charter of the United Nations and the Treaty of Vienna concerning Diplomatic Relations of 18 April 1961 [...] place so much emphasis on the interest of friendly relations between nations.

3.17. On these grounds, we judge that defendant, in considering that a serious threat of long lasting disruption of normal relations between the Netherlands and the People’s Republic of China does negatively affect the interest of the international legal order, has not given a wrong interpretation of Article 2 of the Imports and Exports Act or of the Decree on Exports of Strategic Goods 1963.<sup>87</sup>

It is easy to criticise this judgment. The outsider who is not acquainted with the haphazard ways in which even the highest courts in the Netherlands deal with constitutional history, may be surprised at the casualness with which a single statement of the government in the least important branch of parliament could determine not just the meaning of a constitutional provision but the intention of the framers of the Constitution, which involves the views of at least four different organs. Also the construction itself is not without blemishes. The Tribunal verges on obfuscating the difference between the criteria of the Imports and Exports Act and the terms of Article 90 of the Constitution, which – as we discussed in Sections 5.1 and 5.2 above – are quite distinct. Through a looking glass, also the merely rhetorical reference to Article 1 of the UN Charter<sup>88</sup> does

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87. Trade and Industry Appeals Tribunal, 28 March 1984, *AB* (1984) p. 499; 16 *NYIL* (1985) p. 528; 101 *ILR* p. 419.

88. In the whole constitutional history of Art. 90 and its predecessors, there is no explicit or implicit reference to be found to Article 1 of the UN Charter, even if under a certain understanding these may converge in the same direction (which is the case also with very many other international instruments).

not as such add much substance and credit to the construction the Imports and Exports Act, though the final conclusion may in this case may well be deemed correct.

However, the merit of the approach resides in the following. In terms of the question of the justiciability of Article 90, what the Tribunal does is to be understood as an interpretation of the criteria of the Imports and Exports Act in the light of the policy objective of Article 90 of the Constitution. This is quite similar to how courts in other countries interpret constitutional provisions in light of the aims and objectives formulated in the preambles of their respective constitutions. Also in comparative constitutional law, we find courts seeking such interpretative guidance in express policy objectives contained in social, economic and cultural provisions of the constitution.<sup>89</sup> It is not so much Article 90 itself which is enforced in court, but – whatever the flaws or virtues of the argumentation in this case – it is used to shed light on the criteria of the Imports and Exports Act; more precisely with a view to ascertaining whether the refusal can be considered to be reasonably justified. In the case on the submarines for Taiwan, it is used to uphold the decision in the light of Article 90, and leaves a margin of discretion to the government to decide to what extent the refusal of the export licence could be said to be in accordance with its duty to promote the development of the international legal order. This assumes, even in the indirect mode of referring to it in order to construe another legal criterion, that Article 90 of the Constitution is not beyond the body of law on which a court can rely.

It should be noted that there is no other case-law in which the criteria of the Act on International Sanctions 1977 and the Imports and Exports Act are related (let alone equated, which would anyway be inappropriate) to Article 90 of the Constitution. Yet, this one case suggests the role which the policy objective formulated in it can play in court.

## 6.2 **Civil courts: from the touchstone of public international law to injusticiability**

In the civil case-law, two different lines can be discerned. The more recent of these actually hinges on the issue of justiciability, as will be discussed below. Firstly, we briefly discuss the somewhat older line of case-law which, on the contrary, simply assumes that the matter is justiciable, but does so on a narrow and infelicitous understanding of the meaning of Article 90; this line of case-law can assume without difficulty the unrestricted justiciability of Article 90,

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89. See L.F.M. Besselink, 'De publieke taak en sociale grondrechten: de betrekkelijke waarde van sociale grondrechten', in J.W. Sap, B.P. Vermeulen and C.M. Zoethout, eds., *De publieke taak – Staatsrechtconferenties*, Vol. 7 (Deventer, Kluwer 2003) pp. 95-111.

because it takes it merely to mean that one should observe international law as it is.

The last instance of this older line in the case-law exemplifies this. It concerns the case on *Afghanistan*, brought by a consortium of peace activists<sup>90</sup> against the State of the Netherlands as it was decided in first instance by the President of the District Court at The Hague in interim proceedings on 26 October 2001.<sup>91</sup> The case concerned the (alleged) support and cooperation by the Netherlands for the military operations by the US and its allies against Afghanistan in the aftermath of the attack on the World Trade Center in New York on 11 September 2001. Plaintiffs claimed that such cooperation or support was an infringement of peremptory principles and norms of public international law and ‘as a consequence an infringement of Article 90 of the Constitution’. They asked for an injunction to prohibit such cooperation and support until the Security Council of the UN would have passed a resolution on the basis of Article 42 of the Charter providing an adequate basis for such action; they also asked the court to order a communication from the Dutch government to the governments of the US and its allies, to the Security Council, General Assembly and Secretary-General of the UN, stating that every threat or use of armed force against persons associated by the US with the 9/11 attack is an infringement of peremptory principles and norms of public international law; and ‘finally’ it requested an order to the government to submit a draft resolution to the Security Council, General Assembly and Secretary General to that effect.

The President of the District Court quite unreservedly reviewed the legality of the Dutch position in the matter under public international law, and concluded there was no infringement of norms of public international law, and therefore ‘support for such actions are no infringement of Article 90 of the Constitution’.

In this approach, Article 90 serves as a provision which makes it possible, as a matter of national law, to review the compatibility of government acts with positive norms of public international law at large.<sup>92</sup> Yet this exposes itself to the objection that Article 90 is not about public international law as it is, as argued

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90. Vereniging van Juristen voor Vrede [Association of Lawyers for Peace], De Groenen [The Greens], Vrouwen voor Vrede [Women for Peace], Haags Vredesplatform [The Hague Peace Platform] and the Nieuwe Communistische Partij [New Communist Party].

91. See *supra* n. 42. The judgment in final instance by the Supreme Court will be discussed below.

92. Implicitly, the Supreme Court has confirmed this, see Supreme Court 21 December 2001, see *supra* n. 41: plaintiffs claimed an interest protected under the Civil Code (Art. 6:162, the provision on unlawful acts, which is the basis for court injunctions prohibiting them), which is given by the fact that the acts complained of constitute an infringement of Art. 90 Constitution (Part IV, section 4 of the adduced grounds for cassation); the Supreme Court implicitly acknowledged that the plaintiffs had such an interest, without specifying whether Art. 90 was the most relevant, see para. 3.7.2 of the Judgement.

above. Though Article 90 can be said to be about the *further* development of the international legal order, and therefore does not as such do away with the present norms which constitute that legal order, the actual value of the provision is in its critical function: it is about the international legal order as it should be, not about the legal order as it is.

Courts in the last few years may have become more aware of this critique – or is it judicial fatigue at being confronted with each time very similar objections from the same litigants which are in the end perceived as essentially political contestation? However it may, it has also meant that the issue of justiciability more critically enters into the picture.

This issue of justiciability had already been alluded to by some lower courts at an early stage, though not in the most satisfactory manner. Thus the District Court at the Hague – which is the court competent in cases against the State of the Netherlands<sup>93</sup> – called to adjudicate the lawfulness of a decision to deploy cruise missiles on Dutch territory, in a case brought by a large number of organisations and more than 60,000 individual citizens, referred to Article 90 to point out that it is for parliament to consider whether the decisions of the government, which in accordance with Article 90 are to promote the international legal order, are contrary to international law. This court judged that it was therefore not for a court of law to review the decisions of the government after parliament has done so and has formally approved the government's decision. Contrary to standing case-law, the District Court not only considered the application inadmissible, it even declared itself incompetent to adjudicate the matter.<sup>94</sup> This judgment,<sup>95</sup> as far as it concerns the courts' competence and admissibility, was reversed in appeal without any further reference to Article 90.<sup>96</sup> However, the judgment of the District Court shows a certain sensitivity for the foreign policy choices implied in the duty under Article 90, which it next seems to relate to a separation of powers argument according to which it is not for courts but for parliament to judge the policy choices made by the government.

At this point, a short digression is necessary, to discuss the final outcome of this *Cruise Missile* case in order to understand the development of the more recent case-law to be considered hereafter.

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93. This is the legal person which has standing in civil cases under the Dutch Civil code; only when an individual official, for instance a minister, has obviously acted outside the scope of his function in a manner where his actions can no longer be considered as acts in function, will that official have standing.

94. District Court The Hague, 20 May 1986, see *supra* n. 40.

95. Sharply criticised from the perspective of the 'political question' doctrine, by Kuyper en Wellens, *loc. cit.* n. 40, at pp. 171-174.

96. Court of Appeal of The Hague, 30 December 1987, paragraph 5, quoted in *NJ* (1991) p. 248; 20 *NYL* (1989) p. 364.

The case was pursued up to and including cassation, even after it had turned out to have become unnecessary to deploy those weapons on Dutch territory – the only interest for still deciding the case was that the plaintiffs had in first instance been ordered to pay the costs of the winning party (the government). Whereas the Court of Appeal had not reviewed the legality of the deployment treaty because it deemed the review of treaties against other treaties and customary international law impermissible, the Supreme Court rejected that view.<sup>97</sup> Moreover, it went deeply into the question of the permissibility of having such weapons on one's territory, reviewing the compatibility of the treaty to deploy such weapons in the Netherlands against the prohibition of the use of armed force under the UN Charter, the right to life under the ECHR and ICCPR, its lawfulness under the Non-Proliferation Treaty and customary international law, explicitly leaving aside two questions: the question whether these norms can actually be invoked in court by private organisations and citizens, and the question what a court should do if two directly effective treaty provisions collide. No doubt the reason to take this approach was the very large number of plaintiffs, reflecting the extent of political controversy over the decision to allow cruise missiles to be stationed in the Netherlands. The Supreme Court came to the final conclusion that deploying the weapons involved was not in conflict with any of the norms of public international law adduced, and therefore that it was no longer necessary to establish whether these norms gave private citizens any rights in such a manner that they could invoke them in a court of law.<sup>98</sup>

The most recent case-law has modified the extent of judicial scrutiny in civil cases involving international law and Article 90 in two respects.

Firstly, in its judgment of 29 November 2002 the Supreme Court finally found reason to pronounce on the question of the direct effect of the international prohibitions of the use of armed force and aggression, and thus on the issue whether private parties can in civil cases rely on such norms in cases against the State. The Supreme Court did so in the *NATO bombardment or Kosovo* case, a case involving seven inhabitants of Serbia against the State, in which plaintiffs asked for an injunction against the State to stop (cooperation in) belligerent action against the Federal Republic Yugoslavia as long as a Security Council mandate to such action was lacking, and to communicate this to its NATO allies. They also claimed interim compensation of damages caused by the extreme stress to which they were exposed as a consequence of the permanent threat to their life and well-being during the bombing. The Supreme Court upheld the judgment of the Court of Appeal to the effect that the prohibition of the use of armed force and aggression is directed to states only and in principle has legal consequences

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97. Supreme Court, 10 November 1989, para. 3.4, see *supra* n. 40.

98. *Ibid.*, para. 3.9.

between states only, not granting rights to private citizens but merely being rights which can only be invoked by states.<sup>99</sup>

In this judgment the Supreme Court had stated at the outset:

‘In adjudicating the [complaints in cassation], the starting point should be that the injunctions requested regard issues of state policy concerning foreign politics and defence, which policy shall depend to a large extent on political considerations related to the circumstances of the case. This means that civil courts, all the more in interim proceedings, must show a large measure of restraint in adjudicating claims, such as those made in this case, which aim at having acts implementing political decisions in the field of foreign policy and defence, declared unlawful and therefore as forbidden. For it is not up to civil courts to come to such political decisions.’<sup>100</sup>

This is a shorter repetition of the Supreme Court’s formulation – in dealing with issues of standing and sufficient procedural interest – in its judgment of 21 December 2001, on the legality of the threat or use of nuclear weapons:

‘In relation to the question if and whether the use of nuclear weapons, if this were to be in conflict with the law of war, is unlawful, it deserves note that the claims in this lawsuit regard issues of foreign policy, which policy shall depend to a large extent on political considerations related to the circumstances of the case. This means that civil courts must show a large measure of restraint in adjudicating the claims, such as those made in this case, which aim to have acts implementing political decisions which could in future be made in the field of foreign policy and defence, declared unlawful and therefore as forbidden already now. For it is not up to civil courts to come to such political decisions. Moreover, to start with, the civil courts must leave sufficient discretion for making political decisions taking into consideration unforeseeable concrete circumstances of the case, and they should not restrict the margin of this discretion by imposing injunctions which cannot take into account such circumstances. This does not only apply to the question whether a claim in law should be awarded, but also [...] with regard to the issue of admissibility.’<sup>101</sup>

In this case plaintiffs had relied on Article 90, which was alleged to be infringed by any use of nuclear weapons by the government. The Supreme Court did not need to go into this in this instance. It did so, however, in the most recent case on *Afghanistan*, handed down on 6 February 2004, judging in cassation on the case mentioned above. To reiterate, the District Court had rejected the alleged infringement of Article 90, because no rule of public international law was infringed by giving political support to the operations in Afghanistan. In appeal, the Court of Appeal based its judgment on the fact that the norm of international law adduced, could not be invoked in civil cases by individuals<sup>102</sup> – an argument which had been upheld by the Supreme Court in the judgment of 29 November 2002, the *Kosovo* case.

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99. Supreme Court, 29 November 2002, C01/027HR, para. 3.5, see *supra* n. 43.

100. *Ibid.*, para. 3.3.

101. Supreme Court, 21 December 2001, No. C99/355HR, para. 3.3, sub C, see *supra* n. 41.

102. Court of Appeal of The Hague, 6 May 2002, not reported.

The plaintiffs in the *Afghanistan* case, however, argued that Article 90 of the Constitution was a norm of national law which did not aim to protect states, but had to be respected by the State towards plaintiffs. This was tackled by the Supreme Court as follows. It again upheld the view that the relevant norms were aimed to protect states and could not be successfully invoked by private parties. It continued:

‘Article 90 of the Constitution, on which the claims [in this case] have been founded, do not lead to another conclusion. Although it addresses an instruction to the government to promote the international legal order [sic, LB], neither this nor any other provision determines in which manner this should be carried out. In this connection, the Supreme Court remarks that the claims of [plaintiffs] regard issues of state policy concerning foreign politics and defence, which policy shall depend to a large extent on political considerations related to the circumstances of the case. Also when it regards the prohibition of the use of armed force, it is not for civil courts to come to such political decisions, and to prohibit certain State (or executive) acts implementing political decisions in the field of foreign policy and defence, or to order the State to follow a certain line of behaviour at the request of a citizen.

[Plaintiffs’] statement that the prohibition of armed force is a norm of public international law binding on every person as a consequence of the principle of individual responsibility for crimes against peace, does not detract from this. That individual citizens can be held responsible under this principle for acting in contravention of the prohibition of the use of force, does not mean that an individual can rely on this principle to invoke it against the State in court.

[Plaintiffs’] plea that the prohibition of the use of force and Article 90 of the Constitution aim to protect fundamental rights such as the right to a peaceful international order, the right to life and the right to an undisturbed enjoyment of one’s personal possessions, and that this has as a direct consequence that a civil court has to review [plaintiffs’] allegations that the State does not fulfil its obligations under Article 90 of the Constitution, and that hence [plaintiffs’] interests have been unlawfully affected, cannot be sustained.’<sup>103</sup>

This judgment shows that courts are gradually coming round to realise that Article 90 is about *promoting* the international legal order, and is therefore not easily and fully justiciable; after all, courts can only apply valid law, not desired law.

That this is becoming now also the view of lower courts, which initially had no qualms in understanding Article 90 as the embodiment of the whole of public international law, is evident from the *Iraq* case, adjudicated by the District Court in The Hague on 31 March 2003. In this case, the usual injunctions were requested, including the letters to the US and UK on the illegality of their actions in Iraq, with the proviso that they run the risk of being indicted at the International Criminal Court and a request for a court order to begin criminal investigations aimed at prosecution of a suspected act of aggression. The District Court made short shrift of this on the basis of all the ingredients in the *Nuclear Weap-*

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103. Supreme Court, 6 February 2004, C02/217HR, paragraph 3.4, <www.rechtspraak.nl>, LJN-number: AN8071.

ons and *Kosovo* cases. First, it reiterated the role of courts in interim proceedings with regard to political issues of foreign policy and defence as adumbrated in the recent case-law. Next, it repeated that the relevant international norms cannot successfully be invoked by individual citizens, and are therefore not provisions binding on all persons in the sense of Article 93 of the Constitution. Thirdly, it argued:

‘The views of [the Government] cannot be qualified as being in conflict with the norm of Article 90 of the Constitution, which provides that the government promotes the development of the international legal order, *given the discretion which accrues to political decision-making organs.*’ [emphasis added, LB]<sup>104</sup>

## 7. CONCLUSION

It has been demonstrated that Article 90 has developed from a provision on the use of peaceful means for settling international disagreements, into a general provision on the duty to promote the development of the international legal order. Suspended between various associated notions, it refers primarily to developing the legal framework of international society. Law should be the basis of international relations and international society; it is an exhortation to the government to promote the development of an international legal order. Because of its exhortatory nature, it has a strongly discursive meaning. The emphasis is that of a critical approach to the present state of international relations, and extols an international society or community which should be based on a framework of legal norms, without actually providing concrete clues as to the type of legal order to be realised. In this respect, it is not a provision which lends itself to a self-evident application in practical cases. This distinguishes it from most other constitutional provisions in the Constitution of the Netherlands: it does not regard actual facts, but is about desirable futures. Beyond suggesting an hierarchy between law and society – the latter being based on, subject and subordinated to the former – no contours of that future are sketched in Article 90 itself.

One could say that because of this lack of a pre-defined substance, the provision is, in a sense, more a ‘gesture’. It indicates a ‘dynamic’ in as much as it refers to ‘promoting a development’. A definite substance can hardly be traced in it. Article 90 of the Constitution is therefore not so much a provision for ready application to facts at all; it expresses a constitutional concern as regards the importance of public debate on the desired international order. This reaches necessarily beyond the present state of law, of the international legal order and of international relations.

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104. Court of Appeal of The Hague, 31 March 2003, see *supra* n. 44.

This transcending feature was present when Article 90 and its predecessors were adopted in the Constitution. The 1922 provision aimed at pursuing peaceful means of dispute settlement beyond the point where the use of armed force was allowed. The provision in its 1953 revision aimed at unity and integration in order to remedy the shortcomings which had led to major violent disaster in Europe and throughout the world, whereas the 1983 revision was placed in the context of promoting human rights, social welfare and solidarity.

If any shortcoming of the present international legal order has come to light over the past ten or fifteen years, then it is the weakness of the structure of maintaining and enforcing law and rights. Implementation and enforcement are even greater problems than the law and the rights themselves. This has brought the system of international relations to the verges of sustaining the legal order on which it is based. We have reached the outer limits of a system of international organisation which proves unable both to protect the most fundamental rights of entire populations and even to enforce its own decisions regarding acute threats to these rights.

As argued in the course of this article, Article 90 of the Constitution may lead to disturbing questions on the extent to which it lends support to present-day public international law, though the Netherlands Constitution is far from revolutionary in character. And, in fact, the political discourse on the part of the government has so far been about constructing a legal order building on the principles and law we have now. There remains something unsettling in the fact that the formula of 'promoting the development of the international legal order' originated in the preferred option of peaceful means over the use of armed force, whereas the government has managed to turn this very same formula into one of the grounds for deploying the armed forces (at least until the new versions of Arts. 97 and 100 of the Constitution, which themselves employ the idea of using armed forces to promote international order): no longer are the armed forces there merely to *maintain* the legal order if this becomes necessary, but also to promote its development. For some forty years during the previous century it was enough to be merely *prepared* for war in order to attain peace; now the maxim seems to be that if one wishes peace, one should be prepared actually *to resort* to war.

This is paradoxical and may be unsettling, but reflects the present situation of international society and the international legal order. The role which Article 90 is to have in this highly political discourse, is precisely that it invites and fosters this type of discussion on the relation between law and international society.

Courts have sometimes had difficulty in clearly understanding both the wording and the utterly political meaning of Article 90. But by now, they seem to have turned from disregarding its promotional and developmental crux (understanding it as the mere duty to abide by the law as it presently stands) towards

seeing it as a provision which is essentially one concerning foreign policy choices, the discretion for which must primarily reside with the political organs. They have begun recognising what Article 90 is about: political views concerning the desirable development of the international legal order in international society. There is, of course, the possibility that under pertinent circumstances Article 90 might be used as interpretative guidance in the manner in which preambles and social rights provisions are sometimes used. But the chances that this would actually lead to a judgment in which a court holds a certain act of the government to be contrary to Article 90 are very slim indeed.

Public discourse which refers to Article 90 has not been lacking. As shown, this does indeed begin with the law which is alleged to be binding on the state, but in reality it has a strong critical tone, which may even be directed at the present state of international relations and international law. Admittedly, this popular discourse often does not consider very clearly why a particular desired state of the law and of international relations would or would not best promote the development of the international legal order, and whether it would really contribute to the creation of an effective legal order. This often entails that political debate on the role of public international law remains at the level of an exchange of ideologically inspired, stereotypical points of view, which intellectually, is not always satisfactory. Nevertheless, the use to which Article 90 is so frequently put by fairly large sectors of public opinion, shows that it serves the purpose of rallying public discourse concerning the right course and conduct of foreign policy.

This function of fostering debate on what the foreign policy should be, how international order is to be promoted by developing its legal bases, and whether a certain policy option promotes such a development, is the true meaning of our constitutional provision – a function which is proper to constitutions, which, after all, provide political society with a means of articulating itself. Legal scholarship in the field of public international law has an important contribution to make to this truly constitutional debate.

#### *ABSTRACT*

*The government has the duty to promote the development of the international legal order, says Article 90 of the Netherlands Constitution. Although somewhat similar provisions occur in other constitutions, only the draft Constitution of the European Union contains an identical provision. This essay analyses the precise meaning of the constitutional duty in the Netherlands. It traces the history of the relevant provision and sketches how it developed from a provision on the use of peaceful means for settling international disputes into a general provision on the duty to promote the development of the international legal order. The meaning*

*and content of the duty contained in this provision is distinguished by analysing the overlapping twin notions of abidance by versus promotion of international law, of international society and the international legal order, of serving international and the national interest, and by discussing the attributive versus the regulative nature of Article 90 of the Constitution. The case-law on this provision is discussed separately, and describes the development from reviewing the compatibility of state action with public international law to considering it a programmatic provision with limited justiciability.*

*In its dynamic function, focussing on promoting the development of an international legal order, the provision has a critical, exhortatory function; it does not regard actual facts, but is about desirable futures. It should foster discourse about the structural weaknesses in the present political and legal international order and should highlight the discussion on whether certain policy choices actually promote the latter's development.*