Of interest, though, is the Hoge Raad decision of *US v Bank voor Handel en Scheepvaart*, a decision subject to the Nyugat doctrine.[160] Shortly described, BHS brought an action to recover assets seized during World War II by the US government as "enemy property". Specifically, these were shares in and debts owing from Union Bank, an affiliate of BHS.[161] Since the war, the Union Bank had been liquidated and the surplus retained by the US government for its own use. BHS attacked the seizure as an expropriation contrary to international law, and its characterisation as an "enemy" for the purposes of the Act. The Court dismissed the claim on its merits, rather than declining jurisdiction for reason of US sovereign immunity. In fact, the Court held that no rule of law barred it from examining whether the US action was correct, including under customary international law. Nor did customary international law bar consideration where all elements, legal act and property, were situated within the foreign state.

This case can be examined from three vantage points. The first addresses the merits of the decision, based on its articulation of the governing rule in international law. The second, and related, concerns the role of domestic courts in creating and developing customary international law—that the source of international law is national law and practice.[162] The third approach considers the effect of the Nyugat doctrine. In particular, it would emphasise that a similar result could not obtain were the legislation domestic in origin. The Nyugat doctrine deprives the courts of jurisdiction to do so. Thus the result that the court may enter into the merits of foreign law and its execution in that state, but may not do so regarding its own laws. There is a divide, a distinction thereby created between national law and international law, one which originates in the constitutional structure of a legal and political system. The case exemplifies the change of optic occasioned by *Nyugat (No. 2)*. At one level, this might be said to undercut the monistic project of integrating national and international law, especially given the new, internal perspective of international law. In perhaps a less epic way, the divide also reflects that the kernel of validity and legitimacy to law irresistibly originates not in some inherent or innate quality of "law" or "justice" but in the particular constitutional and social construct of a polity.

(Footnote 159 continued)
AZ1511 (Georgia not entitled to avoid garnishee of amounts owing by Netherlands foundation, on judgment concerning petroleum supply agreement).

[160] HR 17 Oct. 1969, NJ 1970 428. See also *Bank voor Handel en Scheepvaart v Slatford* [1953] 1 QB 248, as a furthur chapter to its story to recover assets seized in wartime.

[161] BHS itself was part of a corporate group ultimately owned and controlled by Thyssen–Bornemisza, of Hungarian/German descent.

[162] To raise the spectre of the Bergbohm hypothesis once more: see Chap. 2 above. And it brings to mind *Banco Nacional v Sabbatino* 376 US 398 (1964), both for the dissent of White J, and Harlan J's view on the nature of immunity as judge-made locally.

4.6.3 A Role for the Executive?

In an application for review of the government's decision not to allow the attachment of Turkish bank account in the Netherlands on the grounds of state immunity, the government had argued that in matters concerning customary international law, the courts cannot be separated from the government such that they should speak with one voice—led of course by the executive. The Raad van State rejected this position (rightly). It did nevertheless accept that,

> when interpreting and applying customary international law in particular, the courts should take account of the fact that the government, as the representative of the State in dealings with other States, also helps to mould the law by disseminating its views on what the law is and by endeavouring to observe in its dealings the practice based on those views. Justice can be done to the Government's special position if the courts hear the Government's advisors on international law to ascertain its views on legal positions, either *ex officio* or at the Government's request, and accord the deference to this opinion which is due on account of the special position….[163]

The rules on state immunity were clear enough in the circumstances, however, not to warrant further Executive Branch input. The reference to a special role for the government, and for deference based on that position acknowledges the central role of the executive in rule-making in customary international law. Indeed, it seems reasonable and self-evident to invite submissions from the government on the tenor and scope of a particular rule of customary international law, to detail its practice in the matter, and its views on the practices of foreign states. Yet at the same time, the Court finds no pause, in the separation of powers or otherwise, before offering the Executive Branch (by way of its special position) a wider opening to and greater voice in that rule-making as a (if the monistic claim is accepted, an automatic) part of domestic law. And ostensibly without Legislative Branch participation or control. From a separation of powers perspective, the decision neatly exposes the otherwise unspoken constitutional characterisation of international law as executive law-making. On the one hand, that is not problematic, where the traditional conception of international law (as the conduct of states only) applies. On the other, the modern conception, together with the internal perspective of international law, engages the constitutional ascription of law-making power. To that extent, the counterweight of the constitutional rule of recognition, direct applicability, seems necessary at the very least.[164] To draw again from *Bouterse,* "A different system might frustrate the constitutional powers of the Government and Parliament."

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[163] *MK v Openbaar Min.* (1998) 19 NYIL 439 (24 Nov. 1986) and cited in S. Stirling–Zanda 2004, p. 17.

[164] Recognising the observations of Trimble 1986 on the infirmities of the judicial system, yet not intending to go as far as argued by Bradley and Goldsmith 1997a.

Chapter 5
Separating Powers?

5.1 In Review

As proposed in Chap. 1 (and perhaps somewhat unconventionally), rather than providing a set of conclusions at the end of each preceding and lengthy chapter, I have reserved such a summary of arguments and general conclusions for this final chapter. My intention is to provide a concentrated and systematised presentation of the position taken in each chapter and, of course, to benefit from an opportunity to suggest once again that a fundamental, structural and conceptual, disjunction exists between international law and domestic law which cannot simply be bridged without amending the foundations of either or both systems.

5.1.1 Constitutional Asymmetry and Systemic Disjunction

At the outset of this study, I suggested in Chap. 2 that a disjunction existed between international law and national law in their respective criteria for legal validity and legitimacy. The disjunction obtained in the situs of law-making power and the manner in which it was implemented. Each legal system postulated its own set of basic conditions and processes by which legal rules were brought into existence. It could not therefore be assumed in my view that international law might seamlessly transpose itself into the national legal system (or national law, into the international) without some attention to, or compliance with, the relevant validity and legitimacy criteria required by basic constitutionalism. But more than just an exercise of description or a means to reanimate the debates between monism and dualism, my purpose was to suggest a fundamental division in the structures of each legal system, a conceptual gap which could not be so easily bridged by simply drawing broad equivalences through normativity, justice or some other like ideal abstracted from institutional practice. The necessary attention or compliance called for in the act of transposition thus commanded something other than perfunctory formalism.

D. Haljan, *Separating Powers: International Law Before National Courts*,
DOI: 10.1007/978-90-6704-858-3_5,

In essence, the disjunction is the constitutional asymmetry between the international legal order and national legal orders. It occurs because the principal actor in the international system is usually a merely co-ordinate and bounded actor within domestic legal systems. The government of a state may represent the full, undivided sovereign power of that state on the international plane, but it exercises only a general (and stylised) third of that entire set of powers as the Executive Branch under the state's constitution. The other two-thirds of that plenitude are divided between the Legislative and Judicial Branches, by the constitutional principle of the separation of powers. In particular, the separation of powers generally ascribes primary responsibility for law-making to the Legislative Branch, and not the Executive alone. Whereas governments generally exercise primary jurisdiction over foreign affairs, they have no power under modern constitutions to make law except as delegated by the constitution or by the legislature. The full law-making powers attributed to governments (as extensions of the state) by the international legal system do not correspond to the actual powers held by governments in their respective domestic constitutional and legal orders. Hence an institutional and functional disjunction will inevitably arise where international law would seek to supplement or supplant national law; that is, be applied alongside and equally with national law. So long as the aspirations and range of international law remained as between states, the disjunction represented a negligible operation. But the re-orientation of international law towards an internal perspective, of seeking greater direct effect upon private and public parties within a domestic legal system, has generated significant friction between the two legal orders and hence greater professional attention.

The disjunction, speaking as it does to law-making powers, is naturally and primarily attuned to the relative positions and powers of the government and the parliament. It recalls the longstanding tensions between deliberative and executive organs of state for effective control of final legislative power in a polity, a central and dominant theme in constitutional history. As it currently stands, that history has set the balance in favour of parliament. The days of the *ancien régime* and of a concentration of legislative and political power in a single administrative, executive organ have long since passed. In its place, constitutional, representative democracy (with or without added monarchy) presumes that primary law-making authority belongs with a parliamentary body, one which is representative, transparent and responsible. At least, that is the ideal. Although technically a subordinate player at the institutional level, the executive branch nevertheless continues to wield power at a functional, practical level, generally through the devices of administrative law and legislative delegation. This, however, does not mean that the courts are relegated to passive auditors in the disputations between parliament and government. The judicial voice can be significant and substantial as well.

A judge called upon to apply international law, whether treaty or customary in form, performs a twofold task. First, the court must decide whether it exercises jurisdiction over the parties and the issues (whatever the principles and rules invoked by the parties). For example, the courts must decide whether a local or foreign public official is amenable to domestic legal process. Likewise, it may

have to decide whether the gravamen of the dispute sits outside the competence of the judiciary, and is simply better left to another forum. Hence, this question of justiciability also includes considerations of the place and role of the courts themselves in the overall constitutional order. Second, the judge must decide whether to accept the invoked rule as law, or as a fact or as some other authority featuring in the complete rule of decision. The character of the rule, how and by whom it was created, necessarily factor into this sources question. Unlike with national law, there can be no perfunctory or routine assumption that international law issues from the usual legislative process and with the indisputable character of domestic law. Inasmuch as international law would seek equal standing in the domestic legal order, it must reconcile itself to the manner in which domestic law is made. It is a question of commensurability, of being understandable on the same terms. For domestic law, these terms are necessarily set and framed by the separation of powers. Thus here too, the courts will look for some constitutional direction on which option ought to be pursued for a rule of recognition. In sum, the starting point for judicial consideration of international law, and the determinative perspective, is the domestic constitutional order, text and convention included.

On a wide view of things, the call for a constitutional dictate produces three general strategies for articulating a rule of recognition for international law in a domestic legal system. The first, and most straightforward, is the institutional position. The courts point to the existence some explicit constitutional ascription of power based on the text of the constitution. To be clear, the institutional position addresses the specific power of transposing international law into the domestic legal system, and not simply or merely general law-making power. It is unquestionably the pivotal question for the courts whether the constitution dictates recognition of international law as domestic law. This it may do directly in a specific clause, or by an attribution of jurisdiction to a particular state organ to establish international law as domestic law. Further, the constitution might also prescribe those powers implicitly, where a state organ would justify or rationalise its claimed authority by extension of, or arrogation from, extant ascribed powers. The absence of such an attribution may of course lead also to rejecting the domestic law status for international law. So on this view, the courts have the task of identifying what, if any, constitutional (textual) basis justifies the claim to law status of international law—of course, within the limits of their own constitutional role. Recourse to settled constitutional law and practice would thus resolve the disjunction.

The second is the presumptive position, where the constitutional basis to (any) law-making power is of secondary, subordinate or minimal relevance. This strategy assumes the absence of any explicit constitutional direction or perhaps also, a fallback position in case of a failure to meet any conditions expressly prescribed to transform international law into domestic law. It would thereby foreclose easy, perfunctory reliance on the institutional strategy. So the principal, determinative consideration becomes the normative character of law, and not a question of institutional—and hence constitutional—provenance. In its best light, the strategy might yet seek to backstop its solution with some institutional connection. The authority to declare or transform international law into domestic

law could derive indirectly, implicitly from some extant power, such as one over foreign policy or the common law powers of Anglo-American courts. Moreover, this may well be left unchallenged (or less provocatively, "accepted") by the courts or the legislature as a matter of convention, whether or not it conflates in an unreflected way law-making powers with other, different powers (such as policy making). While the reasons therefor will no doubt span the full range of possibilities, the presumptive position nevertheless will demand of its adherents a commitment to a wider philosophical and a historical understanding of law and legal systems, as well as a concept of "justice", in order to make good its starting point. In particular, the conceptual unity postulated of law, and its articulation of an ethics of justice trump the history and development of constitutionalism, including the separation of powers doctrine and a necessary orientation to national legal systems. The presumptive strategy would thereby discount or diminish any constitutional infelicities or awkwardness arising from a less than orthodox application of the separation of powers.

The third strategy, one diametrically opposed to the presumptive, considers that history and its foundation on individual legal systems as determinative for the courts' rule of recognition. More than just prescribing exhaustively the sources of valid and legitimate law for the domestic legal system, the constitutional order prevails over all law-making, so that all legal rules are subject to it and have the character of domestic law. If there exists here too some philosophical pre-commitment, it is that valid and legitimate law issues only out of a defined constitutional system for a given polity. Without any express constitutional direction giving domestic legal effect to international law, the latter therefore can have no legal effect as such in the national legal system. It is not of itself a directly binding rule of decision. Instead, it must be adopted and transformed into domestic law according the usual procedures for national law-making, rendering it domestic law. In particular, it must be internalised by the polity, to be recast within and as part their own set of values and interests. This, however, does not entirely discount any effect whatsoever for international law within the national legal system. Its effect, or influence rather, would be indirect and informal. Interpreting domestic law with an eye to a state's international obligations and the external limits of its sovereign power understands international law to be a reflection or extension of its own constitutional order. A state's international undertakings would reflect its domestic constitutional order, its active or supposed values, and an acknowledgement of other like sovereign polities. In other words, what a state does, and what it agrees to on the international stage likely already have some general articulation and practice at home. Those values, rights and obligations will not be entirely unfamiliar to or unjustifiable in its constitutional and legal system. On this view and stated at its highest, international acts (of a legal character or effect) are governed by or are an extension of current domestic law and legal values. Hence the courts would use international law, irrespective of an external or internal perspective, as further evidence in support of the courts' interpretation and application of the current state of rights and obligations in domestic legal practice. International law would therefore not be creating rights and obligations directly

enforceable within a national legal system, but would rather serve a reflexive, reflective role, reiterating certain values in or limits to current law.

Two observations flow from this outline of a reflexive strategy. First, a state may well enter certain international agreements containing obligations which represent novel or unfamiliar legal concepts, rights and duties in its domestic law. Or indeed, it might be considered to be bound by such obligations irrespective of any intentional act or its express consent. The purpose of this, especially concerning the former, treaty-based, situation, is precisely to introduce those rights and obligations into the domestic system, thereby supplementing or supplanting extant law to accommodate the former. On a constitutional footing, this indisputably invokes law-making powers, pure and simple. The reflexive position can account for this. A court can find in its survey of domestic law that the international rules and concepts invoked before it have no footing as yet in domestic law, with the result that further domestic legislation in the ordinary course must follow. That is, the reflexive strategy continues to operate as a rule of recognition of domestic law, putting the courts to determine whether or not certain rights, obligations, values and such like, exist within the constitutionally prescribed legal order. The courts' optic for sources of law remains grounded in the domestic sphere.

The second observation acknowledges that certain consequences of the strategy may prove unpalatable and unacceptable for those advocating the direct applicability of international law in national legal orders. Underpinning that position, the extrapolation from specific instances into a generally binding rule serves both to create the sense of a rule of international law, and the (moral) pressure to comply with the rule because other states do so as well. Likewise in the specific case of rules of international law applicable to private parties within a national legal system, the abstracting out of particular laws and cases seeks a homogenised, transnational core free from national peculiarities and technicalities. And because those foreign courts observe in effect a transnational right or duty, so too should "our" courts. But the reflexive strategy points out that this effort to synthesise a common, transnational rule is predicated upon the actual or supposed existence of that very rule in a domestic legal system. If the transnational character of a rule depends on a national footing, then changes to national practice ought to change the rule's transnational character. On the other hand, if the rule's transnational character is independent of a national footing, national practice represents simply evidence of that character. The reflexive strategy does not allow us to skirt this basic question. Nor does the strategy require us concede the assumption of such a shared, common international legal rule. Indeed, the absence of such a pre-existing footing in a national legal system ought to strengthen the case for not recognising and applying it. Moreover, the reflexive strategy highlights that the process of generalising is founded in, and proceeds from out of, national legal systems. Those rules of international law exist because of national legal systems, not independently of them. The reflexive strategy would apparently foreclose upon the autonomy of the international legal system, or its co-ordinate normative stature at the very least. This would seemingly resurrect the long decried and dismissed logic

of international law being in some way dependent upon, derived from, national law and legal systems.[1]

In addition to this, the required level of generalisation may deprive the international rule of any practicable use and effect domestically. For example, most legal systems recognise a right of free speech. But how that right is implemented, and what restrictions are permissible, are by no means uniform or consistent across any two legal systems. Narrower readings of the right or allowing for various exceptions may well produce results divergent or even contradictory to those achieved under a wider reading, or one with fewer or different exceptions. The devil is in the details. Citing a general international law right to free speech can achieve no practical objective where the issue concerns the actual range and limits to the domestic right as practiced in that legal and political system. It is not the existence of the right which is disputed, but whether a particular type of speech or content may or may not be restricted in society. The only useful reference to such an "international right" or even a "transnational, universal right" is relying on the concrete domestic practice in other legal systems selected simply because their jurisprudence seems to favour the outcome sought in the instant case.

In effect the reflexive strategy would deprive the international legal rule of any legal effect and reduce its existence (but only in domestic law terms, mind you) to, at best, a self-congratulatory pat on the back. International law could just as easily be discounted or ignored in the rule of decision. Only in the circumstances of a novel legal concept or right might international law conceivably make a difference. But even there, the precondition of domestic legislative transposition would bar any immediate solace and relief. Remedies and relief, as was often expressed in earlier judgements, must be sought through diplomatic, political and other non-juridical channels.

Despite this antinomy, the three strategies should not be understood to be entirely mutually exclusive. The reflexive and the presumptive can and do shade into or influence the institutional position. They may encourage a more restrictive or more flexible interpretation of a constitution to locate the necessary powers or justification to recognise or ignore a rule of international law. And certainly, the generally prevalent constitutional silence about the domestic effects of customary international law may induce domestic courts to adopt a more reflexive-oriented strategy for the recognition of customary international law, whereas the constitutional prescriptions about treaties could ground an institutional presumptive position therefor. That in fact represents a primary differentiation in the treatment of international law in national legal systems. Customary international law does not stand on an equally firm constitutional footing as do treaty-based rules of international law. The latter enjoy a significant benefit from the express provisions made for them in many constitutions.

[1] Namely, the proposition of Bergbohm 1892.

5.1.2 Treaties, Constitutions, and Dualism

As made clear in Chap. 3, a treaty is not merely a contract among governments agreeing to adjust or institute specific policy (an executory agreement), but is also often intended as an instrument actually conferring benefits or imposing burdens generally on non-party individuals. These benefits and burdens have the nature of legislative pronouncements but nevertheless stand outside the usual legislative process prescribed by a constitution for domestic law-making. To this end, a treaty has the advantage (over customary international law) of setting its terms in written form. This establishes an identifiable, fixed expression of the rule and grounds the interpretation of its meaning, scope, import and so on. Following from this, a treaty also has the added advantage of appearing as a formal instrument, with all the authority, intentionality and pomp and circumstance, that such a guise carries with it. This contributes undoubtedly, as with legislation, to its persuasive weight as a source of legal norms. Thus for the courts the principal question, if not the liminal one, is considered to be not whether a treaty ought to be interpreted as a mere contract or as law-bearing, but whether those legal rights may be directly enforced by the court irrespective of any explicit legislative fiat.

This raises a number of practical and theoretical questions, all directed to the role and power of the government to enter such agreements, and thereby impose such terms of law domestically or result in such terms being imposed, and the powers and place of the legislature relative to the government. What is clear from the survey of the US, the UK, the Netherlands, and France is that the starting point is their respective constitutions. As might be expected, the courts take their cue from the constitution on two fronts. The first speaks to the specific constitutional provisions concerning applying treaties as domestic law. The second addresses the separation of powers as between the legislature and the government in matters of law-making, and in terms of the limits placed upon the jurisdiction and powers of the courts to review and control government and legislative acts. The courts of all four legal systems practise some degree of interpretative reconciliation between domestic laws and treaty obligations (in the US, the so-called "Charming Betsy canon"). That is, the courts expressly presume that the legislator does not intend to contravene or diverge from relevant international obligations unless that intention is clearly understood from the statutory language. This interpretative solution to seeming inconsistencies between domestic law and international obligations does not really raise constitutional issues pertaining to the separation of powers. The solution clearly recognises the continuing power of the domestic legislator to create rules contrary to existing international law. Where such serious and deeply rooted issues do arise, however, is in controlling the content of treaty terms as domestic law and in their impact on extant constitutional provisions. Just as each of the four constitutions reflect different models of the separation of powers, so too does the constitutional approach to a rule of recognition of treaty-based international law vary among the four states.

By consequence, there exist a number of avenues for differentiation among the four legal systems studied herein. But for the moment, let me leave to one side the most obvious—and seemingly trivial—distinction between the UK on the one side, and the US, France and the Netherlands on the other, concerning the latters' written constitutional directions that treaties have force of domestic law. For even as among the latter three, further grounds exist to separate them on the basis of the specific constitutional terms and constitutional order. That is, the separation of powers, the institutional arrangement and exercise of powers, as well as the precise wording of the relevant clauses all contribute more to reinforcing divisions than to suggesting points of commonality and unity in the juridical treatment of treaty terms in the domestic legal system. The net outcome, like the practical modelling of the separation of powers, would seem very much to settle on a conclusion of *sui generis*.

To begin, the effect of the constitutional grant of recognition varies among the US, France and the Netherlands. The presence of a supremacy clause is no guarantee in and of itself that a treaty provision will be paramount over any or all legislation, whether prior or subsequent to recognition. Let us take France as the baseline. The French courts (Cassation and the Conseil d'Etat) now read together the supremacy clause (Article 55) in a uniform way to mandate treaty supremacy over past and future legislation, providing the treaty has met certain publication formalities. Admittedly, that concurrence between the two judicial branches seemed a long process. The Cour Constitutionnel does not consider the relationship of treaty to legislation: its jurisdiction is restricted to reconciling the treaty to the Constitution. The supremacy clause in the Netherlands' constitution (Article 94) confers paramount status on directly applicable treaty terms only, rather than a general grant of priority. It can also justify an override of prior and subsequent legislation. In both countries, the treaty terms are read as international law having effect in the domestic legal system—hence the normative priority claimed for them. In the US, on the other hand, a treaty under the Article VI "Supremacy Clause" takes effect as ordinary federal legislation (the method of its interpretation aside). It has no special normative standing: subsequent federal statutes may override or qualify its domestic effect and application. The US legal system reveals here a family resemblance to its cousin, the UK system, which transforms treaty terms into ordinary domestic legislation. The supremacy facet in the US pertains to a treaty's paramountcy over state law inconsistent with the former's terms. And this merely recalls the ordinary federal pre-emption doctrine of federal legislation and jurisdiction having precedence over contrary state laws. Thus at first glance, a more significant division seems to emerge between a constitutional order which transforms or converts actively international law into domestic law (the US, the UK) and one which merely confirms or validates its transposition into the domestic legal system (France, the Netherlands).

These observations invite further consideration of the judicial and academic distinction drawn between directly applicable, or self-executing treaty terms, and those not so. The doctrine of self-executing treaty terms, or perhaps better "directly applicable" ones, originated with the courts, the US Supreme Court to be

precise. The Court was required early on in the history of the Republic to make sense of that constitutional directive.[2] The exercise of doctrine sits within the courts' recognised powers to interpret and apply law. Of course, the threshold issue for the courts remains their recognition of treaty terms as "law". And this explains—at least at the outset—the most obvious division among the US, France, and the Netherlands on the one hand, and the UK on the other. Even though the UK courts also have equivalent powers to interpret and apply law, treaties are not transformed into domestic law have no force of law. Nevertheless, among the three similar legal systems, only the Netherlands presents explicit constitutional recognition of directly applicable treaty terms. The 1956 amendment to the Constitution to particularise supremacy for directly applicable treaty terms alone, reduced the earlier and unlimited 1953 recognition of general priority. Even in its best light, this represented a limitation on the courts' powers. Whether the amendment was to clarify the scope of judicial power, or to restrict an over-active judiciary, this express narrowing of the rule of recognition intends to reaffirm the balance of law-making powers in favour of the political branches, with the courts remaining a subordinate, not co-ordinate, member. And thus in practice, while non-self-executing terms will assist interpretation, the courts will only give discernible legal effect (thus when contrary to extant domestic law) to directly enforceable treaty terms.[3] Unlike the Netherlands, the French constitution does not differentiate between directly applicable and non-directly applicable treaty terms. Yet in France, a like result nonetheless obtains after a fashion because of the strict reading given to the court's jurisdiction under separation of powers.[4]

Underlying the differentiation of treaty terms into those with "direct effect" and those without, is the further, and a liminal, issue of whether a treaty becomes transformed into domestic law or retains rather its character as international law though allowed to be enforced domestically. This constitutional point for the courts represents the quintessential question on the separation of powers. Not only must the courts articulate the respective roles and powers of Parliament and government as to law-making, but in so doing, the courts must also account for their own positions and powers relative thereto. Just because a constitution may in general terms enforce the priority of a treaty over domestic legislation does not of itself answer whether the priority extends to legislation passed subsequently. Nor does it answer whether the priority issues from the constitutional grant or from the constitution's conceding the inherent supremacy of international law over domestic legal prescriptions. In other words, to what extent does the government's importation of international law bypass the domestic separation of powers and compromise the sovereignty of parliament? These issues are not limited to

[2] *Foster v Neilson* 27 US 253 (1829).

[3] See, e.g., HR *Nyugat (No. 2)* 6 Mar. 1959, NJ 1962 2; *NATO Nuclear Weapons* 21 Dec. 2001 NJ 2002 217, and *Afghanistan* 6 Feb. 2004, NJ 2004 329.

[4] See, e.g., °108243 CdE 20 Oct. 1989 (*Nicolo*) and °200286, 30 Oct. 1998 (*Sarran*); Cass. *Jacques Vabre* (1975) [1976] CMLR 43 and °99–60274, *Fraiss* (2 June 2000).