REVUE BELGE DE DROIT INTERNATIONAL
1996/1 — Éditions BRUYLANT, Bruxelles

BELGIAN REPORT TO THE INTERNATIONAL LAW ASSOCIATION COMMITTEE ON INTERNATIONAL LAW IN NATIONAL COURTS

PAR

Georges VAN HECKE

A. Background question : *Although the constitutional relationship between international law and domestic law is not the focus of the Committee's study, it would be helpful to an understanding of the answers given in the questionnaire if, in relation to the country surveyed, a very brief overview could be given of the role and rank of international law (conventional and customary) in the domestic legal order.*

Treaties that have been properly introduced in the internal legal order and are self-executing in character have an authority that is superior to that of Acts of Parliament and even to constitutional provisions (cf. MASQUELIN, *Le droit des traités dans l'ordre juridique et dans la pratique diplomatique belges*, 1980 ; VELU, *Journal des Tribunaux*, 1992, pp. 729-741 and 749-761).

Customary international law is « part of the law of the land » (cf. SALMON, « Le rôle de la Cour de cassation belge à l'égard de la coutume internationale », *Miscellanea W.J. Ganshof van der Meersch*, 1972, I, p. 217).

B. Questions relevant to the Committee's study :

1. *Are all courts competent to decide questions of international law arising in the course of proceedings before them, or only certain courts ? If the latter, which courts ?*

All Belgian courts are competent to decide questions of international law arising in the course of proceedings before them, subject only to the « renvoi préjudiciel » described in the answer to question 2.

2. *Where lower courts, being in principle competent to decide questions of international law, are in doubt about that law, may they/must they refer such questions in a higher court ?*

Where the question raised concerns the interpretation of the Treaty establishing the European Economic Community or the validity and interpretation of acts of the institutions of the Community, any court may request the Court of Justice of the Community to give a ruling thereon ; courts against whose decisions there is no judicial remedy under national law shall request such ruling (article 177 E.E.C.-Treaty).

A comparable system exists, with respect to certain treaties, in the Treaty of 31 March 1965 establishing a Benelux Court of Justice.

3. *May the courts (or a specific court) be asked to give an advisory opinion on a question of international law, not relating to an actual litigious case ? If yes, which entities or persons may request such an opinion ?*

No Belgian court can give an advisory opinion.

4. *Is there a mechanism whereby an otherwise final and binding court decision may be corrected or invalidated, if that decision is perceived to be wrong, or if international law has changed in the meantime, in order to prevent the State from incurring international responsability for a breach of international law ?*

According to article 1089 of the Judicial Code the « procureur général à la Cour de cassation » can ask the Cour de cassation to annul a final judicial decision rendered in violation of law or procedural forms, such annulation remaining without effect on the rights of the parties.

According to article 1088 of the Judicial Code the Minister of Justice can instruct the « Procureur général » to ask the Cour de cassation to annul a judicial decision for « excès de pouvoir » (cf., on these two provisions, R. HAYOIT DE TERMICOURT, « Les pourvois dans l'intérêt de la loi et les dénonciations sur ordre du Ministre de la Justice », *Journal des Tribunaux*, 1954, p. 477).

Only one example is known of this last mechanism having been used to prevent the State from incurring international responsibility. On the 16th July 1906 the Cour de cassation annulled three final judgments of the Court of first instance of Termonde because they had disregarded the Hague Convention on guardianship of 12 June 1902 (*Pasicrisie belge*, 1906, I, p. 349).

5. *In what kinds of cases — civil, criminal, administrative, constitutional, etc. — have courts had occasion to consider issues of international law ? Give examples in each category, where possible. Where especially good examples exist, kindly furnish a copy of the text of the court's judgment (unless published in internationally accessible reports).*

Belgian courts have had occasion to consider issues of international law in all sorts of cases, in view of the great variety of matters covered in international treaties.

Two examples may be given as to the effect of treaties on internal law disputes.

On 27 May 1971 the Cour de cassation decided that in the case of a conflict between a self-executing treaty and an Act of Parliament of later date, the treaty took precedence. The case concerned import levies that had in 1964 be declared illegal by the Court of Justice of the European Communities on the basis of the E.E.C. Treaty of 1957. An Act of Parliament of 19th March 1968 subsequently purported to forbid any Court action for the reimbursement of these levies. The Cour de cassation approved the Brussels Court of appeal that had decided to disregard the 1968 Act of Parliament as being in violation of the 1957 treaty. (*Pasicrisie belge*, 1971, I, p. 886).

On 13 April 1964 the Cour de cassation approved a decision of the Brussels Court of appeal that, in a dispute concerning a traffic accident, had refused to apply a provision of a Treaty of 19 September 1949 (approved in 1954) aiming at unifying the rules of the road whereas that provision was contrary to a provision of the Royal Decree of 10 December 1958 regulating road traffic. Interpreting the treaty the Cour de cassation decided that it did not directly confer rights on private parties as long as it had not been implemented by domestic legislation. (*Pasicrisie belge*, 1964, I, p. 849).

Decisions on issues of customary international law are less numerous. One example may however be cited.

On 25 January 1906 the Cour de cassation approved the decision of the Brussels Court of appeal that had decided that the antenuptial agreement entered into between King Leopold II (then Duke of Brabant) and Archduchess Marie-Henriette was valid, even though it had not been notarized according to article 1315 of the Code civil, because the Court of appeal had ascertained the existence of a rule of customary international law permitting members of Reigning Houses to conclude antenuptial agreements in the form of a treaty. (*Pasicrisie belge*, 1906, I, p. 95).

6. *Do any constitutional or statutory provisions require courts to apply international law in particular cases or circumstances ? Please provide corresponding texts and examples.*

No such provision is known to me.

There are however provisions of substantive law that make use of a concept originating in international law. In such cases the courts are under duty to ascertain the meaning in international law of that concept.

An example is the decision of 27 November 1950 of the Cour de cassation, verifying if the Court below, in applying a criminal statute relating to « violation des lois et coutumes de la guerre », had correctly interpreted those words according to their usual meaning in international law. (*Pasicrisie belge*, 1951, I, p. 180).

7. *Do any constitutional or statutory provisions regulate the means by which courts are to ascertain and apply rules of international law relevant to cases before them ? Please provide details, where applicable.*

No such provision is known to me.

8. *Have the higher courts issued directions to other courts as to how international law is to be ascertained and applied by them ?*

The higher courts can not issue general directions to lower courts. They can only approve or reject their decisions in a particular case.

9. *When a relevant rule of international law is contained in a treaty or other international agreement binding on the State, do the courts :*

(*a*) *apply the canons and approaches of interpretation of municipal law in ascertaining and applying its meaning ?*

(*b*) *have regard to the rules of interpretation of treaties contained in the Vienna Convention on the Law of Treaties, 1969 ?*

(*c*) *have regard to the decisions of international courts and tribunals relating to the treaty ?*

(*d*) *have regard to the decisions of courts of other States relating to the treaty ?*

(*e*) *have regard to the published opinions of jurists, textbooks, commentaries, etc. on the meaning of the treaty ?*

(*f*) *have regard to certificates, directions, or opinions of the execu tive branch of government on the meaning or the manner of application of the treaty ?*

In a decision of 27 January 1977 the Cour de cassation had to decide on the meaning of the words « acte ou omission du transporteur et de ses préposés fait, soit avec l'intention de provoquer un dommage, soit témérairement et avec conscience qu'un dommage en résultera probablement » in article 25 of the Warsaw Convention as amended by the Hague Protocol of 28 september 1955.

The Court decided that the interpretation of a treaty aiming at unification of law could not take place on the basis of the internal law of one of the Contracting States but had to proceed on the basis of the object, purpose and framework of the Convention as evidenced by the negotiation minutes and the treaty history. In his submission to the Court the Procureur General referred to the rules of interpretation contained in the Vienna Convention, even though that Convention had not been approved by Belgium. (*Pasicrisie belge*, 1977, I, p. 574).

In general terms it can be stated that Belgian courts will have regard to the published opinions of jurists, textbooks and commentaries. They will not have regard to opinions of the executive branch of government, except that such opinions may be brought to the knowledge of the Cour de cassation in the rarely used procedure of article 1088 of the Judicial Code described in the answer to question 4.

10. *When the relevant rule of international law is a rule deriving from custom, or otherwise from general international law, do the courts ascertain the validity, content, scope, and manner of application of that rule :*

(*a*) *from the court's own knowledge of international law ?*
(*b*) *from the writings of jurists, textbooks, encyclopedias, digests, or the writings ?*
(*c*) *from the jurisprudence of other courts within the forum State ?*
(*d*) *from the jurisprudence of courts of other States ?*
(*e*) *from the jurisprudence of international courts and tribunals ?*
(*f*) *from certificates, or opinions of the executive branch of government ?*

In a decision of 11 June 1903 the Cour de cassation quashed a decision of the Brussels Court of appeal that had granted immunity of jurisdiction to the State of the Netherlands in a dispute concerning the expenses for the running of an interstate railway line. The submissions of the Procureur-Général, on which the Court based its acceptance of what has become known as the restrictive theory of immunity, referred to jurists like Pasquale Fiore, Ludwig von Bar and Albéric Rolin and to the Institut de Droit international's resolution of Hamburg in 1891. (*Pasicrisie belge*, 1903, I, p. 294).

The decision and submissions show that, besides its own knowledge of international law, the Court sought help in the writings of foreign jurists and of an international learned society.

11. *Are the courts permitted to hear expert evidence as to the content, meaning, scope, or application, of a treaty or of a rule of customary or general international law ? Do the courts on occasion allow such expert witnesses to be called, or call them proprio motu ?*

Belgian courts do not hear expert evidence on rules of international law ; they only occasionally do so on rules of foreign law. It should be remembered in that respect that customary international law is part of the law of the land and that the Courts are therefore considered to know it without outside help.

12. *Give, if possible, some good examples of decisions where it is generally accepted that the courts correctly interpreted and applied :*

(*a*) *the provisions of a treaty.*
(*b*) *a rule of customary or general international law.*

Examples are found in the decisions mentioned in the answers to the previous questions.

13. *Give, if possible, examples of decisions which have been criticised by jurists on the ground that the court failed correctly to interpret or apply :*

(*a*) *the provisions of a treaty ;*
(*b*) *a rule of customary or general international law.*

An interesting example is to be found in a decision of 11 March 1982 of the Court of first instance in Brussels (*Journal des Tribunaux*, 1982, p. 802).

A professional translator had sued the State of Portugal for the price of a translation ordered by a commercial attaché of the Portuguese embassy. The Court applied article 31 of the Vienna Convention and granted immunity.

The jurists who have commented that decision have correctly pointed out that the Vienna Convention could not be relied upon by the State of Portugal (VERHOEVEN, *Revue belge de droit international*, 1986, p. 368 ; SALMON & SUCHARITKUL, *Annuaire français de droit international*, 1987, p. 165) even though they have tried to rest the decision on other grounds (VERHOEVEN, p. 369 ; SALMON & SUCHARITKUL, p. 175).

A decision of a domestic Court can give rise to the question whether, in a subject matter where international customary law is in a state of transformation, it has not gone ahead of the evolution already achieved.

In a decision of 30 April 1951 (*Journal des Tribunaux*, 1951, p. 298) the Brussels Court of first instance validated the garnishment of bank accounts, maintained by the Hellenic Republic, in satisfaction of an arbitral award. Since the bank accounts originated in Marshall funds for the reconstruction of Greece, international pressure led to the lifting of the garnishment (cf. SINCLAIR, *Recueil des Cours*, 1980-II, p. 219).

14. *Give, if possible, examples of where the courts failed to acknowledge the existence or relevance of a treaty or rule of international law in a case which, in the opinion of jurists, arguably required the application of the treaty provision or other rule of international law.*

15. *Give, if possible, examples of cases where a court was bound to decide a case in accordance wi th municipal law (which made no reference to international law in its relevant provisions) but where it nevertheless sought to justify its decision additionally by reference to international law.*

16. *Give, if possible, examples of cases where a court was free to decide a case on the basis of international law but preferred to arrive at the same solution under municipal law.*

17. *Given, if possible, examples of cases where a court considered whether to apply a principle or rule of international law and :*

(*a*) *did so in order to fill a gap in municipal law ; or*

(*b*) *decided that it was precluded from doing so by reason of the silence or contrary provisions of municipal law ; or*

(*c*) *decided to disregard or overrule any contrary provisions of municipal law.*

A decision of 26 May 1966 of the Cour de cassation concerned a tort debt of the former colony of Belgian Congo. In challenging the decision of the Brussels Court of appeal that had refused, after the independence of Belgian Congo in 1960, to hold Belgium liable for this debt, the creditor claimed i) that the court of appeal had incorrectly applied the Act of 1908

that had provided for financial separation of the Kingdom and its colony and ii) that customary international law required the opposite solution. After having dismissed the first claim the Cour de cassation considered « qu'à supposer quelque éventuelle contradiction entre le droit interne, qui règle les litiges nés, comme en l'espèce, entre un particulier et l'Etat belge, et les principes coutumiers du droit international public en matière de succession d'Etats, qui gouvernent les relations entre Etats, encore serait-il que ces derniers principes ne sauraient faire échec à l'application du premier ». (*Pasicrisie belge*, 1966, I, p. 1211).

Verhoeven (*Revue belge de droit international*, 1968, pp. 573-574) has rightly pointed out that the Court ought not to have brushed away so easily an issue of customary international law.

18. *Has the issue arisen in the courts of reciprocity of application of treaties or rules of international law under constitutional or statutory provisions, or in the practice of the courts, as a precondition of applying such trea ties or rules in the municipal forum ? (Cf the* exceptio non adimpleti con tractus *in Roman law). If so :*

(*a*) *how do the courts ascertain the existence or absence of reciprocity in the relevant foreign State ?*

(*b*) *have the courts on any occasion refused to apply a treaty or rule of international law on the ground of its non-implementation or non-observance by the relevant foreign State ?*

No case is known to me in which the issue of reciprocity would have arisen.

19. *Do the higher courts have among their members judges who have previously engaged in higher studies, or practice, in the field of international law ? If so, are they usually assigned to sit in cases involving international law ?*

All judges have studied international law as part of their law school curriculum. No other qualification is required. It can be pointed out that the presiding judge (Premier Président) of the Cour de cassation in the period 1977-1982 had previously been president of the court of appeal of the international zone of Tangiers.

November 1993 G. VAN HECKE