THE APPLICATION OF PUBLIC INTERNATIONAL LAW BY DUTCH COURTS

by Joseph Fleuren*

* Associate Professor at the Faculty of Law, Radboud University Nijmegen; Deputy Judge in the District Court of Zutphen.

Netherlands International Law Review, LVII: 245-266, 2010

doi:10.1017/S0165070X10200062

1. INTRODUCTION

When the Netherlands Society of International Law (*Nederlandse Vereniging voor Internationaal Recht*) was founded a century ago, Dutch legal doctrine was divided on the issue whether treaties had the force of law in the Netherlands or had to be implemented by national legislation in order to make their contents binding on natural and legal persons. By then dualistic theories on the relationship between international and domestic law had been blowing over from Germany and Italy. Although many scholars had become enchanted – and others haunted – by those theories, one will look in vain for contributions on this controversy in the proceedings of the Netherlands Society of International Law.[1] I would guess that this is not a coincidence. Dualistic theories have always been foreign to Dutch case law and most members of the society will only have been aware of the armchair nature of these theories.[2] In the Kingdom of the Netherlands the relationship between international and domestic law is deeply rooted in the monistic tradition. From times immemorial, the Dutch courts have been applying treaty law and customary international law. The only lasting impact that dualistic theories have had on Dutch case law was that they made the courts more aware of their attitude towards international law. In the first decades of the 20th century the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) passed a couple of judgments in which it made it explicit that, according to Dutch constitutional law, lawfully concluded treaties as such were binding on citizens, thus rejecting any theory which claimed that the content of a treaty could only be binding on persons to the extent that this content was embodied in national law.[3] That the courts were empowered to apply customary international law as such has never been seriously challenged, so there was no need for them to clarify their position on this issue.

Only thorough historical research could reveal which role the Netherlands Society of International Law and its members have played over the years in keeping the courts on the right track with regard to the application of public international law. But from legal history it is abundantly clear that several of its members were involved from the very start in the 1953 amendment of the Constitution of the Kingdom of the Netherlands, which made it one of the most *völkerrechtsfreundliche* constitutions in the world. In this article I will explore

---

1. The Netherlands Lawyers' Association (*Nederlandse Juristen-Vereniging*), on the other hand, discussed the controversy at its annual meeting of 1937 on the basis of reports presented by Telders and Verzijl (see *Handelingen der Nederlandsche Juristen-Vereeniging* (Proceedings of the Netherlands Lawyers' Association) No. 67 (1937), part I). An English translation of the latter report is included in J.H.W. Verzijl, *International Law in Historical Perspective* (Leiden, Sijthoff 1968) pp. 106-146.

2. Cf. A.A.H. Struycken, *Grondwetsherziening: Theorie en praktijk* (Revision of the Constitution: Theory and Practice) (Arnhem, Gouda Quint 1913) pp. 71-72.

3. *Hoge Raad*, 25 May 1906, *W* (*Weekblad van het Recht*) 8383; *Hoge Raad*, 3 March 1919, *NJ* (*Nederlandse Jurisprudentie*) 1919, p. 371 (*grenstractaat Aken*).

the ways in which Dutch courts have been giving effect to public international law since the middle of the 20th century. I will start with a survey of the constitutional background.

2. THE CONSTITUTIONAL FRAMEWORK

2.1 **The 1953, 1956 and 1983 amendments of the Constitution**

Until 1953 the effect of international law within the Kingdom of the Netherlands was largely determined by unwritten constitutional law and case law.[4] In part it still is. But in 1953 the provisions on foreign relations in the Constitution of the Kingdom of the Netherlands were significantly amended.[5] Ever since, the articles on foreign relations open with the constitutional duty of the Government to promote the development of the international rule of law.[6] The Kingdom may even become a party to treaties[7] which are inconsistent with the Constitution, provided that those treaties have been approved by both Houses of Parliament with a majority of at least two thirds of the votes cast. So, the rigid and time-consuming procedure that has to be followed in case of a revision of the Constitution itself is no impediment to entering into treaties which depart from the Constitution.[8] Furthermore, the 1953 amendment declared treaties and resolutions of international organizations to be binding on all persons insofar as they had been published. One of the most remarkable renewals was the provision that national legislation – including the Constitution, Acts of Parliament and subordinate legislation – was inapplicable if application would be incompatible with treaties and resolutions

---

4. See, e.g., L. Erades and W.L. Gould, *The Relation between International Law and Municipal Law in the Netherlands and the United States* (Leiden, Sijthoff 1961).

5. For a translation and discussion of the 1953 amendment see H.F. van Panhuys, 'The Netherlands Constitution and International Law', 47 *AJIL* (1953) pp. 537-558.

6. Currently Art. 90 *Grondwet voor het Koninkrijk der Nederlanden* (Constitution of the Kingdom of the Netherlands) (hereafter, Const.). For an analysis of this provision see L.F.M. Besselink, 'The Constitutional Duty to Promote the Development of the International Legal Order: The Significance and Meaning of Article 90 of the Netherlands Constitution', 34 *NYIL* (2003) pp. 89-138.

7. In the Netherlands Constitution the concept of a treaty has the same (broad) sense as in international law. A treaty in this sense may be defined as 'an expression of concurring wills attributable to two or more subjects of international law and intended to have legal effects under the rules of international law' (P. Reuter, *Introduction to the Law of Treaties*, 2nd edn. (London, Kegan Paul International 1995) p. 30).

8. Currently Art. 91(3) Const. Since 1954 the relationships between the Netherlands and the Caribbean parts of the Kingdom are regulated by the Charter of the Kingdom of the Netherlands (*Statuut voor het Koninkrijk der Nederlanden*). As the Charter does not contain a provision similar to Art. 91(3) Const., it has to be presumed that the Kingdom may not become a party to a treaty which departs from the Charter until the Charter is amended (*Kamerstukken* (Parliamentary Papers) *I* 1955/56, 4133 (R 19), no. 151, p. 3; ibid., no. 151a, p. 3; *Handelingen* (Parliamentary Proceedings) *I* 1955/56, p. 387; *Kamerstukken I* 1956, 4402 (R 43) No. 7a, p. 2).

of international organizations which had been published, no matter whether the legislation had come into force before or after the publication of the treaty or resolution.[9] The only requirements were that the treaty or resolution had entered into force for the Kingdom of the Netherlands and was adequately published. The duty of the courts to apply treaty law[10] did not (and still does not) depend on the question whether the Government in ratifying or otherwise concluding the treaty might have exceeded the limits of its treaty-making power.[11]

Already three years later, in 1956, the constitutional provisions on international relations were again amended.[12] Although this revision was merely supposed to repair technical flaws in the 1953 amendment and not to touch on its essence, the Constitution as amended in 1956 was – and still is – less friendly or open towards international law than its predecessor. This is the result of the introduction of the concept of self-executing provisions of treaty law in the Constitution. Since the 1956 amendment the Dutch Constitution lays down that (only) self-executing provisions of treaties and of resolutions by international organizations, after being published, are binding on everyone and prevail over national legislation.[13] Of course the Constitution does not use the English word 'self-executing'. Instead it refers to provisions which may be binding on all persons by virtue of their contents (*bepalingen die naar haar inhoud een ieder kunnen verbinden*). From the legal history of the 1956 amendment it is clear that this phrasing was meant to be a description of the concept of a self-executing provision.[14] The reasons for introducing this concept in the Constitution and the way it is dealt with by the courts will be discussed in section 3.

In 1983 the Constitution underwent a general revision.[15] The articles on international relations were smoothed over and shortened, but their substance was

---

9. Hereafter I will use the term 'supremacy clause' to refer to this provision, both in its original and its subsequent wording.

10. In this article 'treaty law' is used as an umbrella term for both treaties and resolutions of international organizations (which are adopted in pursuance of a treaty).

11. Currently Art. 120 Const. Cf. *Hoge Raad*, 31 August 1972, *NJ* 1973, no. 4; 4 *NYIL* (1973) p. 392.

12. For a translation and discussion of the 1956 amendment see H.F. van Panhuys, 'The Netherlands Constitution and International Law: A Decade of Experience', 58 *AJIL* (1964) pp. 88-108.

13. Currently Arts. 93 and 94 Const. Since the 1983 amendment these Articles read as follows:

Art. 93: 'Provisions of treaties and of resolutions by international organizations, which may be binding on all persons by virtue of their contents shall become binding after they have been published.'

Art. 94: 'Legal provisions in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international organizations that are binding on all persons.'

14. See, e.g., *Kamerstukken II* 1955/56, 4133 (R 19), no. 4, pp. 13-15.

15. Cf. M.C.B. Burkens, 'The Complete Revision of the Dutch Constitution', 29 *NILR* (1982) pp. 324-336.

mainly left untouched.[16] Some Members of Parliament had proposed to extend the 'supremacy clause' to all provisions of treaties and of resolutions of international organizations as well as to general rules of international law (*algemene regels van volkenrecht*). But the Government opposed both proposals. After it had assured the Lower House (*Tweede Kamer*) that it favoured a broad interpretation of the concept of a self-executing provision, the first proposal was withdrawn. An amendment to the effect that general rules of international law would be incorporated in the 'supremacy clause' was put to a vote, but rejected.[17]

2.2 Resolutions of international organizations

The Constitution puts beyond doubt that the Kingdom of the Netherlands may become a party to treaties in which international organizations are established or provided with legislative, executive or judicial powers.[18] The term 'international organization' as referred to in the Constitution has a very broad meaning. It covers any entity (for instance, a full-blown organization, an international court or an intergovernmental committee) established by or pursuant to a treaty, which under public international law has the power to pass resolutions which are binding upon the Kingdom of the Netherlands. In so far as such resolutions are published and contain provisions which are self-executing, they may affect the rights and duties of natural and legal persons and will have supremacy over the Constitution, Acts of Parliament and other legal rules. Whether these provisions have or do not have the character of general regulations is irrelevant. Thus even resolutions that concern one or more specifically named or otherwise specified persons may count as resolutions which are binding on all persons within the meaning of the Constitution.[19] UN Security Council resolutions 1192 (1998) and 1688 (2006) are cases in point. The former concerned 'the two persons charged with the bombing of Pan Am flight 103' and provided a legal basis for their trial before a Scottish court sitting in the Netherlands. The latter allowed a chamber

16. Cf. E.A. Alkema, 'Foreign Relations in the Netherlands Constitution of 1983', 31 *NILR* (1984) pp. 307-331. The most important changes related to the basic rule that the Government shall not consent to a treaty or denounce it without the prior approval of the *Staten-Generaal* (i.e., the Dutch Parliament). As a result of the 1983 revision the exceptions to the requirement of prior approval and the ways in which approval may be granted, are no longer laid down in the Constitution itself, but in an Act of Parliament, viz. the Kingdom Act on Approval and Publication of Treaties (*Rijkswet goedkeuring en bekendmaking verdragen*). Cf. J. Klabbers, 'The New Dutch Law of the Approval of Treaties', 44 *ICLQ* (1995) pp. 629-643.

17. *Kamerstukken II* 1979/80, 15 049 (R 1100), nos. 14 and 18; *Handelingen II* 1979/80, pp. 4093, 4436, 4504.

18. If the exercise of these powers will result in resolutions or decisions which depart from the Constitution (or which oblige the Kingdom to take measures that depart from the Constitution), such a treaty may only be entered into after it has been approved by both Houses with a majority of at least two thirds of the votes cast. See Art. 92 Const.

19. *Kamerstukken II* 2005/06, 30 610, no. 3 pp. 5-6; *Kamerstukken I* 2007/08, 31 200 VII, B, p. 5.

of the Freetown-based Special Court for Sierra Leone to sit in The Hague, in order to try the Liberian 'former President Taylor' for war crimes. Judgments of international tribunals may also contain rulings that are binding upon all persons within the meaning of the Constitution. Instances of these are the final judgments of the European Court of Human Rights in which a ruling is given on the question whether the Netherlands has violated the European Convention on Human Rights 1950 with respect to the applicant and whether the applicant should be awarded compensation.[20]

Provisions of resolutions of international organizations which merely contain recommendations do not entail legal obligations for the Kingdom of the Netherlands and thus are *a fortiori* not binding on all persons. For this reason none of the provisions of the Universal Declaration of Human Rights are considered to be binding on all persons within the meaning of the Constitution.[21] This is not to say that the Dutch courts have to ignore recommendations of international organizations and other instruments of soft law. Although courts are not obliged to comply with them, they frequently refer to those instruments when interpreting and applying binding rules of public international law.[22]

2.3 Customary international law and non-self-executing provisions

The 1953 amendment was silent on the force of customary international law in the Netherlands. Consequently it was left to the discretion of the courts to determine to what extent they could review Dutch law for its compatibility with customary international law.[23] But when in 1956 the 'supremacy clause' was restricted to self-executing provisions of treaties and resolutions of international organizations, the Supreme Court reasoned *a contrario* that from the date that the 1956 amendment entered into force the Dutch courts were no longer allowed to review Dutch law for its incompatibility with either non-self-executing provisions of treaty law or customary international law.[24] In legal scholarship this is labelled the 'Nyugat doctrine', named after the case in which the Supreme Court has given this ruling. The Supreme Court upheld the 'Nyugat doctrine' in its famous judgment of 18 September 2001 in re *Bouterse*, arguing that according to the legal history of the 1983 revision of the Constitution the constitutional legislature (*grondwetgever*) had not intended to modify this doctrine. In this judgment the Supreme Court ruled that it was not for the courts to exercise universal jurisdiction in torture cases or to apply the Torture Convention Act (*Uitvoeringswet*

---

20. J.W.A. Fleuren, *Een ieder verbindende bepalingen van verdragen* (Treaty provisions that are binding on all persons) (The Hague, Boom Juridische uitgevers 2004) pp. 225-228.

21. *Hoge Raad*, 7 November 1984, *NJ* 1985, no. 247; 17 *NYIL* (1986) p. 253.

22. See, e.g., *Gerechtshof 's-Gravenhage* (Court of Appeal of The Hague), 20 December 2007, LJN BC0619, *NJ* 2008, no. 133 (*SGP*); *Voorzieningenrechter Arrondissementsrechtbank Utrecht* (Judge in interlocutory proceedings of the District Court of Utrecht), 6 April 2010, LJN BM0846.

23. *Hoge Raad*, 6 March 1959, *NJ* 1962, no. 2; 10 *NILR* (1963) pp. 82 (*Nyugat II*).

24. Ibid.

Folteringsverdrag) to crimes that were committed before the Act had taken effect. The Supreme Court refrained from answering the question whether public international law favoured a different conclusion, because the courts were not allowed to test statutory limitations on retroactive force and jurisdiction against other rules of public international law than the self-executing provisions of treaty law mentioned in the 'supremacy clause'.[25]

However, the Nyugat doctrine should not be overstretched. The doctrine does not alter the fact that *all* treaties, resolutions of international organizations and rules of customary international law which are binding upon the Kingdom of the Netherlands are part of the law of the land. Moreover, it appears from the legal history of the 1953, 1956 and 1983 amendments of the Constitution that within the legal order of the Kingdom of the Netherlands treaty law and customary international law have a higher ranking (i.e., have a higher hierarchical position) than legal rules of domestic origin. The introduction of the concept of self-executing provisions of treaties and resolutions of international organizations has merely imposed limitations on the powers of the courts to apply international law.[26] Non-self-executing provisions lack the force of law towards natural and legal persons and cannot prevent the application of national legal rules. They should nevertheless be implemented and administered by public authorities according to their competences, in so far as this is not precluded by the restrictions mentioned.[27] Nor is it lawful for public authorities to perform an action or to adopt a decision which is in conflict with customary international law, assuming that such an administrative act or decision is not prescribed as mandatory by legal rules of national origin.[28] In a judgment of 10 November 1989 the Supreme Court even examined whether the decision of the Government, approved by Parliament, to conclude a treaty with the United States allowing the latter country to deploy 48 cruise missiles with nuclear warheads on Dutch soil had been compatible with written as well as unwritten public international law.[29]

2.4 **Community law**

The Nyugat doctrine does not apply to Community law. The direct effect and supremacy of Community law is inspired by, but not dependant on, the Dutch Constitution. It was not by chance that the European Court of Justice gave its first ruling on the direct effect of Community Law in a Dutch case: *Van Gend*

---

25. *Hoge Raad*, 18 September 2001, LJN AB1471, *NJ* 2002, no. 559; *ILDC* 80 (NL 2001) (*Bouterse*); *Hoge Raad*, 8 July 2008, LJN BC7418 (for a translation in English see LJN BG1476), *RvdW* (*Rechtspraak van de Week*) 2008, no. 761; *ILDC* 1071 (NL 2008).

26. Fleuren, *supra* n. 20, pp. 338-340; J.G. Brouwer, 'National Treaty Law and Practice: The Netherlands', in D.B. Hollis, et al., eds, *National Treaty Law and Practice* (Leiden, Martinus Nijhoff 2005) p. 482 at pp. 498-499.

27. KB (*Koninklijk Besluit* (Royal Decree)) 19 February 1993, *AB* (*Administratiefrechtelijke Beslissingen*) 1993, no. 385; KB 11 September 2007, *Stb.* (*Staatsblad*) 2007, no. 347.

28. *Kamerstukken I* 1980/81, 15 049 (R 1100), no. 19, p. 1.

29. *Hoge Raad*, 10 November 1989, *NJ* 1991, no. 248; 22 *NYIL* (1991) p. 453 (*Kruisraketten*).

& Loos.[30] As the then Court's President (Donner) pointed out many years later, it was typical for a Dutch court to refer to the European Court of Justice for a preliminary ruling the question whether the article of the EEC Treaty that was at issue had 'direct application within the territory of a Member State'. From the perspective of the Constitution of the Kingdom of the Netherlands it was only natural to refer this question to the Court.[31] Shortly afterwards it became established case law of the Court of Justice that Community law is not only binding on the Member States and their citizens, but also has supremacy over the law of the Member States,[32] including their constitutional law.[33] Dutch courts have accepted this case law from the very beginning. At first, it was assumed that this case law could easily be complied with because of the constitutional articles on self-executing provisions of treaties and resolutions of international organizations. But since a couple of decades the courts tend to endorse a doctrine that renders these articles virtually irrelevant when it comes to Community law. This doctrine points out that according to the case law of the European Court of Justice Community law has direct effect and supremacy *per se* and not in virtue of the constitutions of the EU Member States. From this it is inferred that the articles in the Constitution on self-executing provisions have no impact on the duty of the courts to apply Community law with supremacy over national law. So when it comes to Community law, the courts do not have to be bothered by the restrictions these or other articles in the Constitution impose on their powers to apply public international law.[34] The Nyugat doctrine, for instance, does not affect their duty to test national law against unwritten rules and principles of Community law. In short, the practical importance of the constitutional articles on the effect of self-executing provisions is nowadays limited to treaties and resolutions which are not part of Community law.

3. SELF-EXECUTING PROVISIONS OF TREATY LAW

3.1 **Rationale**

For what reason was the concept of self-executing provisions of international law laid down in the Constitution, only three years after the 1953 amendment? Thus far, there were hardly any court rulings based on this amendment. Not

---

30. Case 26/62 *Van Gend & Loos* v. *Nederlandse Administratie der belastingen* [1963] *ECR* 1.

31. A.M. Donner, 'Inleiding' (= introduction to a special issue on the intertwinement of Community law and Dutch law), 141 *RM Themis* (*Rechtsgeleerd Magazijn Themis*) (1980) p. 354 at p. 359.

32. Case 6/64, *Costa* v. *ENEL* [1964] *ECR* 585.

33. Case 11/70, *Internationale Handelsgesellschaft* v. *Einfur- und Vorratstelle für Getreide und Futtermittel* [1970] *ECR* 1125.

34. *Hoge Raad*, 2 November 2004, LJN AR1797, *NJ* 2005, no. 80.

surprisingly there is nothing to suggest that the embodiment of the concept in the Constitution was prompted by unsatisfactory case law. Insofar as the 1953 revision provided that treaties and decisions of international organizations were binding on all persons after they had been published, the motive for explicitly limiting this effect to self-executing provisions of treaties and decisions seems to have been sheer perfectionism. Of course, to the extent that the objective of a provision of treaty law can only be attained by enacting national laws and not through direct application by domestic courts, the provision itself will not affect the rights and duties of persons. But until the 1956 amendment this went without saying.[35] The restriction of the 'supremacy clause' to self-executing provisions of treaty law was prompted by a generally accepted rationale of the concept, namely the separation of powers within a state.[36] This restriction was introduced in order to prevent the courts from having to disapply a national law even in those cases where the treaty or resolution in question did not itself contain any rules which the courts could apply instead of this law. In such cases a legal vacuum may arise which the courts can only fill by creating law themselves and thus making choices that should be left to the legislature.[37]

3.2 **Criteria**

Whether a provision of treaty law is binding on all persons within the meaning of the Constitution is determined by the courts. An opinion of the Government on the matter may be taken into account, but is not decisive.[38] Although in numerous cases the courts have ruled on the question whether or not a treaty provision at hand was self-executing, only a few judgments contain clear-cut criteria.[39] A landmark judgment in this respect was delivered by the Supreme Court on 30 May 1986 regarding the right to strike as contained in Article 6(4) of the European Social Charter (ESC). In the past attempts to regulate the right to collective action in an Act of Parliament had failed. Now the Supreme Court used this treaty provision to undo the omission. It ruled that Article 6(4) of the ESC was self-executing and that trade unions may rely upon this provision in order to claim the lawfulness of strikes and other means of collective action. At the time the Government had submitted the ESC to Parliament for approval, it had pointed out that the ESC could not be invoked by individuals before domestic courts, because the contracting parties had not intended the provisions of the ESC

35. Fleuren, *supra* n. 20, pp. 201-202.

36. On this rationale see C.M. Vázquez, 'The Four Doctrines of Self-Executing Treaties', 89 *AJIL* (1995) pp. 695-723.

37. *Kamerstukken II* 1955/56, 4133 (R 19), no. 4, pp. 13-14. See also H.F. van Panhuys, 'De regeling der buitenlandse betrekkingen in de Nederlandse grondwet' ('Regulating foreign relations in the Netherlands Constitution'), *Mededelingen NVIR* No. 34 (1955) p. 28 at p. 50.

38. *Kamerstukken II* 1955/56, 4133 (R 19), no. 7, p. 4; *Handelingen II* 1955/56, p. 800; *Handelingen II* 1979/80, pp. 4433 and 4441.

39. Case law on this question is extensively discussed in Fleuren, *supra* n. 20, pp. 240-310.

to have direct effect.[40] Although the Supreme Court itself had in some previous judgments attached considerable weight to the (supposed) intention of the contracting parties in determining whether a treaty provision was self-executing,[41] it now stripped the criterion of the significance it once had:

> 'Whether or not the contracting parties intended Article 6(4) of the ESC to have direct effect is not relevant since it cannot be inferred either from the text or from the history of the Charter that they have agreed that it is not allowed to give direct effect to Article 6(4). In view of this state of affairs, only the content of the provision is decisive under Dutch law: does it oblige the Dutch legislature to enact national rules of a given content or scope or is it of such a kind that the provision can simply function as law in the national legal order?'[42]

This quotation as well as other parts of the judgment suggest that the question whether the contracting parties intended the provision to have direct effect is only relevant in the – quite hypothetical – case that the States Parties have agreed that it shall be *prohibited* from giving direct effect to the provision at hand. Yet in a subsequent judgment the Supreme Court clarified that the intention of the contracting parties may also be decisive in cases where they wanted the provisions to be self-executing.[43] Apart from the cases where giving direct effect to a provision of treaty law is intended or forbidden by the contracting parties, Dutch courts should rely on the content of the provision. The first question to be asked is whether the treaty imposes on the state an obligation to enact national legal rules in order to implement the provision at issue. If so, Dutch courts will usually not deem the provision to be self-executing. In case the state is not obliged to implement the provision by adopting national legal rules, the courts should consider whether the provision itself can function as law, i.e., whether the provision can be implemented by allowing the courts to apply it. This yardstick is rather flexible, so not surprisingly its employment in Dutch case law has not always been consistent.[44]

Nevertheless, the criteria as developed in the Supreme Court's judgment on the right to strike have great potential, as is illustrated by a ruling of the Administrative Law Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) dated 15 September 2004. In the preceding year the Road Widening Emergency Act (*Spoedwet wegverbreding*) was adopted in order to reduce the daily tailbacks on a number of main roads in the Netherlands. When under this act the Minister for Transport had enacted a decree that arranged for

---

40. *Kamerstukken II* 1965/66, 8606 (R 533), no. 3, p. 2; *Kamerstukken II* 1966/67, 8606 (R 533), no. 6, p. 1; *Handelingen II* 1977/78, p. 1898.

41. *Hoge Raad*, 1 June 1956, *NJ* 1958, no. 424 (*Cognac Vieux II*); *Hoge Raad*, 18 May 1962, *NJ* 1965, no. 115 (*Bosch*); *Hoge Raad*, 8 November 1968, *NJ* 1969, no. 10 (*Portalon*).

42. *Hoge Raad*, 30 May 1986, *NJ* 1986, no. 688; 18 *NYIL* (1987) pp. 389-397 (*Spoorwegstaking*).

43. *Hoge Raad*, 18 April 1995, *NJ* 1995, no. 619.

44. *Supra* n. 39.

the adjustment of certain road sections to the effect that hard shoulders could be used as traffic lanes during rush hour, several interest groups and private persons lodged an appeal. The Court examined the decree for compatibility with, *inter alia*, the European Agreement on Main International Traffic Arteries 1975 and its annexes, especially the provisions concerning road construction and the minimum width of hard shoulders and traffic lanes. Although the Court considered some of those provisions to be mere recommendations, it held that the Agreement nevertheless required a mandatory balancing of interests (viz. road safety, environmental protection, the free flow of traffic, the interest of road users) and that its provisions were to this extent applicable by the courts and binding on all persons within the meaning of the Constitution. The Court rejected the defence that the Agreement would only entail obligations for contracting parties: 'That the Agreement may impose obligations on states only, as the defendant argues, does not necessarily imply that they cannot be regarded as binding on everyone.' The challenged decree was nullified because the Minister of Transport, who had attached overriding importance to the free flow of traffic, failed to argue convincingly that the decree was based on a well-balanced weighing of interests.[45]

3.3 **Interpretation and application**

3.3.1 *Preliminaries*

When a court is considering the application of a self-executing provision, it has to establish the extent of the obligations that this provision imposes on the Kingdom of the Netherlands. In this respect several preliminary questions may arise. Has the treaty or resolution at issue entered into force for the Kingdom?[46] Is it binding on its whole territory or does it not concern the part of the Kingdom in which the court has jurisdiction? In case the provision under consideration pertains to a treaty, the courts have to ascertain whether reservations to the treaty have been made which might have modified this provision for the Kingdom.[47] The courts are even empowered to apply provisions of treaties which have not yet entered into force, viz. in case the Kingdom has agreed to their provisional application. So, to the extent that provisionally applied treaty provisions are of a self-executing nature, they are binding on all persons and have supremacy over Dutch law.[48]

---

45. *Afdeling bestuursrechtspraak van de Raad van State* 15 September 2004, *AB* 2005, no. 12; *ILDC* 129 (NL 2004) (*Spoedwet wegverbreding*).

46. See, e.g., *Hoge Raad*, 17 March 1967, *NJ* 1967, no. 237; *Afdeling bestuursrechtspraak van de Raad van State*, 5 July 1979, *AB* 1980, no. 414; *Hoge Raad*, 7 November 1984, *NJ* 1985, no. 247; *NYIL* 1986 p. 253; *Hoge Raad*, 7 May 1996, *NJ* 1996, no. 584; *Hoge Raad*, 29 May 1996, *NJ* 1996, no. 556.

47. See, e.g., *Hoge Raad*, 6 December 1983, *NJ* 1984, no. 557; *Afdeling bestuursrechtspraak van de Raad van State*, 2 October 1989, *AB* 1990, no. 387; *Hoge Raad*, 21 May 1991, *AB* 1992, no. 15; *Hoge Raad*, 24 November 2000, LJN AA8448, *NJ* 2001, no. 376, paras. 4.2 and 5.4.

48. In Art. 15 Kingdom Act on the Approval and Publication of Treaties (*Rijkswet goedkeuring en bekendmaking verdragen*) some limitations have been set on the powers of the Govern-

If a court is confronted with two different treaties which would lead to conflicting results if they were both applied simultaneously, the court has to establish which treaty will prevail according to the law of treaties, especially Article 30 of the Vienna Convention on the Law of Treaties 1969.[49] If the law of treaties does not provide a solution to the conflict of treaty obligations, the court will have to give preference to one of the conflicting treaty obligations on the basis of weighing the various interests involved. For example, the treaty obligation to extradite or surrender an accused may yield to a human rights treaty if the most basic rights which the accused enjoys under this treaty are in danger of being violated by the requesting state.[50]

In dealing with the preliminaries the courts will have to take the final provisions of a treaty as well as the provisions of the Vienna Convention on the Law of Treaties fully into account. However, scholars and courts should not be tempted to consider provisions on, *inter alia*, the conclusion, provisional application, entry into force, validity, and determination of treaties as self-executing. Those provisions deal with questions that have to be answered *before* the question of whether the substantive parts of a treaty or resolution are self-executing becomes relevant.[51]

3.3.2 *Interpretation*

In so far as rules of public international law are binding upon the Kingdom of the Netherlands, they are part of the law that is in force within the Kingdom. Transformation into national law is not taking place. Of course legislation may be enacted to implement these rules, but such legislation does not deprive them from their public international law character within the state. Consequently courts have to ascertain the meaning which these rules have according to public international law when they consider applying them or taking them into account. Human rights treaties are not exceptions to this rule. Although human rights treaties contain

---

ment to bind the Kingdom to the provisional application of treaties, but it has to be assumed that an omission by the Government to observe these limitations would not impair the authority of the courts to apply the treaties concerned. See *Kamerstukken I* 1983/84, 17 798 (R 1227), no. 44a, p. 5; *Kamerstukken II* 1988/89, 21 214 (R 1375), no. 3, p. 32. Cf. E.W. Vierdag, 'Spanningen tussen recht en praktijk in het verdragenrecht' ('Tensions between the law and practice in the law of treaties'), *Mededelingen NVIR* No. 99 (1989) p. 1 at pp. 29 et seq.; J.W.A. Fleuren, 'Voorlopige toepassing van verdragen in constitutioneel perspectief' ('Provisional applications of treaties in a constitutional perspective'), 156 *RM Themis* (1995) pp. 247-262.

49. See, e.g., *Hoge Raad*, 5 January 1990, *NJ* 1991, no. 591; *NYIL* 1991 p. 422; *Hoge Raad*, 15 October 1996, *NJ* 1997, no. 533; *Arrondissementsrechtbank's-Gravenhage* (District Court of The Hague), 3 February 2010, LJN BL1862.

50. *Hoge Raad*, 30 March 1990, *NJ* 1991, no. 249 (*Short*); *Hoge Raad*, 15 September 2006, LJN AV7387, *NJ* 2007, no. 277 (*Kesbir*). See also J.B. Mus, *Verdragsconflicten voor de Nederlandse rechter* (Conflicts of Treaties in Dutch Courts) (Zwolle, W.E.J. Tjeenk Willink 1996) and J.B. Mus, 'Conflicts between Treaties in International Law', 45 *NILR* (1998) pp. 208-232.

51. Cf ., Mus 1996, *supra* n. 50, p. 87.

minimum standards which do not preclude states from granting a higher level of protection to their citizens, it is not for the courts to achieve a higher level of protection by construing the provisions of such treaties in a manner which in no way can be justified by reference to the meaning these provisions have or reasonably may have according to public international law. This is especially true when the provisions are self-executing and may thus set aside Acts of Parliament and even the Constitution itself. So the Supreme Court was right when it ruled in its judgment of 10 August 2001 that Dutch courts are not allowed to make the application of a national legal provision incompatible with Article 8 of the European Convention on Human Rights 1950 by reading in the right to family life as contained in this article a higher level of protection than may be assumed on the basis of the case law of the European Court of Human Rights.[52] This is not to say that Dutch courts are or should be conservative in their interpretation of rules of public international law. But they will usually try to establish a plausible interpretation. In case an earlier construction is no longer sustainable in the light of later developments in international law – for instance, the recent case law of an international tribunal – it will be reviewed.[53]

3.3.3 *Impact*

Courts should use extra care when they are construing self-executing provisions of treaty law which might restrict personal rights and liberties. Depending on their contents, self-executing provisions of treaty law may be invoked by legal and natural persons against national and local authorities and vice versa, or they may be invoked between legal or natural persons. Well-known examples of the different categories are to be found in human rights treaties, treaties and resolutions regarding extradition and surrender of accused persons, and treaties on private international law. Less known is the impact that self-executing provisions of human rights treaties may have on the legal relationships between citizens. In case a human rights treaty imposes on the States Parties an obligation to recognize or ensure rights which individuals should be able to exercise towards other persons, then considering the provisions involved to be self-executing will normally have the effect that these rights become enforceable. Several examples of this are to be found in Dutch case law. To the extent that according to the rulings of the European Court of Human Rights Article 8 of the European Convention on Human Rights contains the right of access to one's children, one parent may invoke this right against the other parent, since Article 8 is held to be self-executing.[54] Article 6(4) ESC is also considered to be self-executing (see *supra* 3.2), so employers will have to respect the right to collective action, including the right to strike, as it may be exercised by workers and trade unions under this

52. *Hoge Raad*, 10 August 2001, LJN ZC3598, *NJ* 2002, no. 278.
53. *Hoge Raad*, 10 November 1989, *NJ* 1990, no. 628.
54. See, e.g., *Hoge Raad*, 22 February 1985, *NJ* 1986, no. 3.

provision. In a recent case the Supreme Court held Article 7(c) of the UN Convention on the Elimination of All Forms of Discrimination against Women 1979 to be self-executing. According to this provision the States Parties shall ensure to women, on equal terms with men, the right to participate in non-governmental organizations and associations concerned with the public and political life of the country. Although the Supreme Court basically had to give a ruling on the question whether the Dutch state should take effective measures against a (orthodox) political party which excluded women from being nominated to stand in general elections, the court made it clear that also the party itself was violating the right that the provision at issue guaranteed to women.[55]

3.3.4 *Judicial restraint*

The main reason why the concept of a self-executing provision was introduced in the 1956 amendment of the Constitution was to prevent that the application of treaty law would now and then lead to lacunae which could only be filled by judge-made law (see *supra* 3.1). In this respect the concept has not fully met its purpose. The courts have been faced with a number of cases where they had to refrain from applying a treaty provision that was considered to be self-executing, precisely because otherwise they would have to make choices that should be left to the legislature. This is due to the increasing impact that human rights treaties are having on Dutch law. Dutch courts are not allowed to review the constitutionality of Acts of Parliament. So they can neither examine an Act of Parliament for compatibility with fundamental rights that are enshrined in the Constitution.[56] As a consequence, the judicial power to test the application of Acts of Parliament against self-executing provisions of human rights treaties has become very important. In quite a few cases the courts have held the law contained in an Act of Parliament to be in conflict with such treaties, notably the European Convention on Human Rights 1950 and the International Covenant on Civil and Political Rights 1966, and have provided remedies. However, on several occasions where Dutch law was not in accordance with self-executing provisions of the European Convention on Human Rights or the International Covenant on Civil and Political Rights, courts have refused to apply the self-executing provision concerned, arguing that to remove the inconsistencies would involve choices that should be left to the legislature. Whether or not the courts are prepared to rectify any discrepancies between the law embodied in an Act of Parliament, on the one hand, and a self-executing treaty provision on the other, depends on whether there is a possible solution that fits in with the history and system of the law in question and whether the consequences of this solution are foreseeable. When several solutions are possible and not one of them meets this test, the courts tend to abstain

55. *Hoge Raad*, 9 April 2010, LJN BK4549, *RvdW* 2010, no. 506 (*SGP*).

56. Art. 120 Const. A proposal to empower the courts to review Acts of Parliament for conflict with fundamental constitutional rights is currently under consideration. See *Stb.* 2009, no. 120.

from making a choice between them. This case law was initiated by the Supreme Court in 1984.[57] Several years later the Supreme Court made an important qualification. According to a judgment of 12 May 1999 this abstinence is a matter of judicial restraint. Although the courts are constitutionally *empowered* to resolve any inconsistencies between national law and self-executing provisions of treaty law, they (initially) consider it prudent not to exercise this power. But should the legislature keep doing nothing about the problem, then it is quite possible that the courts in future cases will provide a solution themselves.[58]

4. CONSISTENT INTERPRETATION AND APPLICATION OF NATIONAL LAW

In the preceding sections we have discussed the application of public international law itself. But in many cases Dutch courts simply ensure that rules of public international law are being observed by construing and applying national law in such a manner that a conflict with those rules is avoided. This technique is used by domestic courts throughout the world, even (or may be one should say especially) in states where treaty law is not automatically incorporated in the national legal order (such as, for instance, in the United Kingdom). In legal doctrine it is often based on the presumption that the state or the legislature has not intended to violate international law. To the extent that rules of public international law are part of the law which is in force within the state, the technique may also be considered as an application of the method of systematic interpretation.

When this technique is used, the decision of the court is, strictly speaking, based on rules of national law; the international law obligation at issue is only an underlying reason for a specific interpretation and application of these rules. In such cases international law has 'indirect effect' or is 'applied indirectly', viz. via domestic law.[59] Of course the courts may sometimes deliberately construe and apply rules of national law in a manner that avoids a violation of obligations that international law has imposed on their states, without making references to these obligations. The Dutch courts, however, show no restraint in citing rules of inter-

---

57. *Hoge Raad*, 12 Oktober 1984, *NJ* 1985, no. 230. Cf. P. van Dijk, 'Domestic Status of Human Rights Treaties and the Atttude of the Judiciary: The Dutch Case', in M. Nowak, et al., eds., *Fortschritt im Bewußtsein der Grund- und Menschenrechte = Progress in the Spirit of Human Rights* (Kehl am Rhein, Engel 1988) pp. 631-650.

58. *Hoge Raad*, 12 May 1999, *BNB* (*Beslissingen in belastingzaken. Nederlandse belastingrechtspraak*) 1999, no. 271 (*Arbeidskostenforfait*). Cf. S.K. Martens, 'De grenzen van de rechtsvormende taak van de rechter' ('The limits of the law making task of the courts'), 75 *Nederlands Juristenblad* (2000) pp. 747-758.

59. Cf. A. Nollkaemper and G. Betlem, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Constistent Interpretation', 14 *EJIL* (2003) pp. 569-589; P.A. Nollkaemper, 'Internationalisering van nationale rechtspraak' ('The internationalization of national case law'), *Mededelingen NVIR* No. 131 (2005) p. 1 at pp. 43-46.

national law, whenever those rules may be considered relevant for the outcome of the case. Consequently case law in which the method of consistent interpretation and application is used may be easily identified. This case law extends to customary international law as well as treaty law. Courts are especially keen to avoid that Dutch laws are applied in matters where the Kingdom of the Netherlands has no jurisdiction according to customary international law or treaty law. Thus the scope of national legislation will always be construed so that it does not exceed the limits that public international law has set on the jurisdiction of the state. Some acts contain provisions which explicitly state that their scope is limited by public international law, but these provisions are mere reminders and are therefore basically superfluous.[60] For the most part, the case law on the technique of consistent interpretation and application relates to matters where the jurisdiction of the state is beyond discussion, but where the point at issue is whether this jurisdiction has been exercised (by the legislature, by an administrative authority or by a lower court) in an manner that was in conformity with international law, often treaty law. Some famous examples predate the 1953 amendment of the Constitution. At the time legal doctrine was divided on the question whether a conflict between a treaty and an Act of Parliament was subjected to the 'later in time rule' or had always to be settled in favour of the treaty. By construing subsequent Acts of Parliament to be in conformity with prior treaties, the Supreme Court managed for decades to avoid having to rule on this issue. It its judgment of 3 March 1919 the Supreme Court formulated the traditional rationale behind the method of consistent interpretation as follows:

> 'It certainly can not be assumed that the Dutch legislature should in any act have deviated unilaterally and high-handedly from that which has been agreed upon in a ratified treaty with a foreign Power, unless the text of the act compels this assumption.'[61]

In 1934 the Supreme Court stretched the method to its utmost limits in a couple of judgments on the principle of free navigation as entailed in the Revised Mannheim Convention on Rhine Navigation 1868. A year earlier, in 1933, an Act of Parliament was enacted to provide for an equitable distribution of freight in inland shipping. To avoid a conflict between the Act and the prior treaty, the court held, as a matter of interpretation, that the Act was only applicable to the rivers that were not covered by the Revised Mannheim Convention. As a result the Act was largely bereft of its effect.[62]

---

60. *Kamerstukken II* 1977/78, 15 049 (R 1100), no. 4, p. 24; *Hoge Raad*, 8 July 2008, LJN BC7418, *RvdW* 2008, no. 761, para. 6.6. Cf. H. Meijers, 'Rond het internationale gewoonterecht in Nederland' ('Concerning customary international law in the Netherlands'), *Mededelingen NVIR* No. 91 (1985) p. 55 at pp. 105-108.

61. *Hoge Raad*, 3 March 1919, *NJ* 1919, p. 371 (*grenstractaat Aken*).

62. *Hoge Raad*, 17 December 1934, *NJ* 1935, p. 5; *Hoge Raad*, 17 December 1934, *NJ* 1935, p. 11. Cf. Verzijl 1968, *supra* n. 1, p. 122.

In the 1953 amendment of the Constitution the precedence of treaties (and resolutions of international organizations) over subsequent Acts of Parliament and even over the Constitution itself was laid down. After the 'supremacy clause' had been restricted to self-executing provisions of treaty law, the technique of the consistent interpretation and application of domestic law became increasingly important once again. The technique is not only used with regard to those provisions, but also as an instrument to make national law and its application comply with treaty law that is not deemed to be self-executing.[63] In a judgment in which the Supreme Court had recourse to this technique, it held – without making a distinction between self-executing and non-self-executing provisions – that Dutch courts 'should, as far as possible, construe and apply Dutch law in such a manner that the State complies with its treaty obligations'.[64] 'Dutch law' includes, of course, legislation, principles of law, customary law and discretionary powers of administrative authorities. This results in the conclusion that an affirmative answer to the question whether a provision of treaty law is self-executing is only imperative to the extent that a violation of treaty obligations cannot be avoided by a consistent interpretation and application of written and unwritten legal rules, principles of law and discretionary powers. In numerous cases Dutch courts have used this technique to give a ruling that complies with a non-executing provision or to avoid a ruling on the question whether the provision at hand was self-executing. But all too often courts dismiss a plea that is based on a provision of treaty law because they hold the provision to be non-self-executing, without examining whether there might be other means to take the provision into account.

5. ISSUES OF WAR AND PEACE

Under Dutch law any natural or legal person whose interests are affected by an act or omission of the authorities or a private party can request the court to review the lawfulness of this act or omission. Almost any matter that is capable of being reviewed by legal standards may be taken to court. Thus the courts are also competent to hear cases in which, for instance, peace activists try to obtain a ruling on the question whether a disputed government decision regarding defence strategy or the deployment of armed forces in military operations abroad constitutes a violation of public international law. The case law on issues of war and peace reached its climax in the above-mentioned judgment of 10 November 1989 (see *supra* 2.3). The Supreme Court did not hesitate to test a treaty that was concluded between the Netherlands and the United States as part of the NATO strategy to

63. For a recent example see, e.g., *Voorzieningenrechter Arrondissementsrechtbank Zutphen*, 29 April 2010, LJN BM2856. I have discussed other instances in J.W.A. Fleuren, 'Directe en indirecte toepassing van internationaal recht door de Nederlandse rechter' ('Direct and indirect application of international law by the Dutch courts'), *Mededelingen NVIR* No. 131 (2005) p. 69 at pp. 90-97.

64. *Hoge Raad*, 16 November 1990, *NJ* 1992, no. 107.

renew its nuclear weapons arsenal against other treaties and rules of customary international law. Although the Supreme Court held that the Netherlands had not acted unlawfully by entering into the treaty, it pointed out that nothing prevented the courts from giving a ruling on the issue.[65] The judgment has been strongly criticized by a former Advocate General at the Supreme Court. He argued that the Court should have declared itself incompetent to give an opinion on the lawfulness of the contested treaty; in other words, it should have resorted to a 'political question doctrine'. Just as there are cases which are too trivial to be handled by the courts, there are cases in which too much is at stake. In his opinion the maxim *de minimis non curat praetor* should have a counterpart: *de maximis non curat praetor*.[66]

This criticism did not fall on deaf ears. Shortly after al-Qaeda had launched its attacks on the World Trade Center in New York City and the Pentagon in Washington DC on 11 September 2001, the Supreme Court modified its case law. It is difficult to say whether there is actually a link with these attacks, but it cannot be ruled out that in the aftermath of 9/11 the Supreme Court anticipated that without an adjustment to its case law the courts would increasingly become involved in matters that touched upon international relations, intelligence, and diplomatic and military strategy. However this may be, from the end of 2001 onwards the Supreme Court has ruled in a number of cases that the courts should exercise great restraint in allowing claims which concern 'the policy of the State in matters of foreign affairs and defence', as this policy 'will strongly depend on political considerations connected to the context of the case'.[67] So the Supreme Court did not have recourse to a fully-fledged political question doctrine – it did not *disqualify* the courts from ruling on the lawfulness of government actions in matters of war and peace – but introduced a doctrine of judicial restraint instead. The courts are still empowered to examine such actions for compatibility with national and international law, but are urged to refrain from exercising this power in cases that are difficult to assess. As a lower court once observed after it had made a reference to the modified case law of the Supreme Court: 'Of course this does not alter the fact that in a State under the rule of law courts have to review independently whether other public bodies act lawfully.'[68]

---

65. *Hoge Raad*, 10 November 1989, *NJ* 1991, no. 248; 22 *NYIL* (1991) p. 453 (*kruisraketten*).

66. T. Koopmans, 'Het leerstuk van de political question' ('The political question doctrine'), in M.G. Rood, ed., *Rechters en politiek: Nationale en internationale beschouwingen* (Judges and politics: National and international considerations) (Zwolle, W.E.J. Tjeenk Willink 1993) p. 9 at p. 20. Cf. T. Koopmans, *Courts and Political Institutions: A Comparative view* (Cambridge, Cambridge University Press 2003) p. 104.

67. *Hoge Raad*, 21 December 2001, LJN ZC3693, *NJ* 2002, no. 217; 34 *NYIL* (2003) p. 383 (*kernwapens*); *Hoge Raad*, 29 November 2002, LJN AE5164, *NJ* 2003, no. 35; 35 *NYIL* (2004) p. 522 (*Kosovo*); *Hoge Raad*, 6 February 2004, LJN AN8071, *NJ* 2004, no. 329; *ILDC* 152 (NL 2004) (*Afghanistan*).

68. *Voorzieningenrechter Arrondissementsrechtbank 's-Gravenhage*, 4 mei 2005, LJN AT5152, *NJF* (*Nederlandse Jurisprudentie Feitenrechtspraak*) 2005, no. 262; *ILDC* 849 (NL 2005) (*President Bush*).

The doctrine of judicial restraint in matters of defence and foreign policy is not the only obstacle that may keep the courts from ruling that a contested government decision on an issue of war and peace is wrongful. Another impediment is the holding of the Supreme Court that individuals cannot invoke the prohibition of the use of force before national courts, regardless of whether they rely on Article 2(4) of the UN Charter or on the prohibition as part of customary international law.[69] The first time the Supreme Court passed judgment on this issue it referred for its substantiation to the advisory opinion of the Advocate General, who had submitted that, according to a generally accepted view, the prohibition of the use of force in international law was addressed to states only and may only be invoked by states.[70] He, in turn, quoted a remark made by Randelzhofer in the commentary on the UN Charter that was edited by Simma: 'Thus the prohibition of the use of force indisputably only protects and is only addressed to states.'[71] There is a serious flaw in this reasoning. The quotation from Randelzhofer concerns the scope that, according to public international law, should be attached to the prohibition of the use of force. It does not imply an answer to the question whether individuals may invoke this prohibition before domestic courts in order to get a ruling on an alleged violation of this prohibition by their state. The answer to this question depends on the national law of the state that is summoned and cannot solely be derived from public international law. From the perspective of Dutch constitutional law an affirmative answer would not have been indefensible. In view of the criteria for determining whether a treaty provision is self-executing which have been development in the landmark judgments I discussed in 3.2, it could easily be sustained that Article 2(4) of the UN Charter is binding on all persons within the meaning of the Constitution.[72]

6. EPILOGUE

Since the 1953 amendment of the Constitution the developments in the relationship between international and Dutch law have mainly been dominated by the question of how to balance the duty of the courts to apply public international law, on the one hand, and the separation of powers between the legislature, the Government and the judiciary on the other. For the last two decades, however, yet another cause for concern has come into focus. The Netherlands' Constitution bears witness to the great confidence in the international rule of law. But since the 1990 Convention implementing the Schengen Agreement of 1985, Dutch

---

69. *Hoge Raad*, 29 November 2002, *NJ* 2003, no. 35; 35 *NYIL* (2004) p. 522 (*Kosovo*); *Hoge Raad*, 6 February 2004, *NJ* 2004, no. 329; *ILDC* 152 (NL 2004) (*Afghanistan*).

70. Advisory opinion (*conclusie*) of Advocate-General Strikwerda, para. 30 (published in *NJ* 2003, no. 35).

71. A. Randelzhofer, in B. Simma, ed., *The Charter of the United Nations: A Commentary*, 2nd edn. (Oxford, Oxford University Press 2002) Art. 2(4), MN 28. (The Advocate General quoted from the 1st edn. (1996)).

72. See also Fleuren, *supra* n. 63, pp. 128-131.

lawyers have become increasingly aware of the fact that international cooperation in matters such as aliens policy or the fight against disorderly conduct, crime and terrorism may result in instruments of international law which interfere with civil rights, without providing for effective remedies for individuals whose rights are violated.[73] Especially the resolutions of the UN Security Council whereby sanctions committees have been established and provided with the authority to designate individuals and non-state entities against whom states must target sanctions, for instance because of their involvement in financing terrorism, have become notorious for their lack of legal protection.[74] None of these resolutions grant to individuals and entities who have been listed by UN sanctions committees the right to have the matter reviewed by an independent tribunal. The inadequate legal protection against decisions of UN sanctions committees to list individuals and non-state entities has raised the question whether the Dutch Constitution should not shield natural and legal persons from treaties and resolutions of international organizations which violate their basic rights, such as the right to a fair trial.[75] In 2009 the Government set up an advisory committee in preparation for a constitutional revision, to which, *inter alia*, this question was submitted. The committee is expected to deliver its report before 1 October 2010.[76] Meanwhile some scholars have already suggested exempting from the 'supremacy clause' those cases where the application of treaties and resolutions of international organizations would be inconsistent with fundamental legal principles.[77]

In my opinion such a modification is not imperative. Like all legislation, the constitutional articles on the effect and supremacy of self-executing provisions of treaties and resolutions of international organizations should be construed and applied with the classical legal maxim *quod raro fit, non observant legislatores* (the law does not take note of that which seldom occurs) at the back of one's mind.[78] In line with this maxim the courts tend to adopt a rather flexible approach to these articles. We have already come across some examples. The mandatory wording of these articles did not stop the Supreme Court from exercising restraint in cases where the application of self-executing provisions would compel the courts to make choices which should – at least initially – be left to the legislature (see *supra* 3.3.3). As the rulings in extradition and surrender cases

---

73. See, e.g., 16 *NJCM-Bulletin* (1991) pp. 803 et seq. ('Schengen Special').
74. See, for instance, UNSC res. 1267 (1999) and 1373 (2001).
75. *Kamerstukken II* 2007/08, 31 570, no. 3, pp. 21-25.
76. KB 3 July 2009, *Stcrt.* (*Staatscourant*) 2009, no. 10354.
77. M.L. van Emmerik, 'De Nederlandse Grondwet in een veellagige rechtsorde' ('The Dutch Constitution in a multi-layered legal system'), 169 *RM Themis* (2008) p. 159; L.F.M. Besselink and R.A. Wessel, *De invloed van ontwikkelingen in de internationale rechtsorde op de doorwerking naar Nederlands constitutioneel recht. Een 'neo-monistische' benadering* (The influence of developments in the international legal order on direct effect in Dutch constitutional law. A 'neo-monistic' approach) (Alphen aan den Rijn, Kluwer 2009) pp. 94, 107.
78. A. Wacke, 'Quod raro fit, non observant legislatores: A Classical Maxim of Legislation', in J.W. Cairns and O.F. Robinson, eds., *Critical Studies in Ancient Law, Comparative Law and Legal History* (Oxford, Hart Publishing 2001) pp. 393-398.

show, the Government cannot enforce treaties and resolutions of international organizations against individuals if this would result in a violation of their most basic human rights (see 3.3.1). Yet another example that should be mentioned here is a judgment of the Supreme Court in which it ruled that criminal liability could not be based on a treaty if the publication of the treaty did not contain an authentic text or translation in Dutch. Although this ruling was neither supported by the wording of the constitutional articles on self-executing treaties, nor by the wording of the Kingdom Act on the Approval and Publication of Treaties, the Supreme Court inferred the requirement that the publication of the treaty must include a Dutch text or translation from the constitutional article in which it is laid down that no offence shall be punishable unless it was an offence under the law at the time it was committed.[79] In the reasoning of the Supreme Court this law must be available in Dutch or in a Dutch translation.[80] In short, when dealing with public international law the courts have never been blind to constitutional principles and personal rights and liberties. That UNSC resolutions obliging states to take measures against individuals and non-state entities are not exempted from this, is illustrated by a recent judgment of the District Court of The Hague. While the Court recognized that under Article 103 of the UN Charter resolutions of the UN Security Council prevail over obligations arising from other treaties, it nevertheless tested the way UNSC resolution 1737 (2006) was implemented in a bye-law against the prohibition of discrimination, embodied in Article 26 of the International Covenant on Civil and Political Rights 1966. According to Article 17 of this resolution the Security Council calls upon 'all States to exercise vigilance and prevent specialized teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran's proliferation of sensitive nuclear activities and development of nuclear weapon delivery systems'. Although this provision explicitly refers to Iranian nationals, the Court held that the bye-law made a distinction based on nationality that constituted a violation of Article 26 of the International Covenant on Civil and Political Rights and therefore lacked binding force. To avoid a conflict with Article 17 of UNSC Resolution 1737 (2006), the Court simply assumed that this article left the member states with sufficient room to implement it in a manner that would not be inconsistent with Article 26 of the International Covenant on Civil and Political Rights.[81]

However, the imagination the courts have to show now and again in order to avoid that compliance with the international law obligations of the state will result in violations of personal rights and liberties reveals that in the international legal order the development of the rule of law has not always been keeping pace with the ever increasing impact that public international law is having on the lives of individuals. In the long run this might even subvert the authority of (some parts of) public international law. In this respect it may be taken as a warning

79. Art. 16 Const.
80. *Hoge Raad*, 24 June 1997, *NJ* 1998, no. 70.
81. *Arrondissementsrechtbank 's-Gravenhage*, 3 February 2010, LJN BL1862.

that the Government has been seeking advice on the question whether a clause should be inserted in the Constitution to shield individuals from self-executing provisions of treaties and resolutions of international organizations which are inconsistent with the rule of law. In the introduction to this article I stated that in the Kingdom of the Netherlands the relationship between public international law and domestic law is deeply rooted in the monistic tradition. At present the best way of supporting this tradition would be to promote as firmly as possible the development of the rule of law within the international legal order. On the threshold of the second century of its existence, this is one of the challenges the Netherlands Society of International Law will be faced with.