International Environmental Law in the Courts of the Netherlands

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10. INTERNATIONAL ENVIRONMENTAL LAW IN THE COURTS OF THE NETHERLANDS

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I. INTRODUCTION

The courts of the Netherlands decide hundreds of cases involving environmental law each year. They have offered an important contribution to the development and enforcement of environmental law in the Netherlands. One factor responsible for the large number of environmental cases is a landmark decision of the Supreme Court in 1986 that granted public interest organisations *locus standi* in cases where their statutory interests are affected.\(^1\) Public interest groups have made great use of this decision. In contrast to the overall number of environmental cases, the number of cases involving the application of *international* environmental law has been relatively small. Notwithstanding the increase in the number of international environmental laws, there has not been any significant growth in the number of cases involving international environmental law. Since the early 1980s, international environmental law has only featured in a small number of cases each year. The total number of published cases\(^2\) involving international environmental law only amounts to about sixty. This number is small when compared to international human rights law and European Community environmental law.

To some extent the opportunity to apply international environmental law, and hence the number of actual cases, is limited by the fact that certain treaties have been incorporated in and hence are applied as part of EC law. This holds for instance for the Basel Convention on Transboundary Movement of Hazardous Waste and the Convention on International Trade in Endangered Species, both of which have been incorporated in EC law. EC law rather than public international law therefore governs the application of the substance of these treaties.

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\(^1\) Hoge Raad, 27 June 1986, NJ 1987, 743.

\(^2\) Of course, not all cases by lower courts are published. From a methodological point of view, it appears valid to confine the analysis of the approach of Dutch courts to those cases that have been published.
II. INTERNATIONAL ENVIRONMENTAL LAW IN THE NETHERLANDS

The 60 or so cases involving international environmental law cover a wide variety of legal areas. In a small number of cases international environmental law has been applied in criminal proceedings, for example, as a defence that an alleged criminal act is not punishable. In other cases international environmental law has been invoked in civil suits as a ground for an alleged wrongful act. In the largest number of cases international environmental law is applied in administrative law cases—either to annul an act or decision of the government or, more often, to justify a particular government decision.

The published cases involve about 15 different environmental treaties. The treaties that are most invoked are the Oslo Dumping Convention—a popular treaty in the 1980s when the Netherlands dumped waste in the North Sea and the Convention of Bern on the Protection of Nature in Europe—a treaty that (together with the EC Habitat Directive) is increasingly becoming a means of last resort for public interest groups as the Netherlands continues to increase the percentage of asphalt on Dutch soil.

It should be noted that attempts to invoke treaties that are to be qualified as part of international environmental law are not always aimed at protecting environmental values. For instance, in several cases plaintiffs have invoked the Convention on International Trade in Endangered Species of wild fauna and flora (CITES) with a view to obtaining export licenses for birds and circumventing more restrictive national legislation. These attempts failed, as the CITES allows parties to take more stringent standards.

The published cases show that only in very few cases resort to a rule of international environmental law is a winning strategy. In many cases the rules of international environmental law that were invoked did not play a role at all. In one or two cases, discussed below, the rule clearly determined the decision of the court. In most cases, international environmental law was an element of undetermined weight.

III. THE GENERAL STATUS OF INTERNATIONAL LAW IN THE COURTS OF THE NETHERLANDS

The application of international law by courts of the Netherlands can be summarised and systematised by a number of brief propositions. All rules of international law, both rules of customary law and international agreements have internal effect in the Netherlands. They are part of the legal system that applies within the State. As such all branches of Government (legislature, executive, as well as courts) have to apply and implement international law, to the extent compatible with their competences. The internal effect of international law is based on established custom in the Netherlands; it is not based on any express provision of the constitution.

As part of their obligation to apply international law, Dutch courts have to review the compatibility of contested acts of government with international law whenever a plaintiff alleges that the act conflicts with that rule, and arguably also when a plaintiff does not invoke that rule. It can be argued that administrative law courts have to review ex officio any contested issue in the light of international law.

According to Article 93 of the Constitution, only certain rules of international law can be applied directly by the courts, without there being a need for further implementation by international or national legislative institutions. Such rules can be applied on a basis for a decision of the courts. In terms of Article 93, a rule can be applied directly if it is 'binding upon everyone'. This criterion means that courts first and foremost examine whether a treaty provision entails sufficient normativity and precision—whether it
grants sufficient guidance to a court and does not require that the court ventures into the domain of political decisions. The Hoge Raad (Supreme Court) has formulated the main criterion for direct application in the form of the question whether the provision obliges Dutch legislature to introduce national legislation with a given content or scope or whether it is of such a kind that the provision can simply function as an objective rule in the national legal order.\textsuperscript{14}

In cases where the application of a national law would conflict with rules of international law, rules of international law that are directly applicable law may take precedence over conflicting national laws. Article 94 of the Constitution reads:

Legislation in force shall not apply if its application would be incompatible with provisions of treaties which are binding upon everyone.

Article 94 is to be read as a restriction on the competence of Courts to apply international law. It restricts the competence of courts to grant a treaty priority over a conflicting rule of national law; only when a treaty provision is 'binding upon everyone', can a court apply the rule of international law and leave aside the conflicting rule of national law. This capacity does not apply to customary law. In case of a conflict between a national law and a rule of customary international law, the court has to grant priority to the rule of national law.\textsuperscript{15} One can say that the rationale of the restriction of the competence of courts to grant international law precedence over national law is to be found in the separation of powers doctrine.

When a treaty provision cannot be directly applied, it nonetheless can be applied in the domestic legal order. Courts can use such provisions (as well as of course provisions that are directly applicable) as a means of interpretation of applicable rules of national law.

\textbf{IV. THE DIRECT APPLICATION OF INTERNATIONAL ENVIRONMENTAL LAW IN THE NETHERLANDS}

In practice courts hardly ever resort to the direct application of international environmental law. Also, only in very few cases have they expressly denied direct effect to international environmental law. In most cases they have elected to leave international environmental law aside on other grounds.

The most renowned case in which a court based its decision directly on a rule of international law was the case on the pollution of the River Rhine by chlorides. In this case three Dutch horticulturists sued the French company mining Mines de Potasse d’Alsace for damages. The plaintiffs claimed that the discharge of saline waste into the River Rhine by the French defendant was tortious and resulting in substantial clean-up and desalination costs. The District Court of Rotterdam found that there was no applicable rule of national law that it could use to decide the case. It then turned to unwritten international law and applied the so-called sic utere tuo principle: no State can use its territory for activities that cause harm to another State. Drawing extensively on the writings of Hersch Lauterpacht, the court held that this rule also applies in the relations between citizens, and that violation of that rule is a direct basis for liability.\textsuperscript{16} The Appeals Court of the Hague quashed this ruling and held that the sic utere tuo principle could not be considered as a rule of international law binding upon everyone and that therefore it could not be directly applied to determine the legality of certain acts in the relationship between citizens.\textsuperscript{17}

One other case coming close to direct application of international law is a more recent case involving the Convention of Bern on the protection of nature in Europe. The Convention obliges the parties to protect the badger and its habitat. The province of Gelderland had planned to build a hotel in an area that was a habitat of badgers. The Court considered that the province had paid insufficient attention to the detrimental effects of the proposed hotel on the badgers and that this was incompatible with the requirements of the Convention.\textsuperscript{18} It should be noted that in this case other considerations played a role in the eventual decision of the Court, and that it could also be construed as interpretative application.

Otherwise courts generally have given a very strict interpretation to the criterion 'binding upon everyone'. For instance, the District Court of the Hague held that the Conventions of Ramsar\textsuperscript{19} and Bern did not include any provisions binding upon everyone and thus could not be directly applied. Statements of such generality are rather questionable, in particular now that Article 4 paragraph 1 of the Bern Convention contains rather determinate obligations and appears sufficiently precise to function as an independent basis of decision. However, these cases are characteristic of the attitude of Dutch courts towards the direct applicability of international environmental law.

In some cases supporting arguments used by the courts to deny direct

\textsuperscript{14} X, Y and Z v Stichting regionaal Ziekenfonds, Centrale Raad van Beroep 29 mei 1996, AB 1996, no 501.

\textsuperscript{15} Hoge Raad, 6 Mar 1959 (Nygatt), NJ 1962, no 2.

\textsuperscript{16} District Court of Rotterdam, 8 Jan 1979, NJ 1979, no 113, Ibid, District Court of Rotterdam, 16 Dec 1983, NJ 1984, no 341.

\textsuperscript{17} Appeals Court of the Hague, 10 Sept 1986; the Hoge Raad (23 Sept 1989, NJ 1989, no 743) did not discuss this issue.


\textsuperscript{19} Convention on Wetlands of International Importance, esp as waterfowl habitat, Ramsar, 2 Feb 1971, 996 UNTS 245.
application of treaty law are not entirely convincing. For instance, courts have held that treaties are not directly applicable as they contain a provision that parties should take legislative measures to implement the treaty. Such treaty provisions can also be explained by the fact that in many States direct application is not possible and legislature therefore should take action. This need not be a ground for withholding direct application in those States that do allow for direct application.20

V. THE INDIRECT APPLICATION OF INTERNATIONAL ENVIRONMENTAL LAW IN THE NETHERLANDS

In contrast to the rather marginal practice of courts giving direct effect to international environmental law, there is a rich practice of courts using international environmental law to give effect to interpret provisions of national law.

Indeed, most of the published cases fall in this category. For instance, courts have used the Oslo Dumping Convention to interpret the criteria for granting licenses under the Protection of Surface Waters Act,21 the Convention of Bern to interpret the criteria for designation of protected areas under the Nature Protection Act,22 and to interpret the granting of licenses under the Land Clearance Act.23 These cases reflect a general approach of Dutch courts on the application of international law: a tendency to attempt whenever possible to reconcile international law with national law. In particular cases, this tendency appears somewhat strained. An example is a case in which plaintiffs alleged that a license for discharges of waste water would be in conflict with the precautionary principle. The Court held, without any explanation, that whether or not the precautionary principle was violated should be examined by reviewing whether the national legislation on the prevention of pollution of surface waters was violated. The legislation itself was not reviewed in light of the precautionary principle, it was presumed that it was in line and that compliance with national law implied compliance with international law.24

A special form of interpretative application of international environmental law in domestic law concerns the use of international environmental law in the law of torts. Under Dutch civil law, a tort is committed

20 See n of P van Dijk to AR RVs of 6 Nov 1987, dBS 1987, no 176.
21 KB no 25 of 13 May 1985 (interpretation based on the Oslo Dumping Convention); Afd G RVs 26 Sept 1989, Milieu en Recht 1990/5, no 24 (interpretation of the Pollution of Surface Waters Act in light of the North Sea Ministerial Declaration); President Afd G RVs, 7 Sept 1992, KG 1992/328 (ibid in light of 'international agreements for the protection of the marine environment').
such documents may acquire legal relevance. In addition to what was said above, practice of Dutch courts that apply international environmental law as a means of interpreting national law, in particular in administrative law cases, shows three interesting patterns.

First, courts have been very liberal in applying quite indeterminate treaty provisions. In cases of direct application, where, as noted above, courts have used a rather rigid construction of the criterion 'binding upon everyone' and in most cases concluded that a treaty provision is too indeterminate and hence cannot be applied directly. In contrast, also treaty provisions that are generally worded have been used to interpret national law. An example is the application of Article 4 paragraph 2 of the Convention of Bern which should be regarded as too vague to be 'binding upon everyone', and that therefore not capable of direct application, but which was used in to construe a decision to annul a plan of the municipality of Nijmegen that offered too little protection for a salamander population. Secondly, courts are also willing to consider legally non-binding instruments in the construction of national law. An example is a case where the court used the Declarations of the International North Sea Conferences—clearly non-legally binding instruments—to interpret the Dutch law on the dumping of waste at sea as entailing a preference for storage on land. Dumping at sea was only allowed when there is no environmentally friendly alternative on land. While Courts have determined that such documents do not impose any duties on the State that can be enforced by the courts, indirect application provides an alternative through which such documents may acquire legal relevance.

Thirdly, in most cases where courts have applied constructions of treaty provisions it has been the Government that relied on and profited from such application. In such cases the Government has cited international environmental law to justify a particular course of action—for instance in its decisions whether or not to grant permits for discharges or for dumping of waste at sea. These, then, are cases in which the Government has not implemented a treaty in its national law, yet relies on the treaty to guide the application of national law. It may be noted that in EC law this construction generally is considered unfavorable. Governments are not allowed to rely on non-implemented directives against citizens. The main difference appears to be that in the cases involving international environmental law courts do not rely exclusively on international law, but use it to interpret and use their margin of appreciation under domestic law. The reverse—interpretative support for an action brought by a plaintiff that attacks a governmental decision are much rarer, but in principle clearly possible.

The possibilities for interpretative application are not unlimited. The most important restriction appears that interpretation of national law in the light of international environmental law is only possible when the national legal provisions concerned leave sufficient leeway for application of international law. For instance, an exhaustive listing of precisely formulated conditions under which licenses may be granted would not leave sufficient room for application of international law. This requirement appears to be applied in a highly flexible manner.

VI. JUDICIAL REVIEW IN ADMINISTRATIVE LAW

Straddling the distinction between direct and indirect application is the practice of judicial review in administrative law. The Courts charged with the control of governmental policy apply a wide range of principles of administrative review, such as the principle of reasonableness and the principle that decisions should be duly prepared. These principles are laid down in the General Act on Administrative Law. In applying principles of administrative review, courts can and do consider rules of international environmental law. For instance, in a case concerning a planning project that might have endangered hamsters where the government had not duly considered the Bern Convention while preparing the plan, the challenged decision was annulled because it violated the principle that a decision should be duly prepared. In another case it was decided that another regional authority had correctly withheld its permission for a license for soil removal in an area populated by badgers. The applicable Soil Removal Act required a balancing of interests. The fact that the Bern Convention protects badgers must be included in the balance. In the light of the Convention, the refusal to grant permission was rightly decided.

34 Case C-148178, Publico Ministerio v Ratti [1979] ECR 1629.
36 KB 22 June 1989, AB 1989, 430.
This method ensures compliance with the Convention without the courts having to decide the issue of the Convention’s direct effect or otherwise. Norms of treaties therefore indirectly impact on the general principles of proper administration. Such cases can be both explained in terms of direct or indirect effect, but the better view would be that these categories do not exhaust the range of judicial techniques to give effect to international law.

VII. WHAT PRINCIPLES AND RULES OF INTERNATIONAL ENVIRONMENTAL LAW HAVE BEEN APPLIED?

Only in few cases courts have applied what are now considered general constitutive principles of international environmental law. On one previously mentioned occasion, the District Court of Rotterdam applied the principle that a State may not use its territory for activities that cause significant harm to other States. This decision was overturned in appeal. The Supreme Court considered the transfrontier pollution caused in France unlawful, but exclusively relied on national tort law. It may be noted that the distinction is to some extent arbitrary—as the international sic utere tuo principle in fact is derived from national law principles such as the one that was applied by the Supreme Court.

In several decisions courts have applied the precautionary principle. However, in most of these cases reference was made to the principle without it being made clear that the principle was applied as a principle of international law or one of national law—the better view would be that it mostly does not matter because the principle is now accepted as an integral part of international and national environmental law and policy.

Most cases involving international environmental law involve specific rules of treaty law, rather than general principles. These include, among many other provisions, Article 4 paras 1 and 2 of the Convention of Bern, Article 4 of the CITES Convention, Article 9 of the Oslo Dumping Convention. A detailed examination of the interpretation of these provisions, which is beyond the scope of this paper, would show certain interesting interpretative aspects that may be relevant in future cases, in cases in other countries, and indeed for the supervisory mechanisms established under these Conventions itself.

VIII. CONCLUSIONS

What conclusions can be drawn from the practice of Dutch courts in regard of international environmental law, or international law in general, for the application of international environmental law in domestic legal systems?

The overriding conclusion is that the attitude of courts is more important than the formal features of the constitutional system. Despite the fact that the Dutch system can be characterised as modesty monist, the courts have given limited effect to treaty law. An interesting analogy can be drawn with the application of human rights law, where for a long time the role of the human rights treaties was rather marginal. In the early 1980s the courts took a different, more open approach and proceeded to apply many provisions of human rights treaties. The constitutional background was a stable variable—what changed was the attitude of courts towards human rights treaties.

A second point that appears relevant are the features of international environmental law. The relative scarcity of cases involving international environmental law as compared to human rights law may in part be explained by the relative indeterminacy of treaty obligations. It is important, though, not to overstate this conclusion. In a few cases, most notably the Rhine chlorides case, courts have been prepared to apply flexible principles, in particular when interpreting national law.

This leads to a third conclusion. The prospects for applying international environmental law are particularly great when there are national environmental provisions that can be used to give indirect effect to international law. In this regard, the improved application of international environmental law depends on the improvement of national law, even when international obligations are not directly and expressly transformed into national law. Richard Falk referred to national courts as ‘agents of an emerging international system of order’. Dutch courts indeed play a part in the supervision of a commonly interest: the implementation of international environmental law. This practice in many aspects is in need of improvement, in particular as regards the willingness of courts to review national law in the light of international law and as regards a less stringent application of the criterion that treaties should be binding upon everyone before being able of direct application. Yet, existing practice shows several threads that hold promise of a greater role of national courts in the implementation and enforcement of domestic law. Further research, in particular in a comparative perspective, may contribute to enhancing that role.