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**International Law in Domestic Courts,
a practical approach of the French and European Experiences**

There are various solutions in Europe as to the effect of international law in national legal order. They depend on national constitutions (the Netherlands, Germany, Spain etc...) or on common law which express either monist or dualist views. They also are the result of European integration and tend to guarantee the prevalence of Community law. However the case-law from the national courts does not show much difference in practice between EC law and international law. It also shows that solutions in common law may be not so different from the ones in civil law countries.

In France the monist tradition prevails. The executive branch (the President and the government) is vested with treaty making power : the President has the power to negotiate treaties , to sign treaties and to ratify them. The Parliament will exercise a general political control over the international agreements and foreign policy, but, more specifically some treaties and international agreements require legislative authorization prior to ratification or approval (article 53 of the Constitution). The Constitution also allows the Head of State to consult the citizens on a treaty through a referendum. As for the implementation of treaties, it is for the courts to solve the question of the relation between international law and domestic law with great “nuances”. The practice may vary from one court to another as the French judiciary is divided in two branches : administrative courts and the Conseil d’Etat and judicial courts with the Cour de cassation. There is also a constitutional court (Conseil constitutionnel) with very specific functions which has stimulated the treatment of international law by domestic courts.

The Constitution fixes the place of the treaties in the hierarchy of norms but the courts had to deal in practice with the domestic effect of international law in order to determine the exact situation of international law in relation to national law then to give effect to international rules in specific cases where they have been invoked by the parties.

I - International law and the courts**A - Prevalence of international law**

Pursuant to Article 55 of the French Constitution, « treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party” (French Constitution, Article 55)

In The European Union, the European Court of Justice ruled :

“The EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply

(.....) the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question” (Costa/ENEL, 6/64).

“A national court which is called upon, within the limits of its jurisdiction, to apply provisions of community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means” (Simmenthal)

The French Constitutional court (Conseil constitutionnel) denied that it had the power to decide upon the conformity of a statute with a treaty or an international agreement (abortion case, 1975 decision) : a statute which does not comply with a treaty is not inevitably contrary to the Constitution. It was then for the courts to ensure the prevalence of a treaty over a statute.

Historically, the courts were reluctant to do so. Only in 1975, the supreme judicial court (Cour de cassation, 24 May 1975 Société Jacques Vabre), then in 1989, the supreme administrative court (Conseil d’Etat, 20 October 1989 Nicolo) accepted that a treaty prevails over subsequent statutes.

However, when the argument is not raised by a party to the case, the administrative court has no obligation to declare that a treaty prevails over a statute (2002, Maciolak ; except in tax matters, 2002, Société Schneider Electric).

Most of the time the courts do their best to construe statutes so as to exclude any contradiction with a treaty. But there is no legal presumption of compatibility.

B – Efficiency of international law

In practice, supremacy of international law might be limited.

With respect to international rules :

+ Prevalence of treaties is subject to a **reciprocity** condition. Till now, the administrative courts consider they have no jurisdiction as to the control of the observance of a treaty by the other party ; they would refer to the opinion of the Ministry of Foreign Affairs (CE, April 9, 1999, Mme Chevrol-Benkeddach, with the exception of humanitarian conventions CE, December 21, 1990 Confédération nationale des associations familiales catholiques). However this is not the view of the ECHR (13 Feb. 2003, Chevrol/France). Conversely, judicial courts assume that reciprocity is satisfied so long as the government has expressed no view neither suspended nor denounced the treaty (Cass. March 6, 1984, Kryla ; March 23, 1994, N°Guyen Duy Thong).

+ As for international **custom** and **general principles** of international law, the French courts are reluctant to apply the principle of prevalence over statutes (CE, June 6, 1997, Aqarone ; July 28, 2000 Paulin ; Cass. 17 juin 2003 MRAP).

Interestingly, some principles of international law which might be not very well established in domestic law have been introduced in national legal order through constitutional amendments

(Environment Charter) and it will be fascinating to see how the courts will interpret and implement those principles.

Decisions of international organizations such the UN are generally published when they affect individual rights : they should prevail over statutes as from the date of their publication. However, the courts are reluctant and they regard those decisions as acts which cannot be separate from the conduct of international relations : therefore they have no jurisdiction to decide on their validity or on their implementation (CE December 27, 1997, Société Heli-Union).

+ **Interpretation** : in 1990 the supreme administrative court ruled the courts are entitled to construe international treaties ; they may refer questions of interpretation to the Ministry of Foreign affairs but they are no longer deemed to be bound by the governmental interpretation (CE, June 29, 1990 Gisti). Judicial courts allowed themselves to construe international agreements (Cass. December 19, 1995, Banque Africaine de Developpement/BCCI). However they refuse to do so where public interest is at stake (Cass. June 7, 1989, Société Cartours) ; criminal chamber of the supreme court keep sending questions of interpretation to the Ministry of foreign affairs (June 30, 1976 Glaeser). The interpretation of the courts may not reflect the views of the States which negotiated the treaty or of the international organization.

However, as to Community law, when the court has a doubt on the construction of a provision in a Community act, it has to refer the question of interpretation to the ECJ for preliminary ruling (ECJ 283/81 CILFIT, 1982). If they do not refer the question, there is a principle of consistent interpretation : in applying national law, 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... (C-106/89, Marleasing, 1990).

With respect to the Constitution :

+ **Constitution supersedes treaties** and international agreements : both the supreme administrative and judicial courts consider that the supremacy conferred by the Constitution on international agreements does not apply, in the internal order, to the provisions of a constitutional nature : the argument that domestic law in ignoring the provisions of international agreements properly introduced into internal law, should thereby be contrary to article 55 of the Constitution cannot but be rejected ; by the effect of the reference made to a provision of a statute by an article of the Constitution, that provision has constitutional value in itself (CE, October 30, 1998 Sarran, Levacher ; Cass. June 2, 2000 Mlle Fraisse).

However, it is not possible under French law to challenge the constitutionality of a treaty or an international agreement after ratification or approval by the President of the government. Neither the constitutional court nor the administrative or the judicial courts have jurisdiction to rule on that matter (CE, December 18, 1998, SARL du Parc de Blotzheim ; November 3, 1999, Groupement de défense des porteurs de titres russes)

+ the **translation of a EC directive** into national legal order is a constitutional mandatory requirement which could be avoided only on the basis of an explicit provision of the Constitution ; where such a provision does not exist, it is for the European court of justice, if necessary on the basis of a reference by the national judge, to control the conformity of the

directive to the allocation of powers as defined by the treaties as well as to fundamental rights provided for by the European Union Treaty (Cons. const. decision July 29, 2004 et al.)

However the transposition of a directive cannot run counter to any rule or principle inherent to the constitutional identity of France, except when the constitution-making power consents thereto ; the constitutional court can only find a statutory provision unconstitutional under article 88-1 of the Constitution if this provision is obviously incompatible with the EC directive which it is intended to translate into the national legal order ; in all events it is incumbent upon national courts, if need be, to refer a matter to the ECJ for a preliminary ruling (Cons. const. decision July 26, 2006).

The supreme administrative court has made more precise how to combine supremacy of the Constitution in domestic legal order and the requirements which flow down from the participation of France into the European Union and EC (CE February 8, 2007 Arcelor Atlantique et Lorraine).

II - International law and the citizen (as a party to a case)

A – The effect of international law

1) The **implementation** of a treaty or an agreement is not, as such, sufficient to allow its invocability by a party before the court. There may be self-executing provisions : they may be invoked when they have been published and thus given effect in domestic law. But if the treaty is not clear enough, it cannot be applied by the courts (CE, January 10, 1958 Bourgin). This also applies where a treaty is not self-executing : its implementation requires complementary measures.

The courts have a wide margin of appreciation.

They may decide that a convention or some of its provisions has direct effect or not. For example the 1990 New York International convention on the protection of the rights of the child and there may be differences between the judicial courts and the administrative courts in that matter (Cass. civ. March 10, 1993 ; CE April 23, 1997 Gisti...)

With regard to Community law, distinction between regulations and directives. Regulations prevail over domestic measures and have direct effect (CE September 24, 1990 Boidet). Directives have no direct effect : courts refuse to consider directives so long as they have not been transposed into French national law (CE, December 22, 1978 Cohn-Bendit). However the administrative courts take into account the objectives of the directive. Directive may prevail over subsequent legislation, even if it has been improperly implemented when it is sufficiently precise so to be applied without appropriate implementing measures (CE September 24, 1990 Groupe environnement protection ornithologie en Picardie ; February 25 1992 Rothmans & Philip Morris). The courts may compel administration to implement directive in due time and to harmonize domestic law with the directive (CE Ass. Cie Alitalia) But the courts accept the administration and government may have a wide margin of appreciation (CE 3 december 1999 Association ornithologique et mammalogique de Saône et Loire et rassemblement des opposants à la chasse).

The courts may cancel individual measures taken on the ground of any domestic rule which does not comply with an EC directive (CE Ass. February 6, 1998 Tête)

In the European Union, national courts must give effect to the provisions of Community law even where it affects fundamental principles such as *Res judicata* and the decisions of the courts (ECJ July 18 2007 Ministero dell'Industria, del Commercio e dell'Agricoltura, C-119/05).

More generally, the interpretation of the statute on the basis of international law may change domestic law :

- extradition treaties : CE October 15, 1993 Joy Davis Aylor
- European convention on Human rights : transsexualism cass. civ May 21, 1990, ECHR March 25 1992, B./France, Cass. Ass. December 11, 1992 ; fair trial Cass Ass. February 5, 1999...

2) There are consequences on **State liability** for legislation passed in breach of European law or of an international convention.

This was clearly stated by the ECJ as for EC law in Factortame C-46/93.

This principle has been developed by the supreme administrative court in France (CE February 8, 2007, M. X)

B – The combination of international rules

The **national courts** may have to decide where two or more international agreements contain contradictory provisions : they tend to enforce the provisions of the most recent agreement (Cass. crim. October 6, 1986 Sander ; CE September 5, 2001 Préfet des Alpes Maritimes/Benkhata).

The situation may also appear in the **European community** legal order where EC law may conflict or has to be combined with international law.

The solution varies :

as to the WTO law, the WTO agreements are not in principle among the rules in the light of which the ECJ is to review the legality of measures adopted by the Community institutions (March 1, 2005 Van Parys, C-377/02)

as to the UN law, it seems as if for the ECJ the obligations of the Member States of the UN clearly prevail over every other obligation of domestic law or of international treaty law including for those that are members of the Council of Europe, their obligations under the ECHR and, for those that are members of the EC, their obligations under the EC treaty.

Most unexpectedly, the Court of first instance of the EC also ruled that it was empowered to check, indirectly, the lawfulness of the resolutions of the Security Council with regard to *jus cogens*. (CFI September 21 2005 Yusuf Al Barakat, T/306/01)