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Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation

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Abstract

This paper explores differences and similarities in how domestic courts — mainly Dutch courts — apply two distinct forms of non-domestic law: public international law and European Community law. The article focuses on the application of the principle that dominates practice in both areas: that courts should, whenever possible, construe national law in conformity with, respectively, public international law and European Community law. This article offers a systematic comparison of how courts employ this principle. On the basis of a detailed analysis of the relevant national case law and the case law of the European Court of Justice (ECJ), it is argued that there is no fundamental divide between the application of public international law and EC law (despite the theoretically opposing starting points); differences in application are a matter of degree not of principle. The principle of consistent interpretation proves to be effective and of great practical importance in both areas and further testifies of similarities in the impact of the two areas on domestic law.

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1 Introduction

For some time after the introduction of Community law, in the late 1950's, there was little difference in the way in which national courts handled arguments involving public international law, on the one hand, and E(E)C law, on the other. The courts' reception of *all* rules of international law¹ was governed by disparate constitutional provisions and the undeveloped doctrine concerning the invocability of treaties in national courts set forth by the Permanent Court of International Justice (PCIJ) in the *Danzig* case.² Enforcement of international law in cases where the legislative or executive branch acted contrary to international law was sought at the international level. Aside from narrowly defined issues such as jurisdiction and immunities, national courts were sidelined as a systematic force in the application and development of international law.

According to common wisdom in modern international legal scholarship, all this changed with the judgments of the European Court of Justice (ECJ) in *Van Gend and Loos*³ and *Costa v. ENEL*.⁴ The Court's finding — that E(E)C law was different from ordinary international treaties — was on the whole accepted by Member States, thereby transforming EC law from purely interstate law to include rights and responsibilities of private parties, and brought national courts to centre stage in the enforcement of EC law. In cooperation with the ECJ, national courts proceeded to develop subtle and intricate doctrines pertaining to the rights and liabilities of private parties with respect to EC law. When we contrast this development with the common understanding of public international law, which is still depicted in all major textbooks as a system of law whose enforcement is primarily in the hands of *states*,⁵ public international law looks 'ordinary' indeed.

The success of EC law has made it a model for lawyers dealing with public international law. Charles Leben writes:

"Community law is 'successful international law', and ... is thus a possible horizon of international law, indicating the route that international law must follow if it is to move forward."⁶

The present article argues that differences in the courts' application of public international law, on the one hand, and EC law, on the other, are more subtle than is often assumed. It substantiates and expounds the observation made by Leben that the distinctive features of the operation of Community law 'almost all exist but in a far less developed and efficient state in the international legal order'.⁷ In certain legal contexts, the reception of public international law has moved far beyond the purely inter-state model, and looks much like that of EC law. The article aims to qualify the

¹ In this article we use the term 'international law' as a generic term referring to both public international law and EC law.

² *Jurisdiction of the Courts of Danzig*, 1928 PCIJ Series B, No. 15., pp. 17–18.

³ Case 26/62, *Van Gend en Loos*, [1963] ECR 1.

⁴ Case 6/64, *Costa v. ENEL*, [1964] ECR 585.

⁵ P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1997), at 3–5.

⁶ Leben, 'Hans Kelsen and the Advancement of International Law', 9 *EJIL* (1998) 298.

⁷ *Ibid.*, at 295.

dominant picture of the great divide between European law and public international law that is underlying in much of current legal scholarship, and leads us to reconsider the distinction between the two legal systems.

The article proceeds through an inductive method. We leave the theoretical issues that explain remaining differences between these legal fields to another time, to analyse on an empirical basis what national courts do in practice. We will do so by reviewing the application of what has, in practice, proven to be the most important doctrine used by courts to grant effect to international law: the principle of consistent interpretation. The principle of consistent interpretation refers to the principle that requires courts to interpret national law in conformity with a rule of international law, with a view to ensuring that rule is given effect.

National case law considered in this article is taken for the most part from one Member State of the EU: the Netherlands. Its open Constitution and liberal judicial practice provide a rich case law on techniques giving effect to international law. Of course, the fact that Dutch courts are constitutionally allowed more leeway than courts in most other EU Member States, does limit the degree to which some of the conclusions of this article can be generalized. However, it is believed that there is sufficient similarity in judicial techniques employed by the courts of the Member States to make the analysis pertinent to practice beyond The Netherlands and, indeed, for our understanding of the differences between public international law, in general, and EC law. Moreover, part of the relevance of the principle of consistent interpretation lies precisely in the fact that this principle is only marginally influenced by constitutional provisions and can be used even when constitutional law otherwise seems to bar application of international law. To illustrate this, reference is made to the practice in states with constitutional systems that differ from that of The Netherlands, notably the United Kingdom.

We shall analyse the principle of consistent interpretation as it operates with respect to EC law and public international law under the following headings: a clarification of the concept of consistent interpretation (2), the controlling legal systems (3), the conditions for the application of the principle of consistent interpretation (4), the legal relationships in which the principle can be applied (5) and the legal effects of the principle (6). In section 7 we add a comparative note by examining the interpretative obligations for the courts under the UK's Human Rights Act 1998 and section 8 draws conclusions.

2 The Relationship between Direct Effect and Consistent Interpretation

The principle of consistent interpretation is to be distinguished from the principle of direct effect. With direct effect we refer to the principle that requires or allows a national court to apply a rule of international law as an independent rule of decision in the national legal order, when that rule is not transposed, or not adequately so, in domestic law. The difference is that when a court grants direct effect to a rule of

international law, it uses that rule as an autonomous or independent basis of decision; in the case of consistent interpretation the rule is used to construe a rule of national law in the light of international law. For this reason the principle of consistent interpretation can also be referred to as ‘indirect effect’ — indirect: via a rule of national law.

The distinction between direct and indirect effect is not always clear. Direct effect also presupposes the existence of a rule of national law (written or unwritten) that allows courts to give effect to international law. These can be either general constitutional rules that incorporate the entire body of international law in the national legal order, or specific rules of reference that incorporate particular treaties or other rules of international law. In some cases it might be argued both that a rule of international law is applied directly on the basis of a rule of reference, or that the rule of reference is construed on the basis of the principle of consistent interpretation.

The principles of direct effect and indirect effect provide alternative techniques for national courts to ensure that international law is effectively applied. But the choice between these techniques is not a free one. In practice, courts will always attempt first to reconcile a conflict between international law and national law through the principle of consistent interpretation. If that proves impossible, for instance if the national law is so clearly in contradiction to international law that no principle of interpretation can remove that inconsistency, only then will courts consider applying the rule of international law directly. Both in EC law and in the application of public international law, the principle of indirect effect has priority over direct effect.⁸

3 Controlling Legal Systems

It is commonly thought that one of the key differences between EC law and public international law is that with the latter, the effect of a norm in the national legal order is determined by national law, not international law; in EC law however, such effect is a matter of EC law, not national law.

This was indeed the distinction the ECJ created in *Van Gend & Loos*.⁹ The Court held that unlike ‘normal’ international conventions, the EEC Treaty is more than an agreement creating mutual obligations between the Contracting States. An independent legal order shared by the Member States has been created: Community law is intended to confer rights upon individuals, independent of the legislation of Member States. Moreover, the Court held that EC law, rather than national law, determines its effect in the national legal order. This ruling also had institutional consequences: to ensure that a particular provision of EC law has the same effect throughout this new

⁸ R.H. Lauwaars & C.W.A. Timmermans, *Europees gemeenschapsrecht in kort bestek* (1997) 100.

⁹ Case 26/62, [1963] ECR 1.

legal order, it is up to the ECJ and not national courts to rule on the effect of Community law.¹⁰

In contrast, public international law is thought to be silent on the validity and the effects of international law in the national legal order. Many states, in particular those for whom parliamentary approval is not a precondition for entry into force of treaty obligations, consider themselves at liberty to separate their international rights and obligations from the national legal order and prevent their organs from applying rules of international law that are not made part of national law. No international court has said that these practices are 'illegal' as such and that international law creates, out of its own force, effects in the national legal order.¹¹ These effects are conditional upon a prior decision of states accepting the validity of public international law. Without the unconditional acceptance of the principle of validity, international law lacks the force to penetrate the national legal orders and to empower national courts to apply international law where national law fails.¹²

However, this fundamental distinction between EU law and international law, which needs to be qualified even with regard to the principle of direct effect,¹³ is to a large extent irrelevant to the practice of consistent interpretation.

In Community law the principle of consistent interpretation is, similar to the principle of direct effect, governed by EC law, not national law. Community law

¹⁰ This also follows from the subsequent case *Costa v. ENEL*, Case 6/64, [1964] ECR 585: 'The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty set out in Article 5 (2) [now Article 10] and giving rise to the discrimination prohibited by Article 7 [now Article 12].'

¹¹ The European Court of Human Rights, which supervises an area of international law that is particularly integrated in national law, has held that while incorporation of the European Convention on Human Rights in national law would be a faithful method of applying the Convention (see *Ireland v. United Kingdom*, ECHR (1978) Series A, No. 25, par. 239), the European Convention is formally neutral as to its mode of implementation and does not require incorporation. See the case of *Swedish Engine Drivers' Union v. Sweden* ECHR (1976) Series A, No. 20, par. 50 (which states that the Convention does not lay down 'for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention'). See also J.A. Frowein, 'Incorporation of the Convention into Domestic Law', in *The British Institute of International and Comparative Law and The British Institute of Human Rights, Aspects of Incorporation of the European Convention into Domestic Law* (1993) at 2–11 (noting that while articles 1 and 13 may suggest an obligation to apply the convention directly, the fact that six of the original contracting parties did not allow for incorporation makes an interpretation to that effect implausible). What matters is that the substance of the rights should in fact be enjoyed by individuals; see M. A. Janis, R. Kay and A. Bradley, *European Human Rights Law. Text and Materials* (2000) 472.

¹² See T. Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law', *Recueil des Cours* 1992-IV, 320–321, noting that 'a treaty that, as a matter of international law, is deemed to be directly applicable is not self-executing ipso facto under the domestic law of the states parties to it. All that can be said about such a treaty is that the States party thereto have an international obligation to take whatever measures are necessary under their domestic law to ensure that the specific provisions of the treaty . . . not only of its substantive obligations, are accorded the status of domestic law.'

¹³ See, for further discussion, Nollkaemper, 'The Direct Effect of Public International Law', in J. M. Prins and A. Schrauwen (eds), *Direct Effect. Rethinking A Classic of EC Legal Doctrine* (2002), p. 157; and P. Craig and G. de Búrca, *EU Law. Text, Cases and Materials*, 3rd edn (Oxford 2002) at 315 referring to the bi-dimensional character of supremacy.

obliges the national courts to construe their domestic law in conformity with the law of the EC. In the *Von Colson* case, the ECJ held that ‘all the authorities of the Member States’ must interpret their national law in light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 EC (now Art. 249).¹⁴ The courts must, insofar as they are given discretion to do so according to national law, construe and apply national law, and in particular the implementing legislation, in conformity with the requirements of Community law (*ibid.*, para. 28). In *Marleasing*¹⁵ the ECJ elaborated on this issue as follows: ‘[I]n applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the directive . . .’ (para. 8).

In public international law, one cannot find a comparable authoritative formulation of the principle that, under public international law, courts should construe their domestic law in conformity with international law. However, there seems to be sufficient acceptance of the notion of international law as ‘higher law’ that must be given effect in the national legal order, and that courts, as state organs, are responsible for the proper application of international law within their jurisdiction;¹⁶ to argue that the position that public international law is neutral on the matter of consistent interpretation is too narrow.¹⁷ State practice allows one to infer an international duty of courts to interpret, within their constitutional mandates, national law in the light of international law.¹⁸

Irrespective of the existence of a general yet unarticulated principle requiring consistent interpretation, the difference between a controlling EC law on the one hand, and the more neutral position of public international law, on the other, is largely mitigated by the fact that there is widespread practice in courts in many countries which apply this principle. In the Netherlands, the *Hoge Raad* (Supreme Court) has long held that unless the legislature has explicitly stated otherwise, any provision of Dutch law must be interpreted so as to avoid a breach of international

¹⁴ Case 14/83, *Von Colson and Kamann*, [1984] ECR 1891, para. 26; see also Case 79/83, *Harz*, [1984] ECR 1921.

¹⁵ Case C-106/89, *Marleasing*, [1990] ECR I-4135.

¹⁶ See also General Comment No. 9 of the UN Committee on Economic, Social and Cultural Rights on the domestic application of the Covenant (UN Doc. A/CONF.39/27), para. 15: ‘It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a state’s international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place that state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter.’

¹⁷ There is truth in the observation of Morgenstern, ‘Judicial Practice and the Supremacy of International Law’, 27 *BYIL* (1950) 92, stating that true supremacy of public international law would be ‘obscured by the fact that, owing to the absence of compulsory judicial dispute settlement in the international sphere, responsibility is not always the automatic consequence of violation of rules of law’.

¹⁸ Morgenstern states that ‘The trend of judicial opinion is significant. It shows that courts have realized that international law, by its very nature, must be enforced contrary provisions of municipal law notwithstanding’, *supra* note 17, at 85–86.

law.¹⁹ There is a large number of other states with a similar practice, including dualist states like Australia,²⁰ Israel²¹ and, as will be developed in section 7, the United Kingdom.²² In those states, the practice of consistent interpretation is as much a reality as if it were explicitly required by public international law itself. Even when the effect of international law could be revocable by the executive or by the legislature, as long as this is not done, the result is similar to that of a situation in which there exists an international obligation of consistent interpretation.²³

This does not mean that the practice of consistent interpretation in EC law and in international law can be equated. States naturally retain more autonomy in determining the conditions and consequences of indirect effect in public international law. Substantial differences in the indirect effect of EC law do exist in the approaches taken by national courts regarding this,²⁴ but in public international law this autonomy is magnified. International courts, while they are not irrelevant to the application of international law at the national level,²⁵ cannot perform the role of the ECJ in controlling uniformity. All this is in keeping with the normal process of auto-appreciation in the application of international law.²⁶ The main similarities and differences in the application of the principle are explored below.

4 Conditions for the Application of the Principle of Consistent Interpretation

Three aspects can be distinguished concerning the conditions for the application of the principle of consistent interpretation: when is the principle applicable, what rules of national law must be interpreted in the light of international law, and what rules of international law can be used for purposes of interpretation.

¹⁹ E.g. Hoge Raad 16 November 1990, NJ 1992, 107, para. 3.2.3 [hereinafter HR].

²⁰ *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh*, High Court of Australia, 7 April 1995, 128 ALR 353, para. 27.

²¹ *Kurtz and Letushinsky v. Kirschen*, Supreme Court, 27 June 1967, 47 ILR 212, at 214–215.

²² For the US: *Murray v. The Charming Betsy* (1804), 2 Cranch. 64, 118. See generally, Steinhardt, 'The Role of International Law as a Canon of Domestic Statutory Construction', 43 *VandLRev* 1103 (1990); for Austria: Balthasar, "'Pacta sunt servanda.'" Zur innerstaatlichen Relevanz von durch Staatsvertrages eingegangenen Verpflichtungen Osterreichs', 50 *ZOR* (1996) 169–171; for Israel: *Kurtz and Letushinsky v. Kirschen*, Supreme Court, 27 June 1967, 47 ILR 212, at 214–215.

²³ Cf. H. Lauterpacht, *International Law. Being the Collected Papers of Hersch Lauterpacht* (E. Lauterpacht, ed.), Vol. 2 (1975), 548, noting that the practice of voluntary acceptance of international law in the national legal order has, as long as it lasts, 'the effect of elevating to the authority of a legal rule the unity of international and municipal law'.

²⁴ For a discussion of the national differences in applying the doctrine of direct effect see Jans and Prinsen, 'Direct Effect: Convergence or Divergence? A Comparative Perspective', in J. M. Prins and A. Schrauwen (eds), *Direct Effect. Rethinking A Classic of EC Legal Doctrine* (2002) 105–126.

²⁵ This is daily routine for the European Court of Human Rights. Decisions of the ICJ may also be relevant, for instance in the *LaGrand Case (Germany v. United States)*, Judgment of 27 June 2001, 40 *ILM* 1069.

²⁶ P. Weil, 'Le droit international en quête de son identité. Cours général de droit international public', *Recueil des Cours* 1992-VI, Vol. 237, 220–223.

The principle of consistent interpretation is primarily applied when the rule of international law in question has not been transposed in national law. However, the principle is not limited to that situation. In EC law, the principle applies both where the directive in question has or has not been properly transposed.²⁷ Indeed, since Community law requires that the result envisaged by a rule of EC law must be attained in law and in fact, judicial interpretation and application will often be decisive for the correct transposition of these rules.²⁸ Where the legislature has timely and correctly transposed the rule — the normal situation — a court is unlikely to encounter the boundaries of acceptable interpretation; in the absence of such transposition — the problem situation — and where there is some discrepancy between the wording of the rule and the implementing legislation, the application of supra-national law does call for a certain judicial creativity.²⁹

As to the question of which rules of national law can be interpreted in the light of international law, it is suggested that the principle of consistent interpretation requires all provisions of national law to be interpreted in light of international law — not only those adopted to implement the international provision. With regard to EC law, the ECJ stated this expressly in *Marleasing*:³⁰ '[I]n applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the directive . . . [Emphasis added]' (para. 8). The same is true for public international law in The Netherlands.³¹ While initially the *Hoge Raad* had taken the position that the principle of consistent interpretation was based on the presumption that the legislator would not unilaterally deviate from agreements made with other states,³² the courts now take a broader approach and hold that every relevant national norm is subject in principle to interpretation consistent with public international law.³³

The most important legal condition for the application of the principle of consistent interpretation is that the contents of the provision of national law must be open to interpretation in conformity with the norm of international law. Community law does not require a *contra legem* interpretation.³⁴ Likewise, the judge's power to apply public international law indirectly is first and foremost determined by the scope for interpretation allowed by the wording of the national provision. However, in particular cases courts have stretched this scope for interpretation and have 'read

²⁷ See Case C-62/00, *Marks & Spencer*, [2002] ECR I-6325 (judgment of 11 July 2002), paras. 22–28; see also S. Prechal, *Directives in European Community Law* (1995), 210 et seq.

²⁸ In particular, see Case 300/95, *Commission v. UK*, [1997] ECR I-2649 (Re: Product Liability Directive).

²⁹ Prechal, *supra* note 27, at 214; Jans, 'Rechterlijke uitleg als implementatie-instrument van EG-richtlijnen: spanning tussen instrument en rechtszekerheid', in: T. Hoogenboom & L.J.A. Damen (eds), *In de sfeer van administratief recht — Konijnenbelt bundel* (1994) 237.

³⁰ Case C-106/89, *Marleasing*, [1990] ECR I-4135.

³¹ As well as for the British Human Rights Act 1998, see section 7, below.

³² HR 3 March 1919, NJ 1919, 371.

³³ HR 16 November 1990, NJ 1992, 107, par. 3.2.3.

³⁴ Opinion of A-G Elmer in Case C-168/95, *Arcaro*, [1996] ECR I-4705, No. 40; Prechal, *supra* note 27, at 227.

into' a national provision a norm of international law that clearly was not there (see section 6, below). Both in respect to Community law and to international law, the textual limit reflects the intertwining of methods of interpretation, the constitutional position of the courts, *contra legem* construction and the principle of legal certainty.³⁵

As to the question of what rules of international law can be used to interpret national law, both in EC law and in public international law, the principle of consistent interpretation applies to all rules of international law. The principle of direct effect is confined to a narrow category of rules that satisfies the criterion of justiciability;³⁶ however, application of the principle of consistent interpretation is not subject to any a priori qualities of a rule of international law. For EC law, it follows from the *Van Munster* case that *all* binding norms of EC law may be relevant for applying the principle of indirect effect.³⁷ The same is true for practice regarding rules of public international law. Dutch courts have held that rules of international law that did not qualify for direct effect, could nonetheless be relevant to the interpretation of rules of national law.³⁸ Since it is primarily a rule of national law that is applied and the courts accordingly do not usurp any legislative powers (one of the key rationales of the test of direct effect), the requirement of specificity is not decisive.³⁹

Likewise, the principle of consistent interpretation is not theoretically dependent on the identity of the addressee of a rule of international law. This is not a criterion in EC law in any case, neither for direct effect⁴⁰ nor for indirect effect. However, for public international law, the nature of the addressee often functions as a barrier to the application of the principle of direct effect, in the form of a test of invocability or subjective direct effect.⁴¹ As many courts consider most rules of international law to be of an 'interstate' nature, they have often refused to grant direct effect, not because the norm is too ambiguous, but because it is directed towards state parties rather than private parties. For instance, in civil cases concerning the legality of the participation of The Netherlands in the Kosovo bombings in 1999, Dutch courts held that Article 2(4) of the United Nations Charter had no direct effect because it was not intended to

³⁵ Van Dijk, 'De houding van de Hoge Raad jegens de verdragen inzake de rechten van de mens', in A.R. Bloembergen *et al.* (eds), *De plaats van de Hoge Raad in het huidige staatsbestel* (1988) 200; Van Houten, 'Contra legem werking van beginselen, toetsing van de wet aan beginselen en beginselconforme interpretatie van de wet', *Ars Aequi* 1992, 698, 703; Prechal, *supra* note 27, at 229 *et seq.*

³⁶ Case 8/81, *Becker*, [1982] ECR 53, at 71; Opinion of A-G Trabucchi in Case 43/75, *Defrenne II*, [1976] ECR at 488. This criterion is comparable to the principle of direct effect that is applied in most states with respect to public international law; see Nollkaemper, *supra* note 13 at 169–179.

³⁷ Case C-165/91, [1994] ECR I-4661, para. 34.

³⁸ Cf. HR 2 May 1995, NJ 1995, 621 (interpretation of the Criminal Code in the light of Art. 1 of the International Convention on the Elimination of All Forms of Racial Discrimination).

³⁹ See also A-G Koopmans in HR 11 December 1992, NJ 1996, 229, para. 6; see also A-G Keus in HR 19 April 2002, NJ 2002, 298 (on the application, by way of consistent interpretation, of Art. 50(6) of the Trade-Related Aspects of Intellectual Property Rights, that was held by the ECJ to have no direct effect in Case C-89/99).

⁴⁰ Opinion of A-G Trabucchi in Case 43/75, *Defrenne II*, [1976] ECR, at 488.

⁴¹ Nollkaemper, *supra* note 13, at 161.

protect the rights or interests of private parties.⁴² By contrast, the principle of consistent interpretation is not subject to preliminary assessments of whether the rule of international law in question was intended to protect private rights and thereby can circumvent these obstacles.⁴³

5 Legal Relationships Governed by the Practice of Consistent Interpretation

The standard situation in which rules of international law are applied, whether through direct effect or indirect effect, arises in the relationship between a state and a private person, where the state has failed to implement or apply a rule of international law, to the detriment of the rights or interests of a private party. The application of the principle of consistent interpretation to this legal relationship as such is not problematic and does not call for further discussion.

More pertinent is a discussion of the application of the principle of consistent interpretation to legal relationships where it is not the state, but a private party that has acted contrary to a rule of international law. This may occur in two legal relationships: between a state and a private person, in particular in criminal cases (the so-called inverse vertical relationship) and between two private parties (the so-called horizontal relationship). For reasons of space, we shall examine the latter only.

The question of the conditions needed to grant indirect effect in a legal relationship between two private parties may arise in particular in the use of international law to construe unwritten norms of due care or the standard of negligence. In principle, this is an accepted method of the judicial construction of duties of due care. For example, the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Goods contains provisions that are used to flesh out Dutch law on negligence in the context of a possessor's good faith.⁴⁴ Another example is a judgment by the The Hague district court taking notice of the Code of Conduct of the *Fédération Internationale du Ski* when applying negligence under Austrian law in a skiing accident liability case.⁴⁵ The contractual notion of good faith of Article 3:12 Dutch Civil Code has also been construed in conformity with international rules or guidelines. For example, in an insurance case, the Netherlands *Hoge Raad* used guidelines from the insurer's branch supervision body to elaborate on the notion of current legal views within the meaning

⁴² Court of Appeals Amsterdam, 6 July 2000. Reproduced, with annotation by Ferdinandusse and Nollkaemper, in 26 *NJCM-Bulletin* (2001), at 208–221.

⁴³ This of course does not mean that standing issues will not be relevant; both in regard to EC law and public international law, courts will examine whether persons invoking a rule of international law have a legal interest that is protected by the rule.

⁴⁴ <http://www.unidroit.org/english/conventions/c-cult.htm>; see Van Gaalen & Verheij, 'De gevolgen van het Unidroit-Verdrag inzake gestolen of onrechtmatig uitgevoerde cultuurogoederen voor Nederland', *Nederlands Juristenblad* 1997, 197.

⁴⁵ Rb. Den Haag 28 February 1996, NIPR 1997, 103.

of Article 3:12 CC.⁴⁶ Against this background, the question is whether analogous judicial notice will be taken of EC law or public international law in the context of negligence.

The application of the provisions of the EC Treaty (or regulations) through the principle of consistent interpretation to horizontal relationships, similar to the situation of inverse direct effect, does not cause any particular problems. Since the principle of direct effect allows for horizontal effect,⁴⁷ it is no surprise that the principle of indirect effect also applies in this legal relationship. Here too, however, the situation is different for directives because of the *general* inability for directives as such to impose duties upon private parties.⁴⁸ By contrast, the principle of indirect effect does apply in horizontal situations. The most incisive application of the principle so far concerns the violation of the prohibition on gender discrimination as laid down in Directive 76/207/EEC on Equal Treatment of Men and Women,⁴⁹ where — despite the absence of direct effect — an employer was held liable in a situation where there would not have been liability under the applicable national rules. The ECJ ruled that the simple violation of this prohibition suffices for civil liability ‘without there being any possibility of invoking the grounds of exemption provided for by national law’ (para. 25 of the *Dekker* case).⁵⁰

That judicial notice can be taken of EC law in the context of negligence is illustrated by the Dutch *Halcion* case,⁵¹ where it was accepted that the notion of ‘defective product’ under Dutch tort law should be defined as ‘defective product’ within the meaning of the EC Product Liability Directive (which was not yet applicable at the time). In another Dutch negligence case, *Pink Floyd*,⁵² the Court considered the possibility of giving indirect effect to a directive by construing unwritten norms of due care (negligence within the meaning of Article 6:162 Dutch Civil Code). It was argued that the EC Directive on the exhaustion of intellectual property rights should be given effect through the written or unwritten rules of competition law. In the first place, it was argued by the right-holder that the Dutch law on trademarks, which was traditionally construed as providing for so-called world wide exhaustion, should be interpreted in the light of a directive prescribing Community-wide exhaustion

⁴⁶ HR 12 January 1996, NJ 1996, 683 (Kroymans/Sun Alliance), para. 3.13.

⁴⁷ See, among others, Case C–281/98, *Angonese*, [2000] ECR I–4139. Joined Cases C-92 and C-326/92, *Phil Collins v. Imtrat Handelsgesellschaft*, [1993] ECR I-5145 and Case C-398/92, *Mund & Fester v. Hatrex Internationaal Transport*, [1994] ECR I–467.

⁴⁸ In the 1994 *Faccini Dori* case (Case C–91/92, [1994] ECR I–3325) the ECJ confirmed a principle it had first adopted *obiter dictum* in the 1986 *Marshall I* case (Case 152/84, [1986] ECR 723) and held that ‘a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual’ (para. 19).

⁴⁹ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L39/40; amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, OJ 2002 L 269/15.

⁵⁰ Case C–177/88, [1990] ECR I–3941.

⁵¹ HR 30 June 1989, NJ 1990, 652 (Upjohn/Van Ommeren); see also HR 6 December 1996, NJ 1997, 219 (Du Pont de Nemours/Hermans).

⁵² HR 25 October 1996, NJ 1997, 649; RAwb 1997, 36.

(meaning that a right-holder's trademark will only be exhausted where he has put the product on the market within the Community, thus being able to enjoin parallel imports from outside the Community). While the Court narrowly construed the principle of legal certainty in this case (see below), it did support the view that directives can be given effect in horizontal situations concerning breaches of unwritten duties of due care.⁵³

There are also certain limitations in horizontal cases, in particular in the form of general principles of law, which do restrict the application of indirect effect. In *Kolpinghuis*, the ECJ referred to 'the limits flowing from the principles of legal certainty and non-retroactivity' (para. 13).⁵⁴ The terms used suggest that this reasoning focuses on the issue of criminal liability, without indicating what the law is in the civil law context.

In other terms, those used by Advocate General Jacobs when affirming the well-established principles of the principle of indirect effect, 'it may well lead to the imposition upon an individual of civil liability or a civil obligation which would not otherwise have existed.'⁵⁵ It appears that in civil law cases, limitations are not to be found in the mere fact that the individual is worse off (as this is just what happened in the *Dekker* and *Draehmpaehl* cases),⁵⁶ neither in the fact that consistent interpretation boils down to a kind of direct effect through the back door, nor in the fact that additional obligations are imposed on individuals. Rather, the issue is whether the outcome of an interpretation of the applicable national law in civil cases in conformity to the directive is acceptable in the light of the general principles of law.⁵⁷

The role of legal certainty as a limitation on horizontal indirect effect also was considered in the above mentioned *Pink Floyd* case. Considering whether the Dutch law on trade marks, which was traditionally construed as providing for so-called world-wide exhaustion, should be interpreted in the light of a directive prescribing Community exhaustion, the Netherlands *Hoge Raad* ruled that the wording of the Dutch Act did not permit such an interpretation (although the Act itself did not refer as such to any specific territory) and that such an interpretation would be contrary to the principle of legal certainty, as the traders could not have been aware of this reading, given the wording of the Dutch Act.⁵⁸ It was also argued that acting contrary to the Directive would constitute negligence (unfair competition). The Netherlands *Hoge Raad* replied as follows:

3.4 . . . This reasoning cannot be accepted because [the Directive] would impose obligations on

⁵³ Cf. J.H. Jans, *European Environmental Law* (2000), 201; Betlem, 'Onrechtmatig Milieugebruik: Schending van Groene Zorgvuldigheidnormen', 21 *Recht en Kritiek* (1995) 525. Cf. *Asser-Hartkamp III*, No. 51h.

⁵⁴ Case 80/86, *Kolpinghuis Nijmegen* [1987] ECR 3969.

⁵⁵ Opinion in Case C-456/98, *Centrosteeel*, [2000] ECR I-6007, No. 35.

⁵⁶ Case C-177/88, *Dekker*, [1990] ECR I-3941; Case C-180/95, *Draehmpaehl*, [1997] ECR I-2195.

⁵⁷ Prechal, *supra*, note 26, at 242.

⁵⁸ In the subsequent Case C-355/96, *Silhouette*, [1998] ECR I-4799, the ECJ found that, based on a provision of the Directive (Article 7 of the First Council Directive 89/104/EEC of 21 December 1988), Member States of the European Union should not be permitted to adopt a standard of international exhaustion.

individuals, albeit indirectly, which is contrary to the principle that directives as such cannot be relied upon against individuals and the national law can only be interpreted in conformity with the Directive within the limits [of the principle of legal certainty] which would be exceeded.⁵⁹

In the light of the case law of the ECJ, cited above, the Netherlands *Hoge Raad's* considerations on horizontal indirect effect are not convincing.⁶⁰ Only *directly* imposing obligations on individuals by a directive (in the words of the Court: 'as such') is excluded. In *Pink Floyd*, at the end of the day, Dutch tort law would have been applied — the unwritten norms of due care as referred to by Article 6:162 CC — and not the Directive as such.⁶¹

The situation in international law is different. The starting point is that rules of international law (taken as rules based on an international source) may well apply between private parties: indeed, this is the very rationale of treaties on matters of private international law. These treaties are 'binding upon everyone' in the sense of Article 93 of the Dutch Constitution and are routinely applied between private parties. These norms can obviously also be applied in an indirect manner. Under certain conditions, treaties that were not intended to be applied to private parties, have also been granted direct effect in a horizontal relationship. This is the case, for instance, of the European Social Charter and the European Convention on Human Rights, and also appears to be possible more generally.⁶² Few provisions have been granted such effect, but if this is possible, and to the extent that such provisions can acquire direct horizontal effect, it seems that they also can be applied indirectly.

The more complicated question is whether rules of international law that primarily lay down rules for states, and that cannot be given direct effect, may, using the principle of consistent interpretation, be applied in a horizontal relationship. Can international law be relevant in construing unwritten duties of due care (Article 6:162(2) CC) or, to put it more precisely, 'should the court, when deciding what due care requires in the case in hand, take notice of legislative intent regarding a desirable approach in the form of the conclusion of an international convention, albeit that the legislature has not yet transposed it into a statute?'⁶³ One might conclude that, considering that courts have used a variety of non-legal texts to construe the norm of due care (see above), norms that have been approved by Parliament, even if they are not incorporated in national legislation, could be used for this purpose. Several authors indeed have suggested that this should be possible.⁶⁴ Case law is not

⁵⁹ See also the Opinion of A-G Mok, No. 5.2.7.2, without, however, mentioning consistent interpretation.

⁶⁰ Prechal, *supra* note 26, at 242; contra: Opinion of A-G Elmer in Case C-168/95, *Arcaro*, [1996] ECR I-4705, No. 39.

⁶¹ Cf. Prechal, *ibid.*, at 241-2.

⁶² Courts can apply directly effective provisions to determine the wrongfulness of acts of private parties and to declare, for instance, that a tort has been committed. *A contrario* this follows from HR 1 June 1956, NJ 1958, 424 (2nd Cognac case). Cf. HR 23 September 1988, NJ 1989, 743, para. 3.2 (MDPA).

⁶³ Case note by Scholten under HR 26 April 1935, NJ 1935, p. 1617 (authors' translation).

⁶⁴ Tammes, "'Een ieder verbindende" verdragsbepalingen', *Nederlands Juristenblad* 1962, 71, at 74; Alkema, case-note to HR 17 October 1980, NJ 1981, 141.

supportive of this position, however.⁶⁵ So far, Dutch courts have not explicitly recognized the possibility of indirect application of treaty law in the context of negligence.

It has been said that, at the time of drafting of the Constitution, the legislature intentionally chose not to provide for indirect application of not-directly-effective international law in tort law. This was to prevent courts from exercising virtually unlimited powers in applying rules of international law that are not directly effective.⁶⁶ The limiting factor would thus be based on concerns about separation of powers. It also could be said that applying rules that are not intended to create rights and obligation for private parties would amount to imposing additional obligations on private parties, which was precisely precluded by the absence of direct effect. The limiting factor would then be based on the principle of legal certainty. This was indicated in a case involving Articles 8 and 14 ECHR (family life and non-discrimination). Article 959 of the old Civil Code provided that only the relatives of a minor who had appeared in court have the right to appeal in guardianship cases. The question arose as to whether this procedure is also applicable to children born out of wedlock. Article 959 CC, as intended by the legislature, gave a negative answer to this question. Articles 8 and 14 ECHR, and in particular the *Marckx* judgment, however, pointed to the opposite direction. The Netherlands *Hoge Raad* therefore eliminated the distinction between children born in and out of wedlock. In this case, it did not ignore the Civil Code's provision; instead it interpreted it to include both categories of children. However, the *Hoge Raad* added that:

“What impact the said development [towards equal treatment] should have — taking into account the judgment of the European Court of Human Rights — on judicially establishing the current Dutch law, must be assessed for each individual provision relevant to the said distinction [between children born within and outside wedlock]; the same applies to the question of which situations may be affected by the development, depending on when they occur(red), in the light of the requirements of legal certainty.”⁶⁷

While practice is scarce, it appears that rules of public international law that do not have direct effect cannot be used as an indirect source of law in the judicial assessment of unwritten duties of due care, due to concerns on separation of powers and legal certainty.

6 Legal Consequences of Indirect Effect

To fully understand the legal effects of indirect effect, these should be compared to the consequences of direct effect. It can be recalled that both in EC law and in public international law as applied in the Netherlands, direct effect may lead to giving precedence to the international norm over the national norm. In EC law, this follows

⁶⁵ HR 9 February 1942, NJ 1942, No. 371. Also: HR 1 June 1956, NJ 1958, 424 (2nd Cognac case).

⁶⁶ J.G. Brouwer, *Verdragsrecht in Nederland* (1992), at 215–216.

⁶⁷ HR 18 January 1980, NJ 1980, 464 (emphasis added).

from the *Costa v. ENEL* case.⁶⁸ As for public international law, this results not so much from international law itself, as it generally is thought that supremacy of international law⁶⁹ is confined to the international sphere, but from constitutional law. According to Article 94 of the Dutch Constitution, all directly effective provisions of international law take precedence over national law.⁷⁰ In principle, norms that do not have direct effect will not lead to these consequences.

However, in practice the consequences of indirect effect can come very close to those of direct effect. In *Marleasing*, the ECJ held that the requirement to construe national law in conformity with the directive at issue precludes the interpretation of the former in such a manner that other grounds of nullity of companies than the ones listed in the Directive apply (para. 9). It follows that the principle of consistent interpretation in Community law goes further than a general incentive to 'reconciling interpretation'. For the outcome — and even the formulation: 'Community law precludes application of national law' — is the same as for direct effect. The way effect was given to the Directive in the present case boiled down to a 'prohibition' for the Spanish court to apply a provision of the Civil Code insofar as it would produce a result not envisaged by the Directive.⁷¹

The effects of public international law can also resemble those achieved by direct effect had it been used. One example is a case in which a German citizen was prosecuted before a Dutch court for a violation of the Dutch Road Traffic Act. The subpoena was issued in Dutch. The Netherlands *Hoge Raad* considered that this was contrary to Article 6(3) ECHR. The lower courts had held that the charges were inadmissible and that the subpoena was void. Suspending the charges did not seem possible as Articles 14–16 of the Dutch Code on Criminal Procedure established an exhaustive list of the grounds for suspension (and did not provide for this situation). Nonetheless, the Netherlands *Hoge Raad* ruled that in case of a breach of a treaty, suspension is possible. It added, in effect, a new ground for suspension to the list contained in the Code on Criminal Procedure, resulting in a breach of a suspect's rights as defined by Article 6(3) ECHR. It had, through consistent interpretation, created new law in Dutch criminal procedure.⁷² Also in other cases the *Hoge Raad* held that, by way of application of the principle of consistent interpretation, the courts

⁶⁸ [1964] ECR 593–594; Cf. Opinion of A.-G. Reischl in Case 106/77, *Simmmenthal II*, [1978] ECR at 650; T. C. Hartley, *The Foundations of European Community Law* (1998), at 218.

⁶⁹ As the ICJ recalled in the *Advisory Opinion on the Applicability to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*: 'international law prevails over domestic law.', ICJ Reports (1988), at 12, 34.

⁷⁰ Art. 94 reads: "Statutory provisions in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions of international organizations."

⁷¹ See also Case C–421/92, *Habermann-Beltermann*, [1994] ECR I–1657; Betlem, 'The *Effet Utile* of Indirect Effect', 2 *MJ* (1995) 73; and more recently, Case C–456/98, *Centrosteeel*, [2000] ECR I–6007 and Case C–386/00, *Axa Royale Belge*, [2002] ECR I–2209 (judgment of 5 March 2002), [2002] 2 CMLR 5.

⁷² HR 23 April 1974, NJ 1974, 272.

should fill gaps in the law.⁷³ The construction is analogous to the one applied in EC law. In both cases, the outcome of the principle of construction resembles that of the principle of direct effect.

One limitation to the effects of consistent interpretation, which arises in a similar fashion with direct effect, will be applied by the courts, though. When applying a rule of international law leads to putting aside the otherwise applicable rule of national law, and the rule of international law itself does not provide a solution for the resulting gap in the law, the principle of separation of powers calls for judicial restraint.⁷⁴ Where interpretation becomes amendment and the existing national or international law does not provide sufficient guidance, the practice of consistent interpretation will encounter its limits.

7 A Comparative Note: ‘the English *Marleasing*’ (Human Rights Act 1998, Section 3)

The ECJ’s principle of consistent interpretation and the practice of Dutch courts can be put in a comparative perspective by examining the UK Human Rights Act (HRA), that incorporates most, but not all, of the fundamental rights laid down in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.⁷⁵ This Act contains a statutory duty for the courts to construe their law in compliance with an instrument of public international law. This principle of consistent interpretation is a hybrid of the two systems studied so far: it is a creature of domestic law but modeled on EC law. In constitutional terms, the status of so-called Convention rights under the HRA within the UK legal order is comparable to European Community law: both systems require that English law, both statute and common law, be compatible with the ‘European’ norms. There is, however, an important difference between the powers of the courts in the event of a perceived incompatibility. The HRA does not empower courts — unlike the principle of direct effect of EC law — to set aside an English Act of Parliament where it conflicts with the HRA.⁷⁶ The only remedy in this context is a declaration of incompatibility which does

⁷³ HR 16 November 1990, NJ 1992, 107, par. 3.2.3 (filling a gap in the Code on Civil Procedure by reference to the 1956 Convention on the Contract for the International Carriage of Goods by Road).

⁷⁴ HR 12 May 1999, NJ 2000, 170 (holding that the Court can fill a gap when the system of the law, the contents of the law and the principles or the history underlying the law provide sufficient direction as to how the gap should be filled; but that when it would require important choices of legal policy, the matter in principle should be left to the legislator). See discussion by Martens, ‘De grenzen van de rechtsvormende taak van de rechter’, *Nederlands Juristenblad*, 2000, 747.

⁷⁵ Available on the Website of HMSO, URL: www.legislation.hmso.gov.uk/acts.htm (Acts of the UK Parliament). The Act came into force in October 2000.

⁷⁶ See generally e.g. Beloff, ‘“What Does it All Mean?” Interpreting the Human Rights Act 1998’ in L. Betten (ed), *The Human Rights Act 1998. What it Means* (1999), at 11; Lindell, ‘Invalidity, Disapplication and the Construction of Acts of Parliament: Their Relationship with Parliamentary Sovereignty in the Light of the European Communities Act and the Human Rights Act’ in A. Dashwood and A. Ward (eds), *The Cambridge Yearbook of European Legal Studies* (Vol. 2, 2000), at 399; and Leigh and Lustgarten ‘Making Rights Real: the Courts, Remedies, and the Human rights Act’ [1999] *CLJ* 509.

not affect the validity, continuing operation or enforcement of the affected provision, nor is it binding on the parties to the proceedings in which it is made (S. 4(6)). However, Section 3 of the HRA obliges the courts to interpret legislation, both primary and secondary, whenever enacted, 'so far as it is possible to do so . . .' and to give effect to it 'in a way which is compatible with the Convention rights'. The wording of this English duty of consistent interpretation is, of course, almost identical to the ECJ's formulation in *Marleasing*; in fact, it has been modeled on it. It has therefore been suggested that the limits to the HRA's duty should be drawn along the lines of those contained in the *Marleasing* formula.⁷⁷

A similar far reaching impact is to be expected under this parallel obligation on interpretation.⁷⁸ It has been argued that this provision requires a different approach to statutory interpretation than the one that has thus far prevailed in England. There exists a stronger case under the HRA for courts to reach compatibility, i.e. stronger than the rule which allowed consistent interpretation only in case of ambiguity. Consistent interpretation is considered possible and must be achieved as long as the statute is not distorted. Most importantly, a purpose-oriented approach to statutory interpretation is required in this context, as it is in the context of giving effect to EC law; in positive terms courts must proceed from a presumption of compatibility and achieve congruity unless the wording of the statute makes that clearly impossible.⁷⁹ As the HRA is still recent, it is too early to assess its full impact on legal practice.⁸⁰ However, given the numerous cases in which it has already been invoked, there can be no doubt about its significance.

In fact, the UK's highest court has already had the opportunity to rule on the scope and limits of the interpretative obligation of the HRA, most recently and most comprehensively on 14 March 2002. In *In Re S (Minors) (Care Order: Implementation of Care Plan)* it dealt with the issue of construing the 1989 Children Act in the light of Articles 6 (fair trial) and 8 (family life) ECHR.⁸¹ The House of Lords reviewed a judgment of the Court of Appeal which contained two major adjustments and innovations in the interpretation and application of this Act of Parliament (under Section 3 HRA), including newly established guidelines on the procedure to be followed by first instance courts when ruling on applications for care orders. The Court of Appeal had introduced so-called starred milestones into care plans, obliging the local authority to reactivate the process of the plan's adoption if they are not reached. The issue before the House of Lords was whether the courts have the power

⁷⁷ Bamforth, 'The application of the Human Rights Act 1998 to public authorities and private bodies' [1999] *CLJ* 159, 169.

⁷⁸ Cf. Edwards, 'Reading down legislation under the Human Rights Act' 20 *Legal Studies* 353 (2000); Leigh and Lustgarten, *supra* note 76, at 511; House of Lords, *R. v DPP, ex parte Kebilene* [1999] 3 *WLR* 972, [1999] 4 *All ER* 801: 'Section 3(1) enacts a strong interpretive obligation', per Lord Steyn.

⁷⁹ Beloff, *supra* note 76, at 29; Leigh and Lustgarten, *supra* note 76, at 538–539; K. Starmer, *Blackstone's Human Rights Digest* (2001), at 28; K. Starmer, 'Two Years of the Human Rights Act', [2003] *EHRLR* 14.

⁸⁰ See, for an overview, Starmer, *ibid.*

⁸¹ [2002] 2 *A.C.* 291, [2002] 2 *All ER* 192.

to ‘read into’ the Act in question, rights and liabilities not sanctioned by Parliament. According to its unanimous judgment, these innovations in particular went beyond the limits of the interpretative obligation. Most notably, perhaps, the House of Lords considered the limits to judicial innovation in the (constitutional) light of the separation of powers. It accepted that Section 3 of the HRA (the interpretive obligation) was a powerful tool and was not subject to the existence of ambiguity. ‘Compatibility with Convention rights is the sole guiding principle.’⁸²

However, the outer limit of this power lies in the fact that the HRA did preserve parliamentary sovereignty over amending and enacting statutes. The Court of Appeal’s introduction of the cited ‘starred milestones system’ (into the Children Act) had crossed the boundary between interpretation and amendment since it departed substantially from fundamental features of this Act of Parliament, including express limits to the courts’ powers for the duration of a care order when parental responsibility is exercised by the local authority (principle of non-intervention).⁸³ One indication of the fact that the boundary between interpretation and amendment has been crossed lies in the result of this new scope, which has practical repercussions that the court is not equipped to evaluate.⁸⁴

In terms of general observations about the limits to ‘reading into’ or ‘reading down’ statutes, the March 2002 judgment adds to (but does not take from) the House of Lords’ judgment in *R. v. A. (No. 2)*.⁸⁵ Briefly, this case concerns the conflict between the requirements of a fair trial (Art. 6 ECHR) and a statutory provision of English law protecting rape victims from being harassed in court about their sexual history; exclusion of evidence in this respect is problematic where the defendant argues that the victim had consented to sex. In terms of ‘HRA law’, the question is whether Section 41 of the Youth Justice and Criminal Evidence Act 1999, which excludes prior sexual history from the admissible evidence, can be construed to ensure the defendant’s right to a fair trial. Lord Steyn affirmed that Section 3 HRA goes far beyond the prevention of absurd consequences. Linguistically strained interpretation may sometimes be necessary; but reading down provisions and implying provisions are also among the techniques to be used.⁸⁶ A declaration of incompatibility is the last resort and ‘must be avoided unless it is plainly impossible to do so’; impossibility arises where a clear limitation of Convention rights is stated in such (express or necessarily

⁸² *R. v. A.* [2002] 1 A.C. 45 (Re Complainants Sexual History) per Lord Hope, para. 108.

⁸³ Lord Nicholls, paras 23–25.

⁸⁴ *Ibid.*, paras 40, 44. It would also seem that one of the reasons for the House of Lords’ reversal of the Court of Appeal’s innovation was that it was not raised during the hearing; it first appeared in the judgment.

⁸⁵ [2002] 1 A.C. 45, [2001] 3 All E.R. 1 (Re Complainants Sexual History). See also Spencer, “‘Rape shields’ and the right to a fair trial”, [2001] *CLJ* 452 (Case and Comment on *R. v. A.*).

⁸⁶ See, for illuminating examples of reading words into (i) the Civil Procedure Rules and (ii) the Fatal Accidents Act 1976: *Goode v. Martin* [2002] 1 WLR 1828, [2002] 1 All E.R. 620 (CA) and *Cachia v. Faluyi* [2001] 1 WLR 1966, [2001] 1 All E.R. 221; both cases concern Art. 6 ECHR (fair trial). In the latter case, the Court of Appeal itself says: ‘This is a very good example of the way in which the enactment of the Human Rights Act 1998 now enables English judges to do justice in a way which was not previously open to us.’

implied) terms.⁸⁷ In other words, general wording in statutes, which could be construed to restrict fundamental rights, shall be deemed to be subject to those rights (principle of legality). This canon of construction was already well established before the HRA. The Act adds that in the unusual case where an infringement of Convention rights by the legislature ‘is so clearly expressed as not to yield to the principle of legality’, the courts will make a declaration of incompatibility.⁸⁸

This early experience with the interpretative obligation under the HRA reflects, regarding techniques of statutory interpretation, the predicted convergence with the purpose and result oriented approach to statutory interpretation under the *Marleasing* formula; ensuring an interpretation which complies with the Convention is paramount. The courts apply this ‘European style’ canon of interpretation whenever a potential conflict between Convention rights and English law arises.⁸⁹ In the EC law context, this is apparent in the House of Lords’ *Webb*⁹⁰ judgment, where it wholeheartedly accepted the ECJ’s ruling, requiring a drastic reinterpretation of the relevant English statutes. The interpretative obligation under the HRA has been described as ‘surgery’ to ensure compatibility by modifying, altering or supplementing the words of Parliament in the Act at issue.⁹¹ The national court therefore no longer emphasizes the limits to consistent interpretation through the sole distortion of the meaning of a statute but focuses instead on reaching a directive’s result, if this is at all possible.⁹²

English courts have developed relevant viewpoints as to the limits of the interpretative obligation; these include the boundary between interpretation and amendment of a statute, and thus the limit to the interpretative obligation in terms of the constitutional role of courts and whether the proposed reading of a piece of legislation has practical repercussions beyond a court’s capacity to evaluate (a factor thus closely linked to the forbidden judicial legislation). Inherent uncertainty about

⁸⁷ No. 46, at [2002] 1 A.C. 68, citing Lord Hoffmann in *Simms* [2000] 2 A.C. at 131; see also Lord Hope in *R v. A* (No. 2) [2002] 1 A.C. at para. 108; Lord Hope agrees with the test formulated by Lord Steyn in his leading speech, see No. 110, but thinks that there is no incompatibility between the Act and Art. 6 ECHR even on ordinary principles of construction (thus, he does not ‘resort to’ S. 3 HRA at all), see para. 106–107 at [2002] 1 A.C. 86.

⁸⁸ *Simms* [2000] 2 A.C., per Lord Hoffmann at 132; see also *McLellan* [2002] 2 WLR 1448 (C.A.), Nos. 76–77 per Waller L.J.

⁸⁹ In fact, even outside the ‘European’ dimension, English courts no longer apply a literal reading of statutes, *Pepper v. Hart* [1993] A.C. 593 at 617 per Lord Griffiths and at 635 per Lord Browne-Wilkinson. See also Steyn, ‘Pepper v. Hart: A Re-examination’, 21 OJLS 59, 70 (2001).

⁹⁰ *Webb v EMO Air Cargo (UK) Ltd* (No 2), [1996] 2 CMLR 990, [1995] 4 All ER 577, [1995] 1 WLR 1454.

⁹¹ Lord Hope in *R. v. A.*, at No. 106. Or, in the words of Spencer: ‘... (in effect) to do whatever violence [is] necessary to the language . . .’ see Spencer, ‘“Rape shields” and the right to a fair trial’, [2001] *CLJ* 452, at 454 (Case and Comment on *R. v. A.*)

⁹² M. Hunt, *Using Human Rights Law in English Courts* (1998), at 121–122; Craig, ‘Indirect Effect of Directives in the Application of National Legislation’, in M. Andenas and F. Jacobs (eds), *European Community Law in the English Courts* (1998) 37, at 49–50: albeit subject to a distinction between cases involving express implementing legislation or not. Note in particular the contrast with the House of Lords’ first judgment in *Webb* (the reference to the ECJ), [1992] 4 All ER 929, [1993] 1 WLR 49: emphasis on further consideration of possibility to reach a consistent interpretation; reference to limits of the duty: no distortion of statute.

the boundary between an impermissible creative interpretation and a robust and sensible construction of documents thus remains, as put by Lord Nicholls (para. 40 of the *Care Order* case); it is not a new problem but it is more acute nowadays in the post-HRA era and the more liberal attitudes of courts generally. Opinions will inevitably differ as to when the frontier between interpretation and amendment (resulting in forbidden judicial legislation) has been crossed. Ultimately, this is a matter of appreciation by each individual judge or panel, with, of course, the final say for the highest court involved in the case in hand, which, indeed, may not be able to reach a unanimous view on the matter itself.⁹³ Thus far, the ECJ has not elaborated on this particular restriction.⁹⁴

8 Final Conclusions

The above analysis leads to the following conclusions.

Firstly, starting with the obvious but most important fact, through the practice of consistent interpretation, national courts play a major role in the application of international law. This is true where a treaty has not been implemented, but also when the legislature has transposed a rule of international law, giving rise to questions as to its proper application. It is only after a court's interpretation of the relevant domestic legislation in the light of the treaty that it may be assessed whether a treaty has been correctly applied.

Secondly, case law (and accompanying legal doctrine) on Community law and public international law have gone their separate ways. Without assimilating these legal systems, we conclude that there are overlapping patterns. The difference between the legal orders of EC law and public international law is one of degree rather than of principle. On the one hand, supremacy may also exist in EC law by virtue of constitutional acceptance, while, on the other hand, in several states, including the Netherlands and even dualist states like the United Kingdom, national practice has made the role of national courts with regard to international law closely resemble to their role in EC law.

The impact of the principle of construing domestic law consistently with supranational law in both legal systems further mitigates the clear distinction between Community law and public international law. In both situations, the courts recognize that there is a binding rule of law, higher in the hierarchy, and that the domestic law is to be construed so as to give effect to that rule of international law. The

⁹³ See for example, the opposing views as to incompatibility, even under 'ordinary' principles of construction, of Lord Hope (No. 109) and Lord Clyde (No. 161) in *R. v. A.* [2002] 1 A.C. 45 as well as their contrary views on the (im)possibility to reach a Convention compliant reading under Section 3 HRA (Nos 109 and 162); Dissenting Opinion of L.J. Sedley in *Marper and Another v. Chief Constable of South Yorkshire* [2002] EWCA Civ 1275, at No. 94.

⁹⁴ It is true that in Case 14/83, *Von Colson and Kamann*, [1984] ECR 1891, the ECJ referred to the national courts' discretion under their own laws (para. 28) but this particular phrase has only been repeated once in the numerous subsequent cases; see Case C-136/95 *Thibault* [1998] ECR, I-2011, para. 22.

limitations to application are based on similar considerations — the margin left by the pertinent national provision, legal certainty, and the constitutional role of the courts.

In evaluating the requirements of the principle of legal certainty, a distinction between different legal areas must be made. In the criminal law context, the principle of legality (*nullum crimen nulla poena sine lege*) plays a pivotal role; perhaps the same can be said for administrative law. In civil law disputes, by contrast, there is a wider scope for consistent interpretation as the imposition of unwritten duties of due care is acceptable.

Thirdly, in some respects the judicial application of international law could benefit from studying developments in Community law and *vice versa*, while taking into account the larger autonomy of public international law. This is particularly true for the limits to consistent interpretation. These limits are more developed in EC law than in the indirect effect of international law (i.e. under Dutch law), notably with respect to the application of general principles of law such as the principle of legal certainty. To the extent public international law is being increasingly applied by national courts, the impact of these principles must be given greater consideration and Community law may be a source of inspiration. In both contexts courts have ‘read in’ additional grounds of review etc. or, by contrast, have ‘read down’ a domestic statute where it went beyond, for example, an exhaustive list of grounds under EC or international law.

Case law on the application of public international law only addresses to a limited extent a number of issues that have proved to be critical in the richer EC case law. The use of consistent interpretation, as well as its limitations, to the detriment of a private party, and the use of treaty norms in the judicial determination of a standard of due care in disputes between private persons all require additional scrutiny. Lessons also can be learned from Community law with respect to reasonable limits to the imposition of obligations on individuals. Taking differences between legal systems into account, the approaches to the effect of public international law can be further developed in light of the more frequent judicial application of Community law. That being said, guidance provided by English courts in the context of the HRA also offer a valuable contribution to the principle of consistent interpretation, by clarifying for example the boundary between acceptable, albeit robust and creative, interpretation and the ultimate forbidden fruit: judicial legislation.