

THE DIRECT APPLICABILITY OF INTERNATIONAL INSTRUMENTS ON HUMAN RIGHTS

(with special reference to Belgian and U.S. law)

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In order to examine in some detail when international instruments on human rights are directly applicable, it is necessary to deal briefly with the question of the direct applicability of international treaties in general. As the same terms are not always used to cover the same notions, it seems necessary to indicate at the outset which legal notion or situation one has in mind when using a particular term, respecting as much as possible the natural meaning of the words (1).

I. PRELIMINARY OBSERVATIONS

Direct applicability is viewed as a particular form of the internal effects of an international treaty. Contrary to the *international effects* of a treaty, which depend on the validity of the treaty on the international plane, the *internal effects* of a treaty concern the domestic status of a treaty in national law. This status depends on the national law, and more in particular on the constitutional law of the State party concerned. In general, international law does not determine which internal effects will be given to the provisions of an international treaty (2). International law limits itself generally to prescribe that the States parties be obliged to fulfill their engagements on the international plane, without interfering with the manner how that obligation will be ensured in national law. Only in exceptional cases does it happen that a treaty explicitly provides that internal effects should be granted to its provisions.

(1) The terminology on this matter is so confusing that it would be an illusion to expect an universally acceptable agreement. It is nevertheless necessary to use different terms to differentiate between different legal situations.

(2) Reuter, Paul, *Introduction au droit des traités*, Paris, A. Colin, 1972, 30, n° 44 : « En principe, le droit international se désintéresse de cette question ; pourvu que le traité soit respecté (art. 27 Convention de Vienne sur le droit des traités), il abandonne à chaque Etat le soin de déterminer comment se règlent pour ses juges nationaux les rapports entre le droit international et le droit national. »

In the case of many treaties, whose object is limited to purely inter-state relations, there is not even a need that its provisions have internal effects. And even in the case of international treaty provisions that by their very content do need implementation on the national plane, it will presumably be desirable that its provisions should have internal effects, but that will not be absolutely indispensable to avoid violations of the international obligations. As a rule, international law is not concerned as long as the international obligation is respected, regardless of whether that is done on the basis of the treaty provision itself or not. It is possible too for, e.g., to ensure for respect in national law of an international obligation without giving internal effect to the treaty provision itself, if the existing national legislation contains provisions which ensure the same legal effects as aimed at by the treaty provisions. As, however, only rarely does a State have legislation that in each and every respect has the same bearing as the provisions of a given treaty, it is clear that the safest means to guarantee respect for those provisions in national law is to give them internal effects.

To give internal effects to treaty provisions can be done in a direct or in an indirect manner. Treaty provisions are *directly applicable* in national law when, according to the constitutional law of the State party concerned, they can be invoked before the national judicial organs as soon as the international (in most cases ratification and entry into force) and the national (generally parliamentary approval and publication) conditions of validity are fulfilled (3). In many States however, treaty provisions can only be invoked before the national judicial organs (4) once the relevant provisions are adopted in a legislative act. To distinguish this situation from the above-mentioned, it seems more appropriate in this case to speak about treaty provisions that are *indirectly applicable* in national law.

However, not all provisions of a treaty incorporated in national law can be applied by a judge. The formulation of the provision has to be sufficiently clear and complete. Whether a treaty provision has such a *self-sufficient* character or not can be verified, independently of the constitutional rules determining the incorporation of international law in national law.

In that respect, the term *self-executing* has quite a different meaning. A treaty provision can properly be called self-executing only if it is both self-sufficient and incorporated in the national law of the State party. The term « self-executing », which is commonly used in legal terminology, often causes confusion as it is sometimes viewed as being synonymous with « self-suffi-

(3) Member States of an international organisation may also accept the international obligation to grant direct applicability to certain acts of that organisation (e.g. the Regulations of the E.E.C.), without requiring the traditional conditions of international (as ratification) and national (as parliamentary approval) law. Such acts will have *immediate effect* in national law (See also *supra*, Verhoeven, Joe, La notion d'« applicabilité directe » du droit international, *R.B.D.I.*, 1980/2, para. 9).

(4) As a matter of fact, not the treaty provisions as such, but the like-worded provisions of the legislative act will be invoked before the national judicial organs.

cient » (5) and sometimes as relating to the direct, and even indirect, incorporation of the treaty concerned in national law, while disregarding the requirement of self-sufficiency (6).

This confusion explains to a large extent the controversy about the question whether the self-executing character of a treaty provision depends either on national or on international law. A treaty provision can only properly be called « self-executing » if two requirements are fulfilled : a) the treaty has to be incorporated in national law ; b) the treaty provision has to be self-sufficient.

The first requirement (incorporation in national law) is determined by the constitutional law of the State party concerned. Except in the rare cases that the treaty itself has made the incorporation in national law an international obligation, the great variety of the constitutional regulations governing this matter makes it impossible to give an answer to this question that would be valid for all States parties. As for the second requirement (the self-sufficient character of the provision) it is possible to give an answer valid for all States parties, since it is a matter of international law.

By its very nature, it is part of the judicial function to determine whether a treaty provision is formulated in a sufficiently clear and complete manner enabling the judge to ensure its application. However, the international judge is only seldom empowered to interpret and to apply treaty provisions. When it concerns a treaty which is incorporated in national law, it will be mostly up to the national judge to determine whether the self-sufficient requirement is fulfilled. To determine its correct meaning, the judge has to look for the intention of the States parties as expressed in the text of the provision invoked.

Consequently, the ability for a national judge to apply a treaty provision will depend as well on a national law requirement (the constitutional rules regarding the incorporation of international law) as on a requirement of international law (the wording chosen by the States parties) (7). Particularly,

(5) For instance, the statement « Article 6 of the European Convention is self-executing » is correct for some States parties (e.g. Belgium and the Netherlands), but not for some others (e.g. the United Kingdom and the Scandinavian countries).

(6) For instance, the statement « The European Convention is self-executing » is correct for some provisions of the Convention, but not for others and in any case only in those countries where the Convention is incorporated in national law.

(7) See also the very recent article of Stefan A. Riesenfeld (The Doctrine of Self-Executing Treaties and *U.S. v. Postal: Win at Any Price?*, *A.J.I.L.*, 1980, 892-904 : « the concept of self-executing treaties is in need of clarification. It has separate international and domestic constitutional aspects » (at 896) ; « Strictly speaking, the term ' self-executing ' is not a notion whose meaning is determined by international law. The self-executing nature of a treaty provision is a product of international and domestic constitutional rules » (at 900) and « the way in which the internal domestic law of a nation must be brought into conformity with the mandates of a treaty provision is a matter governed solely by the constitutional law of each state party. To that extent, the intent of other state parties is irrelevant, and even the treaty-making authorities of that state party whose domestic law is involved may have little or no choice according to the governing constitutional provisions » (at 898). See also *infra*, more in particular chapt. IV.

so far as multilateral treaties are concerned, one may not require that it should be the intention of the States parties that the provisions of such treaties should be self-executing in all States parties, since that is out of question in those States which do not incorporate the treaty in their national law.

The national applicability of a treaty may vary according to the State concerned. That does not result however in a « dangerous variety of the obligations » (8). All States parties assume exactly the same obligation : to respect the normative provisions of the treaty. That obligation is not violated by the mere fact that such a normative provision is not applicable in the national law of the State party concerned, but only if the provision itself is not respected. The inability of certain States to prevent such violations because the treaty is not incorporated in their national law is, however, by no means an excuse for violations of their international obligations. But for States where the treaty is incorporated in their domestic law, it will be easier to prevent in their domestic law violations of their international obligations.

It is on the basis of the preceding considerations that the question of the direct applicability of the European Convention on Human Rights will be briefly examined, with special reference to Belgian law, before giving attention to the same question in respect of the International Covenant on Civil and Political Rights, particularly by way of examples, so far as Belgium and the United States are concerned.

II. THE DIRECT APPLICABILITY IN BELGIAN LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Referring to relevant Belgian judicial decisions, authoritative Belgian writers (9) have repeatedly affirmed the direct applicability of most normative provisions of the European Convention on Human Rights. It is unnecessary to elaborate extensively in so far as this matter is uncontested. There is however controversy on the question whether the direct applicability of its provisions is an international obligation for all States parties and on the extent of the direct applicability of the decisions of the organs of the European Convention, particularly in so far as the possible effects in the national legal order of the interpretations of the Convention adopted by the Court of Strasbourg are concerned.

(8) *Contra* Verhoeven, *loc. cit.*, para. 15.

(9) See in particular Ganshof van der Meersch, Walter, *La Convention européenne des droits de l'homme a-t-elle, dans le cadre du droit interne, une valeur d'ordre public ?* in *Les droits de l'homme en droit interne et en droit international*, Brussels, Presses universitaires de Bruxelles, 1968, 155-251 ; Velu, Jacques, *Les voies de droit ouvertes aux individus devant les instances nationales en cas de violation de la Convention européenne des droits de l'homme*, in *Les recours des individus devant les instances nationales en cas de violation du droit européen*, Brussels, Larcier, 1978, 187-243 ; see also Mast, André, *Overzicht van het Belgisch Grondwettelijk Recht*, Ghent, Story, 1972, 262.

A. DIRECT APPLICABILITY AS AN INTERNATIONAL LEGAL OBLIGATION ?

It is Thomas Buergenthal (10) in particular who defended the opinion according to which a State that does not incorporate the Convention in its national law violates its conventional obligations. The incorporation of the Convention by all States parties is undoubtedly desirable (11). The view of a great number of authors (12) according to which the Convention leaves its States parties free to determine the manner in which they will give effect to their conventional obligations, is, however, the one corresponding to the present legal situation.

Fairly recently the Court of Strasbourg has in its judgment of 18 January 1978 (13) in the case *Ireland vs. United Kingdom* created the impression that it would appear from the *travaux préparatoires* that its authors intended to grant direct applicability to its provisions. Heribert Golsong (14) recognizes that this was the intention of Henri Rolin, who proposed to substitute in article 1 of the Convention the words « shall secure » for the words « undertake to secure », but doubts whether the present wording of article 1 requires or imposes a conclusion identical to the one arrived at by Henri Rolin. The Court appeared to be aware of this when it considered the incorporation of the Convention in domestic law as « a particularly faithful reflection » of that intention. Consequently, by not incorporating the Convention in domestic law, a State party would not *ipso facto* violate its conventional obligations.

If that analysis be correct — and at least it corresponds to the varying practices of the States parties — it would fall outside the jurisdictional powers

(10) Buergenthal, Thomas, The effect of the European Convention on Human Rights on the Internal Law of Member States, *I.C.L.Q. Suppl.* 11, 1965, 79-106.

(11) Ganshof van der Meersch, Walter, Aspects de la mise en œuvre d'une sauvegarde collective des droits de l'homme en droit international — La Convention européenne in *Mélanges Fernand Dehousse*, vol. 1 (Le progrès du droit des gens), Brussels, Ed. Labor, 1979, 199.

(12) See Beddard, Ralph, The Status of the European Convention of Human Rights in Domestic Law, *I.C.L.Q.*, 1967, 206-217 ; Castberg, Frede, *The European Convention on Human Rights*, Leyde, Sijthoff, 1974, 13-14 ; Drzemczewski, Andrew, The Domestic Status of the European Convention of Human Rights : New Dimensions, *L.I.E.I.*, 1977, 1-85 ; Fawcett, J.E.S., *The Application of the European Convention on Human Rights*, Oxford, Clarendon, 1969, 4 ; Opsahl, Torkel, Human Rights Today : International Obligations and National Implementation, *Scandinavian Studies in Law*, 1979, 160 ; Robertson, A.H., Advisory opinions of the Court of Human Rights, in *René Cassin amicorum discipulorumque liber*, vol. I (Problèmes de protection internationale des droits de l'homme), Paris, Pedone, 1969, 225-240 and particularly 239 ; Sorensen, Max, Obligations d'un Etat partie à un traité sur le plan de son droit interne, in *Les droits de l'homme...*, 35-61 ; van Dijk, P. & van Hoof, G.J.H., *De Europese Conventie in theorie en praktijk*, Utrecht, Ars Aequi Libri, 1979, 9-12.

(13) Paragraph 239 : « ... By substituting the words « shall secure » for the words « undertake to secure » in the text of Article I, the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States (document H (61) 4, pp. 664, 703, 733 and 927). That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law (De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 43, § 82 ; Swedish Engine Drivers' Union judgment of 6 February 1976, Series A no. 20, p. 18, § 50). »

of the Court to impose such an obligation by way of judicial interpretation. Moreover, in trying so the Court could not escape the embarrassing conclusion that more than half of the States parties to the Convention violate this « conventional obligation as interpreted by the Court ».

As a matter of fact, the domestic status of the Convention in the national law of the States parties varies widely. It would be hard to sustain that such States parties, as the United Kingdom, Ireland, and the Scandinavian countries, violate their conventional obligations by not granting internal effects in their national legal order to the provisions of the Convention, or that other States parties, as Belgium, the Netherlands, the Federal Republic of Germany, and Italy, misinterpret the Convention by doing so. It appears to be more correct to assume that the European Convention is one of the many international treaties, where the States parties did not make a conventional obligation of the direct applicability of its provisions. In countries where the Convention is incorporated in national law, it is the task of the national judge to determine which are the provisions of the Convention that are self-sufficient and can therefore be applied by him.

B. THE DIRECT APPLICABILITY OF THE DECISIONS OF THE ORGANS OF THE EUROPEAN CONVENTION

The question of the internal effects of the European Convention is not limited to the Convention itself, but concerns also the decisions of its organs. The prevailing legal opinion on this matter in so far as Belgium is concerned can be summarized as follows :

a) Since the decisions of the European Commission on Human Rights on the admissibility and its opinion, expressed in its final reports on the merits, are not binding on the Court or on the Committee of Ministers, as a consequence they do not have the authority of final judgments in domestic law either. As noted by Jacques Velu (15) however, a legal claim before a national tribunal could be raised in the case of a violation of a friendly settlement effected by the Commission.

b) So far as the judgments of the European Court of human rights are concerned, Jacques Velu (16) believes that they should be recognized by right as final judgments in domestic law, but only in respect of the parties to the case before the Court.

c) So far as the decisions of the Committee of Ministers are concerned, Jacques Velu (17) believes that they have no authority of final judgment in

(14) Golsong, Heribert, L'effet direct ainsi que le rang en droit interne, des normes de la Convention européenne des droits de l'homme et des décisions prises par les organes institués par celle-ci, in *Les recours...*, 63.

(15) Velu, in *Les recours...*, 225.

(16) *Ibid.*, 219-220.

(17) *Ibid.*, 228.

domestic law, because the Committee cannot be properly considered as a sufficiently jurisdictional organ (18).

C. THE EFFECT IN DOMESTIC LAW OF THE INTERPRETATIONS ADOPTED BY THE COURT OF STRASBOURG

The foregoing has shown that the decisions of the organs of the European Convention can have legal effects in domestic law for the parties to the case concerned. The interpretation adopted by the Court of Strasbourg of a provision of the Convention may have effects overflowing the limits of the case concerned (19). In a report presented at a colloquium in Brussels in 1975 Jacques Velu (20) noted :

« Un arrêt de la Cour, qui déclare une loi, un règlement ou un arrêté national incompatible avec les obligations découlant d'une disposition directement applicable de la convention, ne saurait avoir pour effet d'abroger ou de modifier cette loi, ce règlement ou cet arrêté ; mais le juge belge, tenu d'une part de reconnaître l'autorité de la chose jugée par la Cour et d'autre part de donner la primauté aux normes de la convention, devra se refuser à appliquer la loi, le règlement ou l'arrêté. »

Since the judgment rendered by the Court of Strasbourg on 13 June 1979 in the case *Marckx*, it has become clear that this can have far-reaching consequences.

As the interpretation adopted by the Court has to be considered highly authoritative (21) it may be expected that in the countries where the European Convention is incorporated, the national judge will not apply anymore the relevant provisions of the national legislation to the extent where they are regarded by the Court as being in violation of the Convention (22).

(18) A reservation to this opinion might be justified however as shown in the following example. In a judgment of 16 January 1976 (*Yearbook Conv.* XIX, 1976, 1118) the civil tribunal of Brussels considered the judgment of 10 March 1972 of the Court of Strasbourg which refused a reparation to the vagrant De Wilde as final also in regard of Belgian domestic law. One may wonder whether the national judge would have been prevented to arrive at the same conclusion in respect of the vagrants Lahaye, Nys and Swalens, because their similar case was subsequently decided by the Committee of Ministers in its resolution DH (72) 1 adopted on 16 October 1972.

(19) See also Alkema, Evert, *EuGRZ*, 1980, 214 : « Denn gem. Art. 53 EMRK werden die Staaten nur von den Entscheidungen verpflichtet, an denen sie beteiligt waren. Dennoch ist klar, dass die Auslegung des EGMR wegen der Direktanwendbarkeit der EMRK-Bestimmungen nicht ohne Einfluss sein wird. »

(20) Velu, *loc. cit.*, 216.

(21) See Drzemczewski, Andrew, *The Authority of the Findings of the Organs of the European Human Rights Convention in Domestic Courts, Legal Issues of European Integration*, 1979, 1-50.

(22) See also Cohen Jonathan, Gérard, *Cour européenne des droits de l'homme* (1979), *Chronique de jurisprudence, Cahiers de droit européen*, 1980, 481 : « cet arrêt Marckx posera aussi de sérieux problèmes en droit français. Il serait nécessaire de modifier la législation car à défaut rien n'empêcherait un particulier de demander au juge judiciaire de faire prévaloir la Convention ainsi interprétée sur la loi ».

In his comments on the *Marckx* judgment, François Rigaux (23) however, stated that article 8 of the European Convention, as interpreted by the Court, was not sufficiently precise to have direct effects in national law. That view has been criticized by the present writer (24). It was admitted that :

« Dans la mesure où l'interprétation de la Cour exige pour certains aspects du respect de la vie familiale de la part de l'Etat des mesures positives, l'invocation de l'article 8 n'est pas suffisante en effet pour que le juge, en absence des mesures positives exigées par la Cour — mais point précisées — puisse les édicter lui-même » (25).

However,

« La Cour a notamment constaté que l'article 8 est également applicable aux mesures positives existantes, pour lesquelles il faut vérifier si elles ne violent pas l'obligation de respecter la vie familiale. Si ceci était le cas, le juge serait tenu de ne pas appliquer les mesures positives qui constituent une violation de la Convention.

En outre, il faut tenir compte de l'effet direct de l'article 14 de la Convention (l'interdiction de la discrimination). Si certaines mesures positives tombaient sous l'application de l'article 8 (ou de l'article 1^{er} du premier Protocole), l'article 14 serait également applicable à ces mesures (26). Et le juge national n'a certainement pas besoin d'autres précisions ou de compléments pour appliquer l'article 14, ainsi que la Cour de Strasbourg l'a fait, et pour reconnaître dans le chef de l'enfant naturel les mêmes droits que ceux prévus dans la législation belge pour les enfants légitimes » (27).

The interpretation of the Court of Strasbourg has already been applied by the Dutch Supreme Court. Referring to the *Marckx* case the Dutch *Hoge Raad* has ruled in a decision of 18 January 1980 (28) that in the matter concerned no distinction may be made between legitimate and natural children.

The lower judge had refused to consider the sister of the mother of a « natural » child as a relative in matters of tutelage, because the relevant article 958 of the Dutch code of civil procedure refers only to « legitimate » children.

In a comment on the decision of the *Hoge Raad*, Ernst Alkema (29) concludes that the *Hoge Raad* has applied the interpretation of the *Marckx* judgment of 13 June 1979 retroactively, because the decision of the lower judge was dated 17 april 1979. As a matter of fact, the Court of Strasbourg has expressed the opinion that :

(23) Rigaux, François, La loi condamnée. A propos de l'arrêt du 13 juin 1979 de la Cour européenne des droits de l'homme, *Journal des Tribunaux*, 1979, 513-524.

(24) Bossuyt, Marc, Publiekrechtelijke aspecten van het arrest *Marckx*, *Rechtskundig Weekblad*, 1979-1980, 929-970 and L'arrêt *Marckx* de la Cour européenne des droits de l'homme, *R.B.D.I.*, 1980, 53-81.

(25) *Ibid.*, 77.

(26) Footnote omitted.

(27) *Ibid.*, 77-78.

(28) *Nederlands Juristenblad*, 1980, 141.

(29) Alkema, *loc. cit.*, 215.

« The principle of legal certainty, which is necessarily inherent in the law of the Convention as in Community law, dispenses the Belgian State from re-opening legal acts or situations that antedate the delivery of the present judgment » (30).

In our opinion (31), the interpretation of the Court is authoritative with respect to all cases not yet finally decided by the competent national judicial organs, but final decisions should not be reopened. The *Hoge Raad* itself stated explicitly that it applied the interpretation of the Court of Strasbourg in « current procedures ». Since the *Hoge Raad* had still to come to a finding, the case was not yet finally decided in national law, and therefore the application of the interpretation of the Court cannot properly be called « retroactive ».

Very recently, a civil tribunal in Ghent (Belgium) has in a judgment of 20 November 1980 (32) taken into account the interpretation of the Court of Strasbourg in the *Marckx* case. According to the Belgian civil code a legitimate daughter could only receive half of the succession of the natural mother of her mother, who had herself refused the succession of the natural mother. The judge however refused to apply the relevant provisions (33) of the Belgian civil code considered to be violative of the European Convention.

The judge considered the question of the retroactivity of previous decisions in the present case irrelevant because it was a recent case on which no decision had yet been taken. There was no doubt in his opinion that in the spirit of the judgment of the Court of Strasbourg the contrariety of the Belgian law existed already before 13 June 1979 and in any case before 23 October 1978 when the succession became open. The judge decided to put aside the rules considered by the European Court contrary to the European Convention and replaced them by other positive provisions of the domestic legal order applicable in cases of legitimate filiation.

III. THE DIRECT APPLICABILITY IN BELGIAN LAW OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The question of the direct applicability in Belgium of the International Covenant on Civil and Political Rights (34) signed by Belgium on 10 De-

(30) *Marckx Judgment*, para. 58 *in fine*.

(31) Bossuyt, *L'arrêt Marckx*..., 71.

(32) *Rechtskundig Weekblad*, 1980/1981, 2328-2332.

(33) See in particular the articles 756 and 757 of the *Belgian Civil Code*.

(34) Adopted on 16 December 1966 by the General Assembly of the United Nations in its resolution 2200 (XXI) and entered into force on 23 March 1976. On 1 September 1980, 64 States were already parties to the « civil » Covenant, including the following belonging to the Group of the « Western European and others » : Australia, Federal Republic of Germany, Austria, Canada, Denmark, Spain, Finland, Italy, Norway, New-Zeeland, Netherlands, Portugal, United Kingdom, Sweden and Iceland. On the functioning of the Human Rights Committee, see Bossuyt, Marc, *Le règlement intérieur du Comité des droits de l'homme*, *R.B.D.I.*, 1978-1979, 104-156 ; Decaux, Emmanuel, *La mise en œuvre du Pacte international relatif aux droits civils et politiques*, *R.G.D.I.P.*, 1980, 487-534.

cember 1968, is at this moment still hypothetical because it has not yet been ratified by Belgium. Since the Belgian Government has submitted on 30 November 1977 both Covenants for parliamentary approval, it may be nevertheless useful to examine the question in some greater detail.

So far as the « self-sufficient » criterion is concerned, it is clear that many provisions of the International Covenant on Civil and Political Rights (hereinafter : the « civil » Covenant) meet that condition. The wording of many provisions corresponds often to those provisions of the European Convention on Human Rights which are generally considered self-sufficient (35).

A surprise was caused when the Belgian « Conseil d'Etat » expressed itself on this matter in the following way in an advisory opinion adopted on 1 December 1976 :

« Aucun des deux Pactes ne contient de disposition qui serait directement applicable en Belgique sans autre mesure de droit interne que l'assentiment des Chambres législatives et la publication » (35).

So far as the « civil » Covenant is concerned, the opinion of the « Conseil d'Etat » was based to a large extent on the wording of article 2 of that Covenant. That opinion, which was shared by the Belgian Government, was sharply criticized by the present writer in an article published in the *Rechtskundig Weekblad* of 23 September 1978 (36).

A. CRITICISM OF THE OPINION OF THE « CONSEIL D'ETAT »

The above mentioned criticism can be briefly summarised as follows :

1) Contrary to the opinion of the « Conseil d'Etat », the wording of the « civil » Covenant does not exclude the direct applicability of its provisions in Belgian law :

a) The comparison made by the « Conseil d'Etat » between the wording of article 1 of the European Convention and Article 2, paragraph 1, of the « civil » Covenant is neither convincing (37) nor relevant (38).

(35) According to the Dutch Government, it would not be very plausible if certain provisions of the European Convention would be considered self-executing and analogous and sometimes nearly identical articles of the « civil » Covenant not (*Tweede Kamer der Staten Generaal*, 1975-76, n° 13932, 13).

(35) *Doc. parl.*, Chambre, 1977-78, n° 188/1, 29.

(36) Bossuyt, Marc, *De directe werking van het Internationaal Verdrag inzake burgerrechten en politieke rechten*, *R. W.*, 1978-79, 235-248.

(37) Particularly, if one compares both English versions, it is difficult to maintain that direct applicability is possible in case of the provisions of the European Convention because there « The High Contracting Parties *shall secure*... the rights and freedoms defined in Section 1 of this Convention », but not in case of those of the « civil » Covenant, because « Each State Party to the present Covenant *undertakes to respect and to ensure*... the rights recognized in the present Covenant... ».

(38) It is undoubtedly more relevant to compare the « civil » Covenant adopted in 1966 by the United Nations with the International Covenant on Economic, Social and Cultural Rights adopted on the same day by the same States in the same framework, rather than with the

b) The wording of article 2, paragraph 2, of the « civil » Covenant (39) does not require legislative measures to make the applicability in Belgian law of its self-sufficient provisions possible. Legislative measures are only required for those provisions which are not self-sufficient or for those States parties, where — contrary to Belgian and Netherlands law — direct applicability of treaty provisions is not possible according to their constitutional system.

The conclusion is that article 2 of the « civil » Covenant does not exclude the direct applicability of (most of) its provisions (40), without making it an international obligation either.

2) The « travaux préparatoires » show that a proposal to add to article 2, paragraph 2, of the « civil » Covenant a sentence according to which « The provisions of this covenant shall not themselves become effective as domestic law » was rejected, because according to general opinion « there was no reason to include provisions in the covenant which might interfere with the application of constitutional processes » (41). A more detailed examination of the discussion concerning this question in the Commission on Human Rights clarifies even further the intention of the authors of the Covenant.

B. THE INTENTION OF THE AUTHORS OF THE COVENANT

In examining the question of the measures of implementation, a Working Group of the Commission on Human Rights noted in 1947 that so far as the domestic status of the Covenant was concerned, one should refer to the constitutional law of the States parties to the Covenant :

« If the constitutional law of any State concerned permits the immediate application within the legal system of the State of treaties ratified, the Working Group considers that this solution should certainly be adopted, since it is so simple and practical from the point of view of implementation » (42).

In any case, the Working Group was of the opinion that :

« The provisions of the Bill or Convention must be part of the fundamental law of States ratifying it. States, therefore, must take action to ensure that their national laws

European Convention adopted 16 years earlier by other States and in another framework (the Council of Europe). This more relevant comparison will show that the « civil » Covenant is — and the other Covenant is rather not — suited to allow for the direct applicability of its provisions.

(39) « Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, ..., to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant ».

(40) A similar opinion was expressed by the Dutch Government (*Tweede Kamer van de Staten Generaal*, 1975-76, n° 13932, 13).

(41) *Official Records of the General Assembly, Tenth Session, Annexes*, agenda item 28-II, document A/2929, chapt. V, para. 12.

(42) E/600, Annex C, para 24.

cover the contents of the Bill, so that no executive or legislative organs or government can over-ride them, and that the judicial organs alone shall be the means whereby the rights of the citizens of the States set out in the Bill are protected » (43).

In the Drafting Committee however, Mrs Franklin D. Roosevelt (United States) proposed in 1948 an amendment to Article 2 of the Covenant that would make it clear « that rights were not self-operative » (44). Mr Geoffrey Wilson (United Kingdom) endorsed the view of Mrs Roosevelt and proposed that a footnote should be added to the effect that the Covenant should not be self-operating (45). Paragraph a of article 2 was accepted carrying the footnote proposed by the United Kingdom, by a vote of five to none, with one abstention (46).

In the Commission on Human Rights itself, Mrs Roosevelt proposed in 1949 the inclusion in article 2 of the Covenant of the following sentence : « The provisions of this Covenant shall not themselves become effective as domestic law ». According to Mrs Roosevelt the proposal was designed to place on the same footing the States, where a ratified treaty became the highest law of the country, and those where the provisions of a treaty needed to be repeated in a legislative or other text in order that it might become enforceable within the country (47).

Several representatives opposed the American proposal. Mr Inglès (Philippines) pointed out that in his country all international treaties and conventions when ratified were incorporated without further formalities in domestic law. He wondered why it would be necessary to demand of such States that, in the case of the Covenant on Human Rights, that incorporation should be effected in accordance with a different procedure. He observed that in any case, the introduction of that sentence in article 2 would not change the constitutional rule of the Philippines, which would be applied in that case as in all others, and that the Philippine Government, as far as it was concerned, was prepared to agree that the Covenant, when ratified, would automatically become a law of its country (48).

According to Mr Charles Malik (Lebanon) the American proposal which eliminated the automatic incorporation of the Covenant in the domestic law of States, the constitution of which provided that every treaty became the law of the land, was useless. He wondered why any obstacles should be set to it in countries where such incorporation was automatic. In his opinion, it was

(43) *Ibid.*, para 14.

(44) E/CN.4/AC.1/SR.33, p. 4.

(45) *Ibid.*, p. 6.

(46) *Ibid.* ; see also E/CN.4/AC.1/SR.43, p. 2, where the wording of the footnote reads as follows : « The Drafting Committee agreed to point out in its report that, in its view, the Covenant is not self-operative ». See also E/800, Annex B, p. 15.

(47) E/CN.4/SR.125, p. 5.

(48) *Ibid.*, p. 6-7.

entirely a question of the constitutional law of States and there was no reason why the Covenant should interfere with the application of that law (49).

Mr Loufti (Egypt) also preferred the Philippine amendment to that of the United States, because the former did not exclude automatic incorporation of the Covenant in domestic law where permissible under the constitution, and, where it was not automatic, provided for such incorporation by means of law or other procedure (50).

It is on the basis of the foregoing discussion that the Commission on Human Rights rejected the American proposal by 9 to 1, with 4 abstentions (51). That discussion and the voting show clearly that the authors of the Covenant did not intend to exclude the direct applicability of its provisions in the States parties whose constitutional system allows for the automatic incorporation of international law in domestic law.

C. RECENT BELGIAN VIEWS ON THE QUESTION OF THE DIRECT APPLICABILITY OF THE PROVISIONS OF THE « CIVIL » COVENANT

At an academic gathering held in Brussels on 8 December 1978, Frédéric Dumon, « Procureur-général » of the « Cour de Cassation », expressed himself on this question in a very significant way by referring to both Covenants :

« dont on dit trop aisément, ..., quant à l'un d'eux en tout cas, qu'aucune de leurs dispositions ne pourra être appliquée par nos juridictions du seul fait de leur approbation législative, de leur publication et de leur mise en vigueur » (52).

At a colloquium held in Liège on 29 and 30 November 1979, Paul Vermeulen (53) recognized implicitly the direct applicability of the provisions of the « civil » Covenant by expressing fears that article 27 of that Covenant could be invoked to substantiate claims of linguistic minorities (54).

(49) *Ibid.*, p. 8.

(50) *Ibid.*, p. 9.

(51) *Ibid.*, p. 17.

(52) « Les actes internationaux concernant la protection des droits de l'homme et la mission de nos Cours et Tribunaux », Séance académique en l'honneur du 30^e Anniversaire de la Déclaration universelle des droits de l'homme, 1978 (not published). Moreover, the « Procureur-général » advises « tous ceux que la question (de l'effet direct) intéresse de prendre connaissance des solutions hardies, réalistes, sages, efficaces et modernes qu'a données à cette importante question la jurisprudence abondante de la Cour de Justice des Communautés européennes. »

(53) Vermeulen, Paul, *Rechterlijke handhaving van regelen tot interne verdeling van soevereiniteit*, *Tijdschrift voor Bestuurswetenschappen en Publiek Recht*, 1980, 272.

(54) It has, though, been noted that article 27 « does not say, for instance, that the government is obliged to provide state-supported schools with instruction in the language of the minority » (Salzberg, John Paul, *The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities: A Functional Analysis of an Independent Expert Body Promoting Human Rights* (thesis New York University, 1973), Ann Arbor, University Microfilms, 164). In any case, it appears difficult to see how national judges could in the absence of legislative measures to that effect decide themselves which groups should be recognized as minorities. More in particular, as far as the Belgian judges are concerned it is hard to believe that they would

During the discussion of the Covenants in the Belgian House of Representatives, the Minister of Foreign Affairs declared on 21 April 1980 that he leaned towards the view expressed by the « Conseil d'Etat » (55). The Rapporteur of the Commission of Foreign Affairs, Mr Frank Swaelen, however called the opinion of the « Conseil d'Etat » disputable (56). Referring to the views expressed by the Dutch Government (57) and to the above mentioned article of the *Rechtskundig Weekblad* (58), the Rapporteur observed that « in countries where, as in Belgium and the Netherlands, the constitutional system does not consider such legislative measures necessary — because they are directly applicable — no other measures are necessary ». And the Rapporteur concluded very pointedly :

« Ni l'avis du Conseil d'Etat, ni l'opinion du Ministre des affaires étrangères ne sont déterminants quant aux effets directs possibles de certaines dispositions de ce traité. J'estime qu'il appartiendra aux autorités juridictionnelles compétentes de juger dans les affaires dont elles sont saisies, si des dispositions du traité qui sont invoquées revêtent ou non un caractère directement applicable. C'est donc en fin de compte le juge lui-même qui devra en décider » (59).

In a report presented at a colloquium organized at the University of Antwerp (U.I.A.) by the Belgian Society of International Law on 7 November 1980, Jacques Velu examined thoroughly the question of the direct applicability in Belgian law of the provisions of the « civil » Covenant. In interpreting the Covenant, Jacques Velu rigorously applied the rules of the Convention on the law of Treaties, concluded at Vienna on 23 May 1969 and which entered into force on 27 January 1980 (60).

loose their traditional caution with respect to the relations between international and domestic law and their restraint in politically sensitive matters, once Belgium becomes a member to the Covenants. As far as the Human Rights Committee would be concerned, it seems also to be unlikely that this Committee, which is — contrary to the Court of Strasbourg — not a judicial organ rendering final and binding judgments, would put a stake in its credibility by considering the fundamental principles of the Belgian linguistic legislation in violation of the Covenant, while the Court of Strasbourg did not consider those principles in violation of the European Convention.

(55) *Doc. Parl.*, Chambre, 1979-80, n° 535/2, 4 : « Le Ministre penche pour l'avis exprimé par le Conseil d'Etat qui se retrouve d'ailleurs dans l'exposé des motifs. »

(56) *Ann. parl.*, Chambre, 1979-80, 29 May 1980, 1825.

(57) The Dutch Government had concluded that many provisions of the Covenant are directly applicable and can be applied by the judge without requiring any additional legislation (*Tweede Kamer der Staten-Generaal*, 1975-76, n° 13932, 13).

(58) See *supra*, note 36.

(59) *Ann. parl.*, Chambre, 1979-80, 29 May 1980, 1825 (translated from Dutch by Jacques Velu). The same view was expressed by the Minister of Foreign Affairs in the Commission of Foreign Affairs of the Senate on 21 January 1981 (*Doc. parl. Sénat*, 1979-80, n° 442/2, 7).

(60) On 27 January 1980, the following States were parties to this Convention : Argentina, Australia, Austria, Barbados, Canada, Central African Republic, Cyprus, Denmark, Finland, Greece, Holy See, Honduras, Italy, Jamaica, Kuwait, Lesotho, Mauritius, Mexico, Morocco, Nauru, New Zealand, Niger, Nigeria, Paraguay, Philippines, Republic of Korea, Spain, Sweden, Syrian Arab Republic, Togo, Tunisia, United Kingdom, United Republic of Tanzania, Yugoslavia, Zaire.

In its article 31, paragraph 1, the Convention provides that :

« A treaty shall be interpreted in good faith (61) in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. »

As far as « the ordinary meaning to be given to the terms of the treaty » is concerned, Jacques Velu noted that a great number of the provisions of the Covenant are formulated in a sufficiently precise manner and with a sufficiently complete content which allows for their direct application.

As far as « their context » is concerned, Jacques Velu refers to the articles 2 and 40 of the Covenant. While it is admitted that the formulation of paragraph 1 of article 2 is ambiguous, it is not considered an obstacle to the direct applicability of the provisions of the Covenant which are sufficiently precise and complete (62). Article 2 is not much clearer in its paragraph 2 (63).

But its formulation does not indicate that it was, any more than it was not, the intention of the authors of the Covenant to provide for the direct applicability of the sufficiently precise and complete provisions of the Covenant in the States parties where the Covenant is part of their domestic legal order (64). Jacques Velu considers the fact that article 40, paragraph 1, of the « civil » Covenant provides that :

« The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and *on the progress made in the enjoyment of those rights...* »

as any obstacle to the direct applicability of the provisions of that Covenant (65).

(61) It would befor, e.g., an interpretation contrary to the good faith, if one would assume that the parties to the Covenant did not intend to take seriously their obligations « to respect and to ensure... the rights *recognized* in the present Covenant ».

(62) Referring to the differences in terminology between article 1 of the European Convention and article 2, paragraph 1, of the « civil » Covenant (see also *supra*, note 37), Jacques Velu notes the following : « De cette seule différence de terminologie, on ne saurait ..., déduire avec certitude que l'intention des auteurs du Pacte a été d'exclure l'applicabilité directe des règles précises et complètes spécifiques à chacun des droits. »

(63) See *supra*, note 39.

(64) It is not necessary to prove that the context of the Covenant provides for the direct applicability of its provisions. The direct applicability of those provisions does not depend from their context, but from their sufficiently precise and complete formulation. It is thus sufficient to demonstrate that the context does not exclude the direct applicability of those provisions.

(65) This becomes even more clear if one consults Egon Schwelb (Civil and Political Rights : the International Measures of Implementation, *A.J.I.L.*, 1968, 827-868) who stresses that, while the original version provided that the parties should report on « the progress made *in giving effect* to the rights recognized herein », the later and final text restricted the « progressiveness » to the « enjoyment », i.e., to the results of governmental action. The final version was adopted on the basis of declarations that « it was clearly understood that the words (the progress made) meant the progress which had been made as a result of the measures adopted by States » (*ibid.*, 841). This matter is connected with the issue of the « immediate application » of the Covenant. In an earlier article, Egon Schwelb (Some aspects of the International Covenants on Human

So far as « its object and purpose » is concerned, Jacques Velu considers that it is the object of the « civil » Covenant to recognize rights of individuals and that it is its purpose to ensure the respect of those rights in the most efficient way.

In conformity with article 32 of the Convention of Vienna, Jacques Velu had recourse also to the preparatory work of the Covenant as a supplementary means of interpretation. A detailed analysis of the relevant « travaux préparatoires » (66) confirmed his unequivocal conclusion (67) :

« Lorsque la Belgique aura approuvé, ratifié et publié le Pacte, celui-ci fera partie intégrante de l'ordre juridique applicable en Belgique et y aura force obligatoire. De surcroît, la plupart de ses normes y auront des effets directs, de sorte qu'elles pourront être appliquées par le juge sans qu'aucune législation ne soit nécessaire à cette fin et qu'en cas de conflit avec des normes de droit interne, le juge devra leur donner la primauté. », (67 bis)

More insight can be gained to this complex matter by examining also the Hearings held in November 1979 before the Committee on Foreign Relations of the United States Senate on « Four Treaties Relating to Human Rights » (68).

IV. THE DIRECT APPLICABILITY IN U.S. LAW OF THE INTERNATIONAL COVENANT ON CIVIL POLITICAL RIGHTS

In the course of Hearings (69) held before the Committee on Foreign Relations of the U.S. Senate, several experts in human rights expressed their Rights of December 1966, *International Protection of Human Rights* (Seventh Nobel Symposium) Stockholm, Alqvist 1968, 103-129) mentions that « in the view of some critics there are elements of progressive as distinct from immediate application implied in the Covenant as a whole » (*ibid.*, 108). Such a view was taken by A.H. Robertson (The United Nations Covenant on Civil and Political Rights and the European Convention on Human Rights, *B. Y.I.L.*, 1968-69, 25), but it has been convincingly refuted by Egon Schwelb (Some aspects..., 108 : « This interpretation is, however, not borne out by the legislative history » ; See also Schwelb/Egon, the Nature of the Obligations of the States Parties to the International Covenant on Civil and Political Rights, *René Cassin amicorum discipulorumque liber* (Vol. I : Problèmes de protection internationale des droits de l'homme), Paris, Pedone, 1969, 301-324 ; Civil and Political Rights..., 839-841).

(66) See also *supra*, chapt. III, sect. B. Jacques Velu analyzed also the discussion in the Commission on Human Rights in 1952 concerning the deletion of the words « within a reasonable time » in article 2, paragraph 2, of the « civil » Covenant. As shown by Egon Schwelb (The Nature...), the « travaux préparatoires » make it clear that this deletion excludes any delay in the fulfilment of the obligations of the « civil » Covenant. Egon Schwelb (*ibid.*, 317) noted also that « In the Covenant as approved by the General Assembly in 1966, article 2 (2) appears as drafted by the Commission on Human Rights at its eight session in 1952 ».

(67) Needless to say that the present writer shared this conclusion in his report of which the present article is a translated, updated and slightly modified version.

(67 bis) During the discussion of the Covenants in the Belgian Senate, Senator de Stexhe shared the view of the « Conseil d'Etat », while Senator J. De Meyer admitted, that, certainly as far as the « civil » Covenant is concerned, its (self-sufficient) provisions will be directly applicable. (*Ann. parl. Sénat*, 1980-81, 19 March 1981, 1176-1177).

(68) *Hearings Before the Committee on Foreign Relations, United States Senate*, 96th Cong., 1st. Sess., on Ex. C, D, E and F, 95-2, Four Treaties Relating to Human Rights, Washington D. C., U.S. Government Printing Office, 1980, 554 p. (hereinafter : Hearings).

(69) *Ibid.*, 59.

opinion on the direct applicability of the provisions of « Four Treaties Relating to Human Rights ». Those treaties — the International Covenants on Human Rights (70), the International Convention on the Elimination of All Forms of Racial Discrimination (71) and the American Convention on Human Rights (72) — were submitted on 23 February 1978 by President Carter to the Senate for advice and consent. In his message to the Senate, the President announced his intention to declare at the moment of ratification that those four treaties were non self-executing.

In the subsequent Hearings several experts raised the self-executing issue and Senator Jacob K. Javits (New York) took the initiative to request a written reply *i.a.* on the following questions (73) :

- « 1. Are the treaties in and of themselves self-executing ?
2. Would the Department of State's proposed non-self-executing declaration render them non-self-executing ? »

For the sake of clarity, the analysis of the answers on those questions will be limited to those concerning the International Covenant on Civil and Political Rights. The answers on the first question concern a matter which is essentially one of international law and are relevant for all countries which incorporate the Covenant. The answers on the second question relate essentially to a question of (U.S.) Constitutional law and will in principle only interest the United States. They might however contain interesting elements for other countries as well. Moreover it is useful to complement the views exposed in the Hearings with elements from the articles written on the same issue by Michael Craig (74), Charles Dearborn (75), James Skelton (76) and David Weissbrodt (77).

A. THE FIRST QUESTION : ARE THE TREATIES IN AND OF THEMSELVES SELF-EXECUTING ? »

Particularly interesting is the negative view of Roberts B. Owen, Legal Adviser of the State Department : « In our judgment the substantive provisions of the four human rights treaties submitted to the Senate in February

(70) Signed by the United States on 5 October 1977.

(71) Signed by the United States on 28 September 1966.

(72) Signed by the United States on 1 June 1977.

(73) *Hearings*, 275.

(74) The International Covenant on Civil and Political Rights and United States Law : Department of State Proposals for Preserving the Status Quo, *Harvard International Law Journal*, 1978, 845-886.

(75) The Domestic Legal Effect of Declarations that Treaty Provisions are not Self-Executing, *Texas Law Review*, 1979, 233-251.

(76) The United States Approach to Ratification of the International Covenants on Human Rights, *Houston Journal of International Law*, 1979, 103-125.

(77) United States Ratification of the Human Rights Covenants, *Minnesota Law Review*, 1978, 179-222.

1978 are in and of themselves non self-executing » (78). With only one exception, the experts, however, who answered the question of Senator Javits were in disagreement with this view. According to Philip Andereg (79), Oscar Garibaldi (80), Louis Henkin (81), Harry Inman (82), Oscar Schachter (83), Morton Sklar (84) and David Weissbrodt (85), most provisions of the Covenant are self-executing. Only Norman Redlich (86) expressed — rather hesitantly — the view that the provisions of the Covenant would be non self-executing.

Most experts (87) took as the starting point for their analysis the words of Chief Justice Marshall in the case *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) :

« Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. »

The courts have applied different criteria in deciding whether or not a treaty provision is self-executing. The wording used in the provision concerned constitutes undoubtedly the most important criterion. As noted by Norman Redlich, « The court looks to the language of the treaty and, most frequently, compares it to that of a statute to determine whether the provision prescribes a rule that is sufficiently definite and mandatory for a court to rely

(78) *Hearings*.

(79) *Ibid.*, 280 : « Yes, as to all articles except perhaps Article 1 (1), 2 (3) (a), 23 (4) and 24 (1). »

(80) *Ibid.*, 300 : « ... those provisions which impose negative obligations on the State must be considered self-executing... »

(81) *Ibid.*, 287 : « Most of the provisions of the Covenant on Civil and Political Rights would be self-executing. They can be given effect by U.S. and state authorities and courts without any need for Congressional legislation. They were clearly intended to be self-executing where that is possible. »

(82) *Ibid.*, 285 : « ... many of the operative provisions of the human rights treaties under consideration would be interpreted by the courts as self-executing, directly granting justiciable rights to individuals. »

(83) *Ibid.*, 276 : « ... several, but not all, of the provisions of the Treaties would be self-executing in the United States... »

(84) *Ibid.*, 289 : « ... the « grant » of rights and protections (...) goes directly to the beneficiaries. »

(85) *Ibid.*, 286 : « The courts would need to consider the language of each and every article of the human rights treaties to determine their self-executing nature. »

(86) *Ibid.*, 291 : « the Covenant on Civil and Political Rights would be non self-executing, although certain language of this Covenant may lend support to a contrary conclusion with regard to some of its provisions » and 294 : « While, arguably, certain provisions of the Covenant on Civil and Political Rights might appear to be self-executing, it is extremely doubtful that a court would so hold, in light of the language and history of Article 2. » See however Schachter, *Ibid.*, 277-278.

(87) See *Hearings*, 276 (Schachter), 284 (Inman), 289 (Sklar), 292 (Redlich), 299 (Garibaldi) ; see also Weissbrodt, *loc. cit.*, 66-67, note 176 ; Dearborn, *loc. cit.*, 234, note 7, and Craig, *loc. cit.*, 855.

upon it as it would a statute » (88). One should not, however, exaggerate this last requirement, because as is the case with several constitutional provisions, the courts do not hesitate to apply provisions as « equal protection » and « due process » which are not particularly precise (89). It is sufficient that the language used does not prevent the judge to apply it.

Quite often reference is made to the intention of the parties. This does not mean however that it should have been the common intention of the States parties to make from the direct application in the national law of all States parties of the treaty provision concerned an obligation of international law. It is sufficient that it was the intention of the States parties that the provision should be self-executing in the States where the treaty concerned would be incorporated in their national law. In the words of Oscar Garibaldi (90) : « The 'intention of the parties' criterion is not always realistic, because a contracting State which has no system of automatic incorporation will not often be interested in the internal arrangements of the other Parties. » Noting that « increasingly the intent standard is being questioned », Charles Dearborn (91) refers to Bernhard Schluter (92) who wrote that « In view of its shortcomings and inconsistencies, the intent doctrine should be entirely abandoned except where the intent is explicitly expressed ». In the same sense, David Weissbrodt (93) considers that :

« In regard to a multilateral treaty, ..., it is doubtful whether the intent of the parties manifested either at drafting or in ratification should serve as an appropriate standard of evaluation. The interest of merely a few parties to a multilateral treaty should not control its self-executing effect » (94).

The best approach is undoubtedly to deduce the intentions from the wording of the treaty, as did the Supreme Court of California in the often quoted *Sei Fujii v. State* case (95) where it noted that the U.N. Charter's

(88) *Hearings*, 292 (Redlich).

(89) *Ibid.*, 285 (Inman).

(90) *Ibid.*, 299, note 8.

(91) *Loc. cit.*, note 90.

(92) Schluter, Bernhard, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, *California Law Review*, 1973, 130. See also Riesenfeld, Stefan, *The Doctrine of Self-Executing Treaties and GATT : A notable German Judgment*, *A.J.I.L.*, 1971, 550 : « It seems more reasonable to consider the self-executing or executory nature of international conventions as a matter depending primarily upon the constitutional law of each nation rather than upon a dubious intent of the parties. »

(93) *Loc. cit.*, 69.

(94) In Belgian legal doctrine it has also been noted that a subjective approach which takes the intention of the authors of a treaty as the decisive criterion for the direct applicability of its provisions looses more and more ground in favour of an objective approach which does not depend on the intention of the contracting parties, but on the « réunion de certains traits permettant au juge d'appliquer la norme au litige dont il est saisi... » (Louis, Jean-Victor, *La primauté du droit international et du droit communautaire après l'arrêt « Le Ski »*, in *Mélanges Fernand Dehousse* (vol. 2 : La construction européenne), Brussels, Ed. Labor, 1979, 240.

(95) 38 Cal. 2d 718, 242 P. 2d 617 (1952).

human rights provisions « lack(ed) the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification ».

In particular, as far as the International Covenant on Civil and Political Rights is concerned, Oscar Schachter (96) considers it « plainly wrong » to infer from article 2 of the Covenant that the provisions of the Covenant are non self-executing : « How can an obligation to adopt legislative or other measures as may be necessary be read as requiring legislation that is not necessary ? When the constitution provides that a treaty shall be the law of the land and when a provision of that treaty can be directly applied by a court, then it is obvious that no legislation is necessary for that purpose. » Consequently, Oscar Garibaldi (97) puts it very rightly, when he writes that :

« paragraph 2 (of article 2 of the Covenant) neither mandates nor prohibits the incorporation of the Covenant into municipal law. The matter has been left entirely to each contracting State. The obligation imposed by paragraph 2... is a conditional obligation ; it applies only if the legal system does not already contain adequate implementation measures. »

B. THE SECOND QUESTION :

« WOULD THE DEPARTMENT OF STATE'S PROPOSED NON SELF-EXECUTING DECLARATION RENDER THEM NON SELF-EXECUTING ? »

As with most reservations (98) the experts were in general very critical about the proposed declaration which was called « unfortunate » (99), « undesirable » (102), « most unwise » (101), « improper » (102), « distressing » (103) and « troublesome » (104). While considering most provisions of the

(96) *Hearings*, 277-278.

(97) *Ibid.*, 312-313. With respect to the American Convention on Human Rights, Garibaldi has also noted that « Article 2 neither requires nor precludes the direct incorporation of the American Convention into domestic law » (*ibid.*, 300).

(98) See e.g. Henkin, *Hearings*, 139 (« Most of (the reservations) are unnecessary and undesirable. Indeed some of them are ignoble and unworthy of us and would largely undermine the important reasons why the United States should adhere to these agreements ») and Weissbrodt, *loc. cit.*, 77 (« Many of the proposed reservations or understandings appear either trivial, unnecessary, violative of international law, or a combination of the above »). As put by Bruno Bitker (*Hearings*, 116), it seems like « someone in some division went through the treaties with a fine tooth comb. It would appear as though everytime he came upon a provision to which some senator might conceivably object a limiting provision was inserted ». Thomas Farer (*ibid.*, 96) explains this as follows : « if they had not felt constrained by a long tradition of senatorial obstructionism, they would not have proposed this almost illusory form of ratification ». Such declaration « can only intensify the appearance of national hypocrisy (*ibid.*, ; see also Schachter, *ibid.*, 88). Skelton (*loc. cit.*, 125) concludes : « if, ..., the United States opts for the symbolic approach, it will have sacrificed the very substance of the Covenants, as well as much of its own credibility. »

(99) Lillich, Richard, *Hearings*, 349 and Sklar, *ibid.*, 262.

(100) Garibaldi, *ibid.* 301.

(101) Buergenthal, Thomas, *ibid.*, 333.

(102) Weissbrodt, *loc. cit.*, 71.

(103) Skelton, *loc. cit.*, 118.

Covenant self-executing, several experts were afraid that in case such a declaration were made, the courts would probably give the intended effect to such a declaration and would consequently treat the treaties as non self-executing. This opinion is expressed by Philip Andereg (105), Louis Henkin (106), Oscar Garibaldi (107) and Oscar Schachter (108). Norman Redlich (109), who already considered the treaties as « in and of themselves » non self-executing was even more affirmative in that case.

Other experts however, and more in particular Harry Inman (110), Morton Sklar (111) and David Weissbrodt (112), disagree. Of particular interest again is the opinion of Robert Owens, the Legal Adviser of the State Department :

« The non-self-executing declaration proposed by the Departments of State and Justice does not automatically render the treaties non-self-executing. Rather the proposed declaration, as applied to each of the four treaties, constitutes further evidence of the U.S. intention, as manifested in the texts of the treaties and in their negotiating history, to interpret the treaties as non-self-executing. In the United States the final determination as to whether a treaty is self-executing or not is made by the judiciary, and it is the intention of the parties as found by the courts, rather than declarations attached to the resolution of ratification, that would render the human rights treaties non-self-executing » (113).

(104) *Ibid.*, 125.

(105) *Ibid.*, 281 : « ... the declaration would likely be regarded by a court faced with the issue as constituting an interpretation of the treaties by the Executive Branch, to which great weight is to be given, ... ».

(106) *Ibid.*, 288 : « Answer. Probably. As regards provisions that could otherwise be self-executing such a declaration by the United States, at the time of ratification, would presumably be effective, if only as a reservation. »

(107) *Ibid.*, 301 : « ... the proposed declarations would probably render non-self-executing some provisions which would otherwise be self-executing ».

(108) *Ibid.*, 278 : « ... the proposed declaration to be made by the President on the advice of the Senate would very likely render the Treaties non-self-executing ».

(109) *Ibid.*, 294 : « The State Department's declaration, if incorporated in the consent of the Senate would operate to make the Covenants non-self-executing. »

(110) *Ibid.*, 285-286 : « A declaration stating that the human rights treaties are not self-executing would not *ipso facto* render them self-executing... (but) would create a presumption to that effect... that would be difficult to overcome. »

(111) *Ibid.*, 290 : « Two points lead me to answer in the negative. A declaration, especially in a major multilateral treaty, can be argued as having dubious value in establishing the acceptance of signatory partners to its terms. As an indication of one nation's interpretation of a provision or provisions, it can be shown to be inconsistent with the more general view of the intended meaning and thereby invalid. More important, no declaration is valid that is in essential respects inconsistent with the principle purposes and provisions of a treaty. Declaring a treaty that is generally deemed automatically binding as not so would fit into that category of a non-effective reservation. »

(112) *Ibid.*, 286 : « No, the courts have the final word on the self-executing issue, although the courts may be guided by State Department and Congressional views. »

(113) *Ibid.*, 315

It appears thus that the initiators of the declaration, who consider the treaties « in and of themselves » non self-executing (114), do not consider that the declaration could be the legal basis for it. Once established that nothing in the Covenant precludes the self-executing character of most of its normative provisions, it is not such a declaration that could prevent it (115). It may be justified however to examine more in detail two of the most important aspects of the second question : a) the legal nature of such a declaration ; b) the organ that will be competent ultimately to decide that treaty provisions are self-executing.

a) *The legal nature of such a declaration*

Once established that the Covenant does not prescribe that its provisions should be self-executing in the internal law of the States parties to the Covenant, it is clear that such a declaration is not a reservation in international law (116) and that for that very reason it cannot be contrary to international law (117). But since the Covenant provides explicitly that the States parties should take the necessary measures (legislative or others) to give effect to the rights recognized in the Covenant, such a declaration by which a State party manifestly tries to evade the most efficient means to give effect to those rights raises doubts concerning its « good faith » (118).

Moreover, it would be a violation of article 2 of the Covenant if the State concerned would not take the measures (legislative or others) to guarantee in its internal law the rights recognized in the Covenant (119), except if the State can prove that its existing legislation (or other measures) already assure the respect in its internal law of all those rights (120). If the courts would give to

(114) See however Craig, *loc. cit.*, 853 : « Apparently the State Department recognized the possibility that our courts might find the Covenant to be self-executing, absent any declaration. If there were no such possibility, the declaration would be entirely superfluous. »

(115) See in particular Dearborn, *loc. cit.*, 244 : « The declarations are only 'an expression of the Senate's desires and not... part of the treat(ies) » and 245 : « It merely expresses the Senate's belief that the treaty is not self-executing. The declaration is therefore not binding on the courts under the supremacy clause ... Furthermore, a declaration that is not part of a treaty is merely a Senate resolution and does not bind the courts. »

(116) Dearborn, *loc. cit.*, 243 : « ..., declarations that the human rights treaties are not self-executing do not become part of the treaties. They cannot constitute true reservations because they relate only to domestic procedures for implementing the treaty and leave international obligations embodied in the treaties unchanged ».

(117) Craig, *loc. cit.*, 862-863 and 867 : « The State Department's proposal is not seriously open to challenge for any conflict with international law. »

(118) *Ibid.*, 863 : « The fact that the treaty creates obligations for a state vis-à-vis its own citizens, however, may raise a question as to whether or not this declaration, when viewed as part of the full set of restrictions suggested by the State Department, evidences a good faith intention to give domestic effect to the Covenant's provisions. » See also Schachter, *Hearings*, 87.

(119) *Ibid.*, 86 : « The obligation to give full effect to the covenant in the national legal system through domestic remedies is made very clear by article 2 of the covenant. »

(120) Craig, *loc. cit.*, 858 : « The provision requiring implementing legislation could be written into the treaty to make it clear that those governments whose constitutions do not operate automatically to make international agreements the law of the land are obliged to give the treaty internal effect. »

such a declaration its intended effect, it would be impossible for them to prevent violations of the Covenant (121) and the beneficiaries of the rights would not be obliged anymore to exhaust the local remedies in case of violation of the rights recognized in the Covenant but not guaranteed in the internal law of the State concerned (122).

b) *The organs ultimately competent to decide whether treaty provisions are self-executing*

To decide which treaty provisions are self-executing is in essence a judicial function. It is the responsibility of the courts and the tribunals to decide in the cases submitted to them on the interpretation of the relevant treaty provisions and in doing so to examine whether they are self-executing or not (123).

Exceptionnally, when an international judicial organ is made competent to supervise the interpretation and the application of a treaty, this organ can also render an authoritative — or even a binding (124) — decision on the possible self-executing character of the treaty provisions. But national courts can only give effect to such a decision if the treaty is incorporated in the internal law of the State concerned.

Attempts of the executive or the legislative power to intervene in this essential judicial function would be deemed to be contrary to the constitutional principle of the separation of powers, because it is the responsibility of the judge to settle disputes concerning the fundamental rights of the law subjects (125).

V. CONCLUDING OBSERVATIONS

Before making some comments on the question of the direct applicability of the provisions of international treaties in general, it may be allowed to come back to this question in the context of Belgian constitutional law.

(121) Weissbrodt, *loc. cit.*, 67 : « The effect of this declaration is to deprive American courts of their most potent technique for contributing meaningfully to the interpretation of the Human Rights Covenants. »

(122) Buergenthal, *Hearings*, 349 : « In some cases it might very well be held by an international forum that a U.S. citizen does not have an obligation to exhaust domestic remedies if the convention is not self-executing in the United States because then the required judicial remedies may not be available. » See also Reuter, *op. cit.*, 20., nr. 44.

(123) Dearborn, *loc. cit.*, 237 : « It is a court in the final instance that must decide whether to apply a treaty as law in any specific case. If a treaty is self-executing, courts are under a duty to give judicial effect to the treaty provisions » ; Weissbrodt, *loc. cit.*, 67 : « But, while the views of the Executive are given great weight, the issue has been considered as ultimately one for the courts, which must determine whether to give the treaty effect as law without legislative implementation. »

(124) As is the case for the decisions of the Court of Justice of the European Communities.

(125) See also Louis, *loc. cit.*, 239.

A. THE BELGIAN CONTEXT

It would not be correct to consider the direct applicability of provisions of an international treaty in Belgian law as a recent phenomenon introduced by the « Cour de Cassation » in the famous Ski-case in 1971 (126). The direct applicability of international treaty provisions was of course not contemplated in the 19th century, because in the light of the very limited degree of development of international relations and the resulting « primitive » character of international law, practically no international conventions touching directly upon the rights of individuals were concluded.

But the Belgian judiciary certainly did not wait until the European community law to apply international treaty provisions directly in Belgian law (127). As early as 1925 — long before the European community law came into existence (128) — the Belgian « Cour de Cassation » applied directly a provision of the Treaty of Versailles of 28 June 1919, approved by Belgium by the law of 15 September 1919, and gave it priority over a provision of a law-decree of 10 November 1918 (129). On the basis of another judgment of the same year, where the « Cour de Cassation » pointed out that :

« les tribunaux n'ont pas le pouvoir de refuser d'appliquer une loi pour le motif qu'elle ne serait pas conforme, prétendument, à ces obligations (internationales) » (130).

the tribunal considered that no priority could be given to a treaty over a posterior law which would be contrary to it.

In general, the priority of the treaty over preceding domestic law was not based on the very nature of international law, but the treaty was considered as an act equivalent to a law stopping the effects of a prior law. Already in 1927 the « Cour de Cassation » gave nevertheless priority to the Treaty of Versailles over a law of 24 May 1854 considering that :

« dans ce conflit des lois, le droit des gens prime le droit privé national » (131).

Undoubtedly influenced by the decisions of the Court of Justice of the European Communities, the Belgian legal world became more and more convinced that the primacy of international treaties is based on the very nature of international law (and of European community law) which as common expressions of the wills of several sovereign States should have

(126) See *infra*, notes 127 and 133.

(127) The following synopsis of Belgian jurisprudence is taken from Salmon, Jean J.A., *Le conflit entre le traité international et la loi interne en Belgique à la suite de l'arrêt rendu le 27 mai 1971 par la Cour de Cassation*, *J.T.*, 1971, 509-520 and 529-535.

(128) The Permanent Court of International Justice also recognized the possible direct applicability of international treaties already in 1928 in the case « *Jurisdiction of the courts of Danzig*, advisory opinion of 3 March 1928 (Series B, n° 15).

(129) Cass., 8 January 1925, *Pas.*, 1925, I, 101.

(130) Cass., 26 November 1925, *Pas.*, 1926, I, 76.

(131) Cass., 27 May 1927 *Pas.*, 1927, I, 241.

priority over the unilateral expression of the will of only one of those States (132). A denial of this primacy is in fact a denial of the very existence of international (or European) law.

The Belgian « Cour de Cassation » came thus to a very logical conclusion in the so-called Ski-case when it pointed out that :

« lorsque le conflit existe entre une norme de droit interne et une norme de droit international qui a des effets directs dans l'ordre juridique interne, la règle établie par le traité doit prévaloir ; que la prééminence de celle-ci résulte de la nature même du droit international conventionnel » (133).

It should thus be well understood that it is not since 1971 that the « Cour de Cassation » applies directly international treaty provisions and gives priority to them over domestic laws, but only that the « Cour de Cassation » put very clearly in 1971 that this primacy has also to be recognised in respect of posterior laws.

It is not because the (Belgian) constitutional fathers were unconscious of the development international law would take in the 20th century and because they could not presume that Belgium would become a party to a number of treaties containing provisions which aim at producing legal effects for individuals, that one may assume it contrary to the spirit — if not to the letter — of the Belgian constitution, when the Belgian judge gives priority to the international obligations of Belgium over domestic rules.

To refuse this primacy would amount to forcing the Belgian judge to violate consciously and knowingly the international obligations freely contracted by Belgium with the approval of the Belgian legislature and to engage the international responsibility of Belgium. It is hard to believe that the Constitution of 1831 imposes such a behaviour.

B. GENERAL COMMENTS

It is crystal clear that the direct applicability of international treaties facilitates greatly the respect of international law on the national level. Whether or not a treaty provision is directly applicable in domestic law is in most cases only really relevant when there is a conflict between the treaty provision and a domestic rule. When in such a case the national judge gives priority to the domestic rule, the international obligations of the State concerned will be violated. It is an undisputed rule of international law that a State may not invoke its domestic rules to back out of its international obligations (134). The direct applicability allows precisely the national judge to assure the respect of this fundamental rule of international law.

(132) See also the conclusions of Frédéric Dumon, (than) « Premier Avocat-général », judgment of 14 January 1976 of the « Cour de Cassation », *R.W.*, 1975-1976, 1749 (quoted by Louis, *loc. cit.*, 237).

(133) Cass., 27 May 1971, *Arr. Cass.*, 1971, 967.

(134) See e.g. the following pronouncements of the P.C.I.J., judgment of 25 May 1926 in the Case concerning *Certain German Interests in Upper Silesia (merits)* : « From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which

In no way could it be justified to discriminate in this respect between provisions of international law and provisions of European community law (135). Neither from the point of view of international law, nor from the point of view of constitutional law could it be justified that the rules appertaining to direct applicability would be different depending on the facts whether the treaty concerned is in force between ten as in case of the European community treaties, or twenty as in case of the European Convention on Human Rights or sixty and more States as in the case of the U.N. Covenants. Some may be more enthusiastic for the one than for the other treaties, but a rule according to which only treaties concluded between Western States could be directly applicable would be legal nonsense. It would also be politically disastrous if a country would pretend that it respects its international obligations on the domestic plane only in case of treaties concluded in a Western framework.

Particularly for those who would be inclined to accept the direct applicability only in respect of European community law, it should be stressed that the European community treaties — as most other treaties — do not explicitly provide for the direct applicability of its provisions. This is only provided for in respect of the Regulations (136). It may be assumed however that the direct applicability of the provisions of the European communities treaties was implicitly accepted by the States parties as an international obligation (137).

Moreover the judiciary, and particularly the European Court of Justice itself, have determined that many more provisions of the European community-treaties are directly applicable than assumed by the Member States at the moment they became parties to those treaties. This does not mean however that the international obligations of the Member States became subsequently more extensive, but only that the judiciary was able to contribute more extensively to assure their respect.

express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures » (Series A, n° 7, 19) ; advisory opinion of 31 July 1930 in the case of the *Greco-Bulgarian Communities* : « ... it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty. » (Series B, n° 17, 32) and advisory opinion of 4 February 1932 in the case of the *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory* : « ... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force ». (Series A/B, n° 44, 24).

(135) See also e.g. Louis, *loc. cit.*, 237 ; Salmon, *loc. cit.*, 533 and Pescatore, Pierre, *Cahiers de droit européen*, 1971, 579-582.

(136) See article 189, al. 2, of the E.E.C.-Treaty : « A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States ».

(137) One may not lose sight of the fact that the binding force of the European Community treaties has no other basis than the basic rule of international law : « *pacta sunt servanda* ». It is because the European Community treaties are treaties that they have priority over domestic rules.

It would be unrealistic (138) to ask the parties to a treaty to point out at the moment of the elaboration of a treaty which of its provisions would be directly applicable (139). In any case, it would definitely not increase the efficacy of international treaties. It does not appertain to the legislature either to determine unilaterally when the wording of a treaty allows the judge to assure its respect (140). The approval of the legislature is needed to contract international conventional obligations, but it is the task of the domestic — and exceptionally of the international (141) — judge to apply the (self-sufficient) provisions in the cases submitted to them.

Since international treaties on the protection of human rights generally provide that their provisions may never be construed as restricting provisions that are more favourable to the individuals concerned (142), the direct applicability and the primacy of international law can only result in a strengthening of the protection of human rights. Moreover, it is typical of the « Rule of Law » that the interpretation and the application of the rules protecting human rights be entrusted to independent judges.

In any case, one should be conscious that in trying to restrict the direct applicability of international conventions, one in effect limits the efficiency of international law and increases considerably the chances that international law will be violated. Such a behaviour is even less defensible in the case of international conventions on human rights which hardly can attain their very object (the protection of human rights) if their provisions are not applied in domestic law whenever possible.

(138) It would be overly cumbersome if, once an agreement is finally reached on the text of a particular treaty, a new negotiation should be undertaken in order to determine which of its provisions enable the judge to apply them directly. It is also an impossible task from a technical legal point of view, because the direct applicability has to be determined — not in an abstract manner, but — in confrontation with concrete cases.

(139) See the suggestion of Senator de Stexhe, *Ann. parl.*, 28 June 1972, 1411-1412 and *R.B.D.I.*, 1974, 263-265.

(140) As well for the European community treaties as for the European Convention on Human Rights, the Belgian legislator has very rightly not expressed himself on the direct applicability or not of the various provisions of those treaties.

(141) It is the advantage of the European community law over traditional international law that the former provides for compulsory jurisdiction of an international court (*i.e.* the Court of Justice of Luxembourg) which ensures a uniform interpretation of the European community law. However, in order to fulfill their purposes, the direct applicability of international treaties touching upon the rights of individuals is as much necessary as for the European community treaties.

(142) See e.g. article 60 of the European Convention on Human Rights and article 5, paragraph 2, of the International Covenant on civil and political rights.