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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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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.

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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 whose practical value is unclear. But there are a few exceptions to this non-ideological character of the Constitution. In 1983, some of the already present social objectives were extended into a series of provisions on social rights which are largely programmatic in nature.[1] Another notable exception is found in Article 90:

> The Government shall promote the development of the international legal order.[2]

This essay explores the meaning of this provision. The provision is clearly about law. Yet this essay raises as a 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.

The order of this essay is as follows. After some introductory remarks of a comparative and methodological nature (paragraphs 1.1 and 1.2), I trace the history of the provision's text (paragraph 2) and its more general constitutional context (paragraph 3). In order to delineate the meaning of the provision, we describe 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 (paragraph 4). On the basis of these constitutional intentions, we further 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 (paragraph 5). Before concluding our essay, I describe the uses to which Article 90 has been put in the case law. We shall 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 has become recognized by courts, which limits its justiciability (paragraph 6). In conclusion, we sum up our findings and briefly assess the role the provision can play under present day conditions of international relations and international law.

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[1] Already since 1848 there were two similar general provisions, 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 mistranslation, 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.>.

1.1 A brief comparison with other constitutions

By way of introduction we point out that 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 their provisions.[3] Most of these mention in

[3]Other countries with constitutional provisions similar to Article 90 are the following. France, preamble: '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'; Germany, preamble: '...moved by the purpose to serve world peace as an equal partner in a unified Europe...', Article 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'; Greece, Article 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'; Ireland, Article 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'; Italy, Article 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'; Portugal, Article 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'; Spain, preamble: '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'; Brazil, preamble: 'We, ... committed, in the internal and international spheres, to the peaceful solution of disputes, promulgate ... this Constitution'; Japan, preamble: '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 honored place in an international 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', Article 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'; Switzerland, Article 2 (4): '[The Swiss Federation] strives to safeguard the long-term preservation of natural resources and to promote a just and peaceful international order'; India, Article 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

some form or other the aim of serving 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), 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 indeed 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 *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 essay.

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', which gives 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 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.[4] 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:

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obligations in the dealings of organised people with one another; and (d) encourage settlement of international disputes by arbitration.'

[4]Constitution of Surinam of 1987, Article 7 (2): 'The Republic of Suriname promotes the development of the international legal order and supports the peaceful settlement of international disputes.'

"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."[5] (emphasis added)

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.[6] 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 we will only make very limited references in a comparative manner to the Draft EU Constitution in the section on conceptual analysis (paragraph 5). 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. Particularly because our primary aim is to establish the meaning of the Dutch provision, we must in this essay focus 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

In this essay we first trace the origins of the provision and from there onwards we discuss the uses to which it has been put in the light of those origins. In other words, we choose a historico-linguistic approach in our endeavour. It concerns in a sense an archeology of the relevant texts, aimed at uncovering the meaning(s) of the provision.

This approach is legitimate for two reasons. First of all 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 like Article 90 has its own problems due to its relative obscurity. Obscure though the provision may seem, our exercise should not usher in some gratuitous post-modern fantasising. It

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

[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.

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 also 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 had 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 Article 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.[7] This revision was prompted by the new situation brought by the end of Great War – a period of renewal, expectation and optimism after the terrors and atrocities of the war. The Netherlands in the Great War 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, the 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.[8]
The key in which the 1922 revision was set, was that of 'democratisation'. With regard to 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

[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).
[8]See his preface to Hugonis Grotii De jure 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, Lugduni Batavorum (Leyden) 1919 (BG 615); also many of his works collected in *Mr. C. van Vollenhoven's Verspreide Geschriften I* (ed. F.M. van Asbeck), Haarlem, Tjeenk Willink/ 'sGravenhage , Nijhoff 1934.

parliamentary approval of treaties, one may seriously doubt;[9] 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 several times been used 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. Also the Commission 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'.[10]

In a minority report, the social-democrat member of parliament Schaper[11] explained that to introduce only 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 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.'[12]

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[9]See already F.J.A. Huart, *Grondwetsherziening 1917 en 1922*, Arnhem 1925, p. 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 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 SDAPand at the time member of the Lower House [Tweede Kamer].

[12]Ibidem, minority report Schaper, p. 3.

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.'[13]

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.'[14]

This amendment was in the end adopted by the legislature and became the text of Article 57 of the Constitution of 1922.[15]

As we said, the constitutional revision of 1953 brought the next and crucial textual stage of our provision. Its revision was part of a larger revision of the provisions on foreign relations. The general background instigating the revisions was again found in the fundamental changes in international relations. The ending 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, were 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 our provision originated. First of all there was the Van Eysinga Commission on the cooperation between government and parliament in foreign policy.[16] 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. Thus it proposed the following text:

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[13] Article 58; see Handelingen der Staten-Generaal, Bijlagen 451, nr 3, p. 2.
[14] See *Handelingen der Staten-Generaal, Bijlagen*, 90 nr. 7, V, § 21; and *Handelingen der Staten-Generaal, Tweede Kamer*, 1921-1922, p. 429.
[15] *Handelingen der Staten-Generaal, Tweede Kamer*, 1921-1922, p. 441.
[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 Leyden.

> '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.'[17]

A further 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.[18] 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 'international 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';[19] '[t]he task here attributed to the King, is not to promote the development of this community, but more especially of the legal order which has this community as its object.'[20]
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 the whole of the old Article 58, both the supreme authority of the government over foreign affairs *and* the duty to promote the development of the international legal order: also without this provision the government would still do its utmost to promote that development, in line with established tradition. After

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[17] *Eindrapport van de Commissie nopens de samenwerking tussen regering en Staten-generaal inzake het buitenlands beleid, 9 juli 1951*, The Hague 1951, p. 13-14.
[18] *Eindrapport van de Staatscommissie tot herziening van de Grondwet ingesteld bij Koninklijk Besluit van 17 April 1950, No. 25*, p. 154.
[19] *Handelingen der Staten-Generaal, Bijlagen*, 2374, nr. 3, p. 2.
[20] *Handelingen der Staten-Generaal, Eerste Kamer,* Memorie van antwoord [memorandum of answer to the relevant parliamentary committee], 2374, nr 10, p. 28.

pressure from the Lower House, the government relented and thought it a good idea to retain this latter duty after all, and proposed only to delete the provision on the supreme authority of the King over the conduct of foreign affairs. As we shall see below,[21] this deletion was of considerable consequence. The more so, because not 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',[22] but otherwise the provision remained unchanged and was numbered 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, that is to say in context of the general characteristics of the relevant constitution. We here make a few remarks on the general constitutional context of Article 90.

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. The social-democrat 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. Precisely this 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, who defended his own brainchild, who was the object of the sharp polemicist approach by Marchant. But also others voiced objections against including 'confessions of faith' in the constitution.
I here quote Rutgers, a prominent protestant member of the Lower House:[23]

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[21] Paragraph 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 Article 42 (1) of the Constitution: 'The Government shall comprise the King and the Ministers.'
[23] V.H. Rutgers, 1877-1945, member of the Anti-Revolutionary Party, member of the Lower House 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.

> '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.'[24]

The government initially shared such objections. The Constitution is primarily concerned with powers and competence; mere 'guidelines' should not be part of it.[25] As the parliamentary debate progressed, however, the government gradually began to drop this objection.
Not only the nature of the constitution was in play. Rutgers was by no means the only one, nor the last one, to object to the vagueness of the provision. In 1953, during the second reading of the proposal to introduce the present version of our provision, the catholic senator Sassen[26] still objected:

> '*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 to be too broad.'[27]

This is still a pertinent criticism, as we shall see in the course of this essay. But we will also see 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 in the course of time to have faded into a very distant background. [28]

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[24]Rutgers, in: *Handelingen der Tweede Kamer*, 11 November 1921, p. 427.
[25]*Handelingen, Bijlagen*, 451 nr 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 Lower House as a spokesman on legal matters in 1946, was minister for colonial affairs (1946 to 1948), member of the Upper House (1952 -1958), member of the *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 till 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]*Handelingen EK,* 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 Article 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

And yet a provision such as Article 90 partakes of the elusiveness and elevated sense which constitutional provisions should have. Its ring is nearly 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 all this, as becomes all the more apparent if one is reminded that the constitutional culture in the Netherlands is extremely weak. Within law faculties constitutional law has been (and where it was, 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.[29]

But whereas politics remains deficient, Article 90 has caught the fancy 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, shows 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 than that and derive from Article 90 also some more concrete normative content? A further analysis of our provision can tell us a few things which can serve to delimit some of its contents. We do so in two parts: first

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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 Article 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.

[29] Article 120 Constitution: 'The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.'

we present an historical analysis of the three layers of which our provision consists (paragraph 4) and next we give a conceptual analysis of its terms (paragraph 5).

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.[30] 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.'[31]

So although the formulation of 1953 is broader, adds so to say a 'thicker' layer of meaning, underneath there has remained the constitutional obligation first to seek peaceful resolution of international conflict before resort to arms is allowed. The government conceded this in so many words when introducing the new formula:

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[30] This is argued most forcefully by Huart 1925, p. 48-49.

[31] *Handelingen, bijlagen*, 2374, nr 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.

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

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? The provision in none of its versions 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.[33] This could *a fortiori* be said about judicial means of dispute settlement, notwithstanding the these days 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 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:

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[32] Ibidem.
[33] F.J.F.M. Duynstee, *Grondwetsherziening 1953: de nieuwe bepalingen omtrent de buitenlandse betrekkingen in de Grondwet*, Deventer, s.d. [1954], sub voce *Artikel 58*, p. 49.

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

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.'[35]

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 the circumstances the initial meaning of the provision, the duty to resort first to peaceful means of dispute settlement, remained at best as 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'.[36]
So actually not just the wording of 1922, which was limited to peaceful dispute settlement, 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.

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[34] *Handelingen der Staten-Generaal, bijlagen,* 2374, nr 3, p. 3 = *Eindrapport van de Commissie nopens de samenwerking tussen regering en Staten-Generaal inzake het buitenlands beleid, 9 juli 1951*, p. 14.
[35] *Handelingen, Eerste Kamer* [Upper House], bijlagen 1951-52, Memorie van Antwoord [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, p. 50, 63, 140.

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.[37] 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 try to explore the further contours and substance of Article 90 against the background of these three phases of constitution making. We analyse 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 international 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 we quoted in our 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

[37]See the recurrent summing up in *Naar een nieuwe Grondwet*, loc. cit. p.48-50, 63, 113, 127, 140, 172, 176.

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.[38] 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.
We saw that 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 qualification 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?[39]
In public discourse, 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

[38]I use the text produced by the Convention on the Future of Europe. 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 Article 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 Article 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 principles of the Charter. This is a substantive limitation on the means of promoting that development, which is absent from the Dutch Constitution. We could put our minds at ease for a moment, recalling 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 we assumed (to 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 we can use Article 90 as a basis for refraining from fulfilling this treaty obligation.

cruise missiles[40] or of nuclear weapons in general,[41] removing the Taliban regime in Afghanistan,[42] the bombing of Serbia and Kosova,[43] the ousting of the regime of Saddam[44] – or for that matter allowing entrance to the Netherlands to persons bearing responsibility for cases of torture in Argentina,[45] allowing political parties which refuse female candidates to stand in election for their party,[46] or a member of parliament talking lightly of parental castigation of children.[47] 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

[40]For the *Cruise Missiles* cases, see President District Court The Hague [Rechtbank 's-Gravenhage], 20 May 1986, AB 1986/445; Pres. Rb. 's-Gravenhage 5 November 1985, AB 1986, 441; H[oge] R[aad] 10 November 1989, NJ 1991, 248; see particularly also P.J. Kuyper and K.C. Wellens, Cruise Missiles in Europe, NYIL 1987, p. 169.

[41] Hoge Raad 21 December 2001, nr. C99/355HR, NJ 2002, 217, (*Nuclear Weapons*), plaintiff stressed throughout the proceedings that Article 90 of the Constitution should be applied.

[42]President of the District Court The Hague, 26 October 2001, (*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 peremptory 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 Hoge Raad, 29 November 2001, C01/027 HR, *(NATO bombardments of Yugoslavia*).

[44]See numerous interventions in the press; also Rechtbank Den Haag [District Court The Hague] 31 March 2003, KG 03/331, (*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, *Nederlands Juristenblad* 2001, 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) ostricises 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 L.B.).

[46]R. Holtmaat, *Nederlands Juristenblad* 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 committee. 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 Article 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 L. B.).

[47]J.C.M. Willems, *Nederlands Juristenblad* 2001, 2091: 'A plea for the 'corrective smack' by a member of the Lower House 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 Article 93 of the Constitution. Article 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 L.B.).

infringement of public international law and hence amount 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 them 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 both seem to start off from the idea of abiding by the law that exists, and hence incorporating the principle *pacta sunt servanda*; but they finally add a critical component which goes beyond existent international law. This latter component is hence necessarily critical with regard to existent substantive norms of public international law.
If we take this indeed to be a 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'.

We can illustrate these distinctions and the truly dynamic meaning of Article 90 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, I should think, a safe interpretation of this provision. But if we take the idea, clearly worded in this provision, 'to promote' 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).[48] 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.[49] That might put the country beyond the pale of the present international order. So in fact, 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 'the international legal order' and the international obligations and instruments of that legal order.
The Act on International Sanctions 1977 [*Sanctiewet*] 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.[50]
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

[48]See also Article 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 footnote 79.
[50]Sanctiewet 1977, Article 2.

fact, whenever the words 'maintaining or promoting the international legal order' are used, doubt creeps in as to whether they really mean 'the international legal order', or only any particular legal norm or, different again, merely international society. 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" (paragraph 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" (paragraph 2 sub h); here the reference is interestingly – 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 international 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.[51]up very drastically, it was decided by way of exception that a separate Advisory Committee on International Legal Affairs, *Commissie van Advies voor Volkenrechtelijke Vraagstukken*, was to be retained next to the Advisory Council of International Affairs, *Adviesraad Internationale Vraagstukken* – which was inspired by Article 90; see Kamerstukken TK 25460, 3, pp. 1-2.
What the minister said, with an allusion 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.

[51]Hence, when the jungle of advisory bodies and committees surrounding the government was tidied

Two types of remarks should be made regarding this understanding, firstly regarding its historical context at the time, and secondly with regard 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 sociological 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.[52] 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. As on 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.

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. But also 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.[53]

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.[54] 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

[52]J.J.C. Voorhoeve, Peace, Profit and Principles: a Study of Dutch Foreign Policy, The Hague/London: 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, 2001.

[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, and passim.

spilt over in the legal infra-structure (or as the government of 1953 would called 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.[55] 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 means a relative eclipse of the relevance of public international law.

Now 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, we should not overestimate the substantive meaning of Article 90 in this context. It may be useful to remind ourselves 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 old-fashioned inter-governmentalism. It simply states that the development of the law underlying these structures, whatever their type, should be promoted.
I would therefore submit once again 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. 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).[56]

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

[55]See Report of the ILC from its 55th session (A/58/10), p. 270-271 (para. 419). See also Martti Koskenniemi & Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 LJIL (2002), p. 553-579.
[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. No doubt 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.

Much 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.

Article 66
[...]
Treaties are binding on everyone insofar as they have been published.

Art. 67
(2) Articles 65 and 66 are also applicable to decisions of international organisations under public international law.'

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 Articles 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.[57] 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

[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 *Introduction to Dutch Law for Foreign Lawyers*, D.C. Fokkema e.a. (red.), Deventer 1978, p. 561-584; furthermore L. Erades, `International law and the Netherlands legal order', *International Law in the Netherlands*, vol. 3, p. 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/New York 1961 and most extensively L. Erades, *Interactions between International and Municipal Law; a comparative case law study*, ed. M. Fitzmaurice-Lachs en C. Flinterman, TMC Asser instituut, Den Haag, 1993, 1037 + XXVI 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,* W.E.J. Tjeenk Willink Zwolle, 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').

national interests having to give way to the international interests.[58] This may sometimes be so, but certainly not always and not necessarily.[59]
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 we said above, the interest of promoting the development of the international legal order leaves in principle open what this international legal order

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[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. College van beroep voor het bedrijfsleven [Appeals Court for Industrial Affairs], 31 January 2001, nr. 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-number AA9865; see earlier, CBB 21 October 1986; CBB 17 June 1988, AB 1989, 503, para. 6.6.
[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 of Parliaments have priority over rules of customary international law and of non-self-executing provisions of written law; see HR 6 maart 1959, NJ 1962, 2 m. nt. D.J. Veegens (Nyugat), 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', in *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 1990, 266-269 and 384-386.

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.[60] Also through legislative instruments, and of course through actual policies, clearer articulation can be given of the substance of what the international legal order should be about. Thus, we 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.'[61]

So essentially – 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[62] 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

[60]See footnote 48.

[61]See Kamerstukken TK 23900 XV, nr 44, pp. 7-8.

[62]Finnish Constitution, Article 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 Article 95 (1): 'The conclusion of an international treaty which contains stipulations contrary to the Constitution shall require a prior constitutional revision': Russia, Article 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.'

fit of realism for reasons which are hard to square with Article 90: the criterion of promoting the international legal order was deemed to be too vague and also one might wish to conclude such a treaty also for other reasons.)[63]

But also outside the context of international law-making, the conduct of foreign affairs may diverge from constitutional principles. One of the clearest examples of this regards the constitutionally founded principle of transparency and open government.[64] 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'.[65] 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. First, 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 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

[63] *Naar een nieuwe Grondwet*, volume Vb, 69. Cf. for instance the Danish Constitution, Article 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 Article 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 Article 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] Article 10 (d) Wet Openbaarheid van Bestuur.

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.[66]

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 have to turn to a discussion of 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, next to 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: this subject is the government. This is not because the government is the only one who 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.

All this was quite unproblematic, except that in 1983 – as we 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 Lower House. 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

[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.

on the constitutional powers of the government.[67] (As we saw, 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.[68] 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.[69]

This 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 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.

This is next combined with what this power is attributed for, i.e. to 'promote the development of the international legal order'. But 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

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[67]This was subsequent to the passing of a resolution, the Motie-Van Leeuwen; see Handelingen Tweede Kamer 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 Carribean, 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 Article 3 (1) sub b in connection with Articles 2 (1) and 4 (1) of the Charter.

[69]The origin of this change is due to a remark of a member of the Upper House, see *Naar een nieuwe Grondwet*, loc. cit, 173, who derived from a number of remarks made in the Lower House (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, *Naar een nieuwe Grondwet*, 176.

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.[70]

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

An example, which we discuss in some detail, 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 order were included among the tasks of the armed forces).[71] 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 concern on the precise basis of 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,

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[70]In fact, we can see 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 treaty before the treaty has actually been signed. Only after much hesitation, was in 1991 the Lower House 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 Lower House after the negotiations had finished but the text had not yet been signed; TK 1990-1991, 21 214, nr. 8, pp. 2-3; on the incidents surrounding the Maastricht Treaty see Handelingen TK 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 TK 1991-1992, 22 300 V, nr. 54 (motie-Van Middelkoop), Handelingen TK 1991-1992, p. 2035, left column.

[71]See on this amendment H. van Schooten and W.G. Werner, Democratic control of the Use of Force under the Dutch Constitution. In: 10 Tilburg Foreign Law Review (2002), no. 1, 43-62; also L.F.M. Besselink, The Constitution and the Armed Forces. In: 7 European Public Law,(2001), 3, pp. 365-374, and by the same author, Military Law in the Netherlands. In: *European Military Law Systems*. Georg Nolte (ed.), De Gruyter Rechtswissenschaften Verlags-GmbH, Berlijn 2003, pp. 547-646.

Hoge Raad, 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.[72] 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.[73] This claim – put forward when there was large political support for such missions – was on those occasions not contradicted by members of the Lower House; no member of the Lower House at the time discussed the issue of what type of 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 the Constitution. Parliament has no right of veto in this matter: government decisions are subject only to ministerial responsibility.'[74]

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 Lower House 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.[75] 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

[72]HR 8 February 1980, NJ 1981, 334.

[73]E.g. the deployment of military units in the second Gulf crisis in January 1991, Kamerstukken 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).

[74]Kamerstukken 1990-1991, 21 664, nr. 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 Rechtbank 's-Gravenhage 22 February 1979, AB 1979, 162.

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.'[76]

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 *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.[77] The person involved argued that carrying out a police task in Bosnia cannot be considered as falling within the term 'interests of the State' in the old Article 98 of the Constitution (now: 'interests of the Kingdom' in Article 97). The *Centrale Raad* 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.[78]
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[79] – one of the ironies of (legal) history.

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[76]Kamerstuk 1995-1996, 23 591, nr. 6, p. 11, this author's translation.
[77]CRvB 7 September 2000, T[ijdschrift voor] A[mbtenaren]R[echt] 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 thereto TAR November 2001, at pp. 533-535.
[78]Close inspection of the explanatory memorandum indicates that it can hardly support the finding of the Centrale Raad. 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'(Kamerstuk TK 1996-1997, 25 367 (R 1593), nr. 3 p. 3-4, author's translation) - which of course begs the question whether there was a constitutional basis for that practice; the Lower House, 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

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,[80] the power to conclude treaties,[81] and the attribution of the power to authenticate and verify documents.[82]

Particularly the last mentioned case is of interest, which should be read in relation to earlier case law of the administrative justice 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,[83] just like the highest civil court, the *Hoge Raad* had previously done.[84] 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. That the Council of State based 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.[85]

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contorted explanation by the minister of Defence in response to the pertinent criticisms of member of parliament Middelkoop (Handelingen TK 1997-1998,13 January 1998, 40, p. 3244-3245 at ibidem, 3268-3269.

[80]Rechtbank 's-Gravenhage 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 Article 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.]

[81]District Court The Hague 28 October 1987, M en R 1988, 40, *Eems-Dollard*; see also the same court 21 May 1984, AB AB 1985, 12.

[82]Afdeling Bestuursrechtspraak Raad van State, 18 February 1999, AB 1999, 143.

[83]Afdeling Bestuursrechtspraak Raad van State [the Administrative Judicial Division of the Council of State], 10 April 1995, AB 1995, 498, *Long Lin*.

[84]HR 7 February 1986, NJ 1986, 477, *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 HR decided that there was no legal basis for

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). Next as links to national law it pointed to the task of the minister as head of the ministry of foreign affairs and Article 90. It said: '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 ascribed 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 prejudge 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 put back in history to the times when governments claimed *plena potestas* to do as they like 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

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competence in any national legislative norm, so not in Article 90 of the Constitution either. Also in *Long lin* some commentators have argued that 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, 498.

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 relied also 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? Isn't Article 90 a policy objective which does not lend itself to enforcement through courts, just like 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.[86] 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.
We therefore have to examine the manner in which courts have dealt with the invocation and adjudication of Article 90.
In the Dutch judicial context, there are two fora in which judicial means exist to enforce relevant rights. Administrative courts can adjudicate whether an

[86]C.Flinterman, Het opperbestuur der buitenlandse betrekkingen. *Nederlands Juristenblad* 28 October 1978, p. 802

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.
We write a few words about pursuing a claim under Article 90 in each of these fora.

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 [*In- en Uitvoerwet*]. We saw above that 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 Constitut
The judgment of the *College van Beroep voor het bedrijfsleven* [Appeals Court for Industrial Affairs] 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 *College* 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 (paragraphs 3.12-16):

> '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 is a 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.'[87]

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 *College* 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[88] does not as such add much

[87] *College van Beroep voor het bedrijfsleven*, 28 March 1984, AB 1984, 499.
[88] In the whole constitutional history of Article 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

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 *College* 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.[89] 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 we shall discuss below. First 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 an 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, because it takes it merely to mean that one should observe international law as it is.

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understanding these may converge in the same direction (which is the case also with very many other international instruments).

[89] See L.F.M. Besselink, De publieke taak en sociale grondrechten: de betrekkelijke waarde van sociale grondrechten. In: De publieke taak. J.W. Sap, B.P. Vermeulen, C.M. Zoethout (red.), Publikaties van de Staatsrechtkring – Staatsrechtconferenties, deel 7. Kluwer, Deventer 2003, 95-111.

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[90] 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.[91] 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 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.[92] But this exposes itself to the objection that Article 90 is not about public international law as it is, as we have argued 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.

[90]Vereniging van Juristen voor Vrede [Association of Laywers 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]Case number KG 01/1219, <www.rechtspraak.nl> LJN-number: AD4855. The judgment in final instance by the *Hoge Raad* will be discussed below.
[92]Implicitly, the Hoge Raad has confirmed this, see Hoge Raad 21 December 2001, nr. C99/355HR, NJ 2002, 217: plaintiffs claimed an interest protected under the Civil Code (Article 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 Article 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 Article 90 was the most relevant, see para. 3.7.2 of the Judgement.

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 is 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[93] – 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.[94] This judgment,[95] as far as it concerns the courts' competence and admissibility, was reversed in appeal without any further reference to Article 90.[96] 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, we should make a short digression, and discuss the final outcome of this *Cruise Missile* case, because we need this to understand the development of the more recent case law which we are to discuss hereafter.
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 *Hoge Raad* rejected that view.[97] 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

[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]Rb. 's-Gravenhage, 20 mei 1986, AB 1986,445.
[95]Sharply criticised from the perspective of the 'political question' doctrine, by Kuyper en Wellens, op. cit., pp. 171-174.
[96]Hof 's-Gravenhage 30 December 1987, paragraph 5, quoted in: NJ 1991, 248.
[97]HR 10 November 1989, para. 3.4, NJ 1991, 248.

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.[98]

We now turn to the most recent case law, which has modified the extent of judicial scrutiny in civil cases involving international law and Article 90. It has done so in two respects.
First of all, in its judgment of 29 November 2002 the *Hoge Raad* 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 *Hoge Raad* did so in the *NATO bombardment* or *Kosovo* case, a case of 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; also they 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 *Hoge Raad* 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 between states only, so does not grant rights to private citizens and can only be invoked by states.[99]
Also the *Hoge Raad* in this judgment had at the outset stated:

> '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

[98]Ibidem, para. 3.9.
[99]HR. 29 November 2002, C01/027HR, para. 3.5, <www.rechtspraak.nl>, LJN-number: AE5164.

> therefore as forbidden. For it is not up to civil courts to come to such political decisions.'[100]

Now this is a repetition in fewer words of what the *Hoge Raad* had formulated as a starting point – 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.'[101]

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 *Hoge Raad* 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 – the same case of which we mentioned the judgment in first instance by the District Court above. We saw that 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[102] – an argument which had been upheld by the *Hoge Raad* in the judgment of 29 November 2002, the *Kosova* case.
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 *Hoge Raad* as follows. First 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:

[100]Idem, para. 3.3.
[101]HR 21 December 2001, nr. C99/355HR, paragraph 3.4, sub C, NJ 2002, 217.
[102]Court of Appeal, 6 May 2002, not reported.

> '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 *Hoge Raad* 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.'[103]

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 Weapons* and *Kosova* 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; and thirdly:

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

> '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][104]

7 CONCLUSION

Having come to an end of our venture into the meaning of Article 90 of the Netherlands Constitution, we overlook the panorama and draw some conclusions.
We have seen how 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.
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

[104]Rechtbank 's-Gravenhage, 31 March 2003, KG 03/331, paragraph 4.6, <www.rechtspraak.nl>, LJN-number: AF6540.

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 we said in the course of this essay, 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 Article 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 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 we saw, this does indeed start off from 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 is intellectually 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.