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Channelling International Law into the Domestic Legal Order – Some Practices and Constitutional Problems

*Evert Alkema**

1. Introduction

This contribution considers the influx of international law into the Netherlands domestic legal order. The central issue will be the manner in which international law is implemented. As an old constitutional lawyer, my focus on the constitution will be two-fold. First, how does the constitution regulate the process of implementation? Second, how does implementation affect the constitution itself?

As a caveat, I note that this study primarily concerns Dutch practice and experience. Public law will be the focus here; however other branches of law (e.g. private and penal law) may use special implementing techniques of their own. Further, I will rarely go into European Community law. Not just for lack of adequate knowledge, but also to resist a temptation. The Communities and their development vis-à-vis the legal orders of their member States could be in many respect exemplary for our topic. However, they might also work like a strong magnet, attracting the debate towards and shaping the possible solutions in their own image. Other international law may be less sophisticated in its relationships to the State than Community law, but this is precisely what justifies studying it in its own right.

2. International law – its legally binding force

Firstly, a few observations about international law: over the last sixty years its expansion has been enormous. The ensuing impact of international law on daily life – for citizens, lawyers and politicians – is conspicuous. Here, however, I would point to some major changes in international law that seem especially relevant for their implementation.

International law has always been known for its heterogeneity. It stems from different sources: treaties, custom, general principles, judicial decisions

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and teachings as well as resolutions of international organisations. However over time, matters are changing drastically. To take customary law as an example: much customary law has been transformed through codification into treaties, particularly in conventions.

At the same time a new type of international (customary?) law is emerging among the membership of some international organisations, such as the Council of Europe¹ and OECD,² based on the loyalty which the States owe to the organisation.³ So much so, that these days the question can be raised seriously whether Russia – as a member of the Council of Europe – is still at liberty not to ratify the 14th protocol to the ECHR, given that all the other member States have done so.⁴ The traditional answer, of course, is that Russia does have that negative power. However, it seems doubtful that most of the other member States of the Council of Europe could have indulged in one of their members being so ‘uncooperative’. Apparently, international legal norms do not have the same normative value for – say – Russia or the USA as for the Netherlands or Norway.

No doubt, uncertainty about the binding force of international law in its various forms is a major problem. Binding force, if any, is principally subject to and dependent on rules of both international and domestic law. On the international plane, the 1969 Vienna Convention on the Law of Treaties sets the standard. The legal nature of resolutions of international organisations is not so clear.⁵ Statutory rules of those organisations rarely stipulate their binding force⁶ or exceptionally, their superiority.⁷ Mostly, however, they are silent as to the question of binding effect.

Neither the resolutions of many of the intergovernmental international organisations, nor the ‘views’ of the UN bodies supervising compliance with

¹ See A. Drzemczewski, ‘Monitoring by the Committee of Ministers of the Council of Europe : A Useful ‘Human Rights’ Mechanism?’ in Ziemele (ed.), *Baltic Yearbook of International Law* (Vol. 2, 2002), 83-103.

² See generally S. Douma and F. Engelen (eds.), *The Legal Status of the OECD Commentaries*, IBFD, Conflict of Norms in International Tax Law Series, (Vol. 1, Amsterdam 2008).

³ See also EC Treaty (Treaty of Rome, as amended), art. 10.

⁴ Cf Council of Europe Liaison Committee with the European Court of Human Rights, 19 November 2008, requesting from the Steering Committee for Human Rights a preliminary opinion on the advisability and modalities of inviting the Court to put into practice certain procedures which are already envisaged to increase the Court’s case-processing capacity.

⁵ See generally H.G. Schermers and N.M. Blokker, *International Institutional Law* (4th rev ed, Nijhoff: Boston 2003), §§ 1217-1230.

⁶ E.g. art. 33 juncto art. 52 para 1 of the Constitution of the International Civil Aviation Organisation.

⁷ So art. 103 of the Charter of the UN.

human rights conventions, formally provide for their binding force. Binding force, if any, may be explained in different ways. It can be construed as a custom or established State practice, but also as a matter of foreign policy or of loyal membership to an international organisation. These factors are not purely international; they also stem from considerations of internal policy and can be triggered by public opinion ('mobilisation of shame'). Those motives are so diverse that one could speak of a sort of 'circumstantial' binding force.

In creating international law, the State's role continues to be predominant. As noted before, nowadays much of that creative activity takes the shape of co-operation within international organisations; in that respect, supranational organisations are notable for having gained importance. Moreover, the States are not only involved in international organisations through their diplomats and other high-ranking officials; in Europe, national parliamentarians as delegates to the Parliamentary Assembly of the Council of Europe, and directly elected members of the European Parliament also participate in norm-setting. Within the national legal order this leads to a staggering of tasks with respect to international law over persons and institutions. We will return to that later.

3. Internal effects of international law

3.1 General remarks

Traditionally, the effect of international law within the domestic legal order has been related to the well-known dichotomy: monism versus dualism. Monism in its pure and simple denotation presupposes that international law is not only superior to domestic law but also that the international legal order and the domestic legal orders constitute one entirety. Thus, in theory, international law would permeate without further ado into the national legal order. By contrast, dualism holds that the two legal orders are separate: the internal effects fully depend on the conditions set by national constitutional law.

Over time the distinction between monism and dualism seems to have lost its original and primarily theoretical sharpness, particularly where States cooperate very closely, as is the case in some regional organisations. This change is notable in the European Union, where EC Regulations bestow rights and duties directly on European citizens.

Usually, international law itself is silent, if not indifferent, about the ways and means by which national authorities ought to implement international legal obligations into the domestic legal order; what matters, according to international law, is the result. As a consequence, implementation is predominantly subject to domestic law, especially constitutional law.

Before elaborating this view, a few words about the exceptions. Treaties, resolutions of international organisations or decisions of international tribunals, rarely specify how those documents or certain elements thereof have to

be implemented: through legislation or – by contrast – through direct application by the domestic courts. So, more recently, the European Court of Human Rights (*ECtHR*) in some of its so-called ‘pilot’ judgments has given guidelines for their implementation;⁸ since the alternative was likely to be a massive number of similar applications, it seems only natural that the *ECtHR* sought to prevent such claims by issuing guidelines to the national authorities about the measures to be taken. This reaching out of international authorities – exceptional as it still may be – seems a promising development.

3.2 Implementation of international law by the Netherlands

3.2.1 Generalities

The Netherlands, although being considered as a monistic State, never fully lived up to that epithet. That international law is binding on the executive and the legislature is considered a matter of domestic customary constitutional law.⁹ As far as the judiciary is concerned, the Constitution restricts monism, in principle, to treaties and resolutions of international organisations. Other sources, such as custom and general principles of law, are not considered by the Constitution; their effect is a matter of case-law. Customary international law is applied by the courts, but not for judicial review of Acts of Parliament, following explicit consideration by the Supreme Court,¹⁰ reflecting a doctrine that was reaffirmed on the occasion of the major revision of the Constitution of 1983.¹¹

With regard to the general principles of law, this exclusion is less explicit, perhaps because there is no clear boundary between general principles of domestic law and of international law. Moreover, some general principles of international law have been ‘codified’ in international conventions, most notably the principle of equality and the ban on discrimination. As a rule, testing of legislation against general principles is not permitted.¹² In this respect there is a remarkable difference with the Federal Republic of Germany (FRG). Though usually labelled as dualistic, the FRG recognises in art. 25 of its *Grundgesetz* those general principles as part of federal law.

⁸ E.g. *ECtHR* 22 June 2004, *Broniowski vs Poland* (Appl. No. 31443/96 § 192) and – in the same case – the friendly settlement of 28 September 2005 § 34. An early exception is *ECtHR* 26 March 1985, *X and Y vs The Netherlands* (Series A no 91 § 27).

⁹ J.W.A. Fleuren, *Een ieder verbindende bepalingen van verdragen* [Provisions of treaties that are binding on all persons] (Boom: The Hague 2004), 18-19.

¹⁰ HR [Supreme Court] 6 March 1959 (*Nyugat*), NJ 1962, 2.

¹¹ See Fleuren (note 9), 26-30.

¹² HR 14 April 1989 (*Staat vs Landelijke Studenten Vak Bond*), NJ 1989, 469.

Another source of international law, namely resolutions of international organisations, has been recognised in the Constitution. In 1953 the present art. 92 prepared the ground. Furthermore, resolutions of international organisations were introduced and placed on a par with treaties by articles 93 and 94. By contrast, the Constitution has no specific provisions about the European Union or European Community law, so far.

3.2.2 Specific constitutional provisions

For our subject articles 90 through 94 of the Constitution are the most relevant.¹³

The importance attributed to the international rule of law is reflected in art. 90:

‘The Government shall promote the development of the international rule of law’.

The involvement of Parliament with regard to treaty law is laid down in art. 91:

‘1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament.

2. The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval.

3. Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour’.

This is an essential provision for the legitimacy of international law within the domestic legal order and the ensuing implementing measures. The democratic element consisting of parliamentary control, however, is being watered down. So, the Act of Parliament mentioned in paragraph 1 provides for several exceptions for international obligations engaged in by treaty.¹⁴ More importantly, with respect to some treaties, notably the statutes of international

¹³ E.A. Alkema, in JMJ Chorus et al. (eds.), *Introduction to Dutch Law* (4th ed, Kluwer Law International: Alphen a d Rijn 2006), 326 and the literature quoted there in note 32.

¹⁴ Kingdom Act provided for in art. 91 of the Constitution on the Approval and Publication of Treaties and the Publication of Decisions of International Organisations of 7 July 1994 (Stb. 542) (*Rijkswet goedkeuring en bekendmaking verdragen*).