ANNEX I

Information provided by The Kingdom of the Netherlands

Overview of the role of customary international law in the legal order of the Netherlands as used by the courts

Note: Attached to this document is an overview with references to Dutch case law illustrating the way in which Dutch courts have dealt with the question of whether a particular norm constitutes customary international law, from the period 2005 to present (ANNEX II).

Introduction

For a better understanding of the case law referred to in the overview, the following is a brief description of the role of customary international law in the legal order of the Netherlands as used by the courts.

- Customary international law is in principle part of the domestic legal order. Government has stated in parliament that ‘[U]nwritten international law must be understood as binding for the Dutch legal order’.
- Customary international law forms part of the domestic legal order of the Netherlands without the need for prior transformation. In this sense the Netherlands has a monist system.

Priority of domestic law over customary international law

The role of international customary law in the domestic legal order is significantly limited by the fact that in case of conflict between a domestic norm and a rule of international customary law, the former takes precedence. This was concluded by the Supreme Court in 1959 in its landmark judgment in the “Nyugat” case (Supreme Court, 6 March 1959) and has been followed by the courts since.

The Nyugat case

The facts of this case were as follows: the Hungarian flagged and Swiss owned steamship Nyugat was captured as prize on 13 April 1941 in Surabaya in the Netherlands Indies, now Indonesia. The ship was sailing under the flag of an enemy State (Hungary) at the time of its capture, when the Second World War had not yet reached that part of Asia. After capture, the ship had been used by the Netherlands, until it was scuttled in March 1942 to prevent capture by Japan.

At issue was the complaint that changes in Dutch domestic prize law during the war had led to a situation in which Dutch law differed from the international law of prize which is essentially of a customary nature. These changes had been to the disadvantage of the plaintiffs who considered that the difference between Dutch and international customary law implied they suffered an unacceptable violation of their rights under international law. This in their view was contrary to the constitutional system in which the judge could
determine that the application of a particular domestic rule was contrary to international law, and could decide to apply the international legal rule instead.

Since the events had taken place and the case came before the Supreme Court, the rules in the Dutch Constitution on the applicability of international law had changed with the constitutional reform of 1956. The text of article 66 of the Constitution (current article 94) that was relied on specifically refers to the direct applicability of self-executing provisions of a treaty, but is silent on the applicability of customary international law. The article provides that “Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.”

With an a contrario reasoning, the Supreme Court decided that what is mentioned in the Constitution, excludes what is omitted in its text. Customary international law, described as unwritten international law, cannot be relied on in a manner similar to self-executing treaty provisions. Thus the understanding in Dutch constitutional law is that, in accordance with the legislative history of the Constitution and as confirmed by Nyugat, it is not possible for the Dutch judiciary to give precedence to international customary law in individual cases over a rule of Dutch domestic law.

The limited scope of article 66 (current article 94) of the Constitution was intentional, and was the result of a discussion in parliament. It appears to have been the view that, whilst a judge could decide on the non-applicability of domestic law in view of a self-executing provision of a treaty, it would be up to the legislator to decide on the compatibility of national law with unwritten international law. The fact that the application of a treaty provision by courts is quite different and more individualized and specific than the general evaluation of the conformity of new domestic legislation with international customary law by parliament was not addressed, nor was the related question whether in fact parliament could (or would) evaluate proposed legislation in the light of existing customary law.

The Nyugat (II) case is of importance as it is one of the few cases in which the Dutch judiciary has been asked to address the direct applicability of international customary law. The understanding of the case has been that, in general, the Dutch judges do not have the authority to apply international customary law with a view to setting aside a rule of Dutch domestic law.

Application of customary international law

The system described above has consequences for the way in which customary international law can play a role in domestic law. In certain cases domestic law expressly provides for a role for customary international law, but this is rare. In those cases in which domestic constitutional law contains a strict principle of legality (such as in criminal law) and formal legislation provides for a general power for government organs, such power can only be limited by customary international law when this is expressly provided for in domestic law. Such express limitation is provided for in a limited number of cases. One example is the International Crimes Act, which provides in Article 16 that, inter alia,
persons whose immunity from jurisdiction is provided for under customary international law cannot be prosecuted on the basis of that Act.

On the basis of domestic case law, there remains uncertainty whether the priority of domestic legislation over customary international law is limited to "formal" domestic legislation only (i.e. legislation that has been adopted by Government and Parliament), or whether it also extends to "material" legislation (i.e. legislation not adopted by Government and Parliament but by another public authority that has the power to legislate).

Customary international law may play a role in the interpretation of domestic law

Although the role that customary international law plays in the domestic legal order is limited by the above-mentioned precedence of conflicting domestic legislation, this does not mean that it plays no role at all. In particular, domestic courts from time to time have used customary international law to give further substance to a specific rule of domestic law. In certain cases this has been on the basis of provisions in domestic law that expressly refer to customary international law. This has been the case, inter alia, in the context of immunity from jurisdiction. In other cases, courts have used customary international law to give substance to a norm of domestic law that does not contain an express reference to customary international law but that leaves room for further interpretation.

As the overview illustrates, courts in the Netherlands have referred to customary international law in relation to international crimes and war crimes in particular, attribution of conduct to the State, immunity from jurisdiction of states and international organizations, and obligations of the State with respect to the environment (in the context of torts). Most cases in which the courts have done so concerned cases in which individuals were prosecuted for the commission of war crimes.

Reference to external sources for finding that a rule has a customary international law character

In situations in which customary law has been successfully invoked in domestic courts, these courts have never themselves made the analysis whether a rule of customary law existed. Rather they have relied on the analysis of outside bodies, such as the International Court of Justice, the International Law Commission, the national Advisory Committee on Issues of Public International Law (CAVV), the International Criminal Court or other tribunals. Courts, including the Supreme Court, have also referred to the Articles on the Responsibility of States for Internationally Wrongful Acts and the Articles on the Responsibility of International Organizations adopted by the International Law Commission. In addition, courts have referred to (the adoption of) treaties, in particular the UN Convention on Jurisdictional Immunities of States and their Property. It may be noted that this convention is not yet in force, and that the Netherlands is not a party to it.

Thus, when a Dutch court refers to a norm of customary law, this norm is likely to have been identified as such by a reliable (international) body. The conclusions regarding the
existence of a norm of custom by such a body tend to be easily accepted by the Dutch judiciary, which does not engage in a distinct identification process by itself.

Also, when referring to norms of customary international law, the courts have sometimes done so without citing sources for the proposition that the norm in question is of a customary international law nature. One example is the "Urgenda" case, in which the District Court implied that the "no harm" principle is a norm of customary international law.

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### Overview of references since 2005 by Dutch courts to external sources in support of finding that a norm constitutes customary international law

<table>
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<tr>
<th>Case</th>
<th>Reference by court to external source in support of finding that a rule constitutes customary international law</th>
<th>Paragraph Citation from the court’s judgment (in English where available).</th>
<th>Source (in Dutch unless indicated otherwise)</th>
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<th>Joseph M.</th>
<th>considerable number of provisions in Additional Protocol II to the Geneva Conventions have developed into norms of customary international law.</th>
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<td>Court of Appeal of the Hague, 16 July 2009, ECLI:NL:GHSGR:2009:BJ2796, Prosecutor v. X (Appeal of this judgment led to judgment of Supreme Court of 8 November 2011 referred to below)</td>
<td>In determining whether the doctrine of superior responsibility in international criminal law was of a customary law nature, the Court looked to, inter alia, the case law of domestic courts and the ICTY and ICTR.</td>
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<tr>
<td>Supreme Court (Hoge Raad), 5 February 2010, ECLI:NL:HR:2010:BK6673, Kingdom of Morocco v. X</td>
<td>The Supreme Court finds that, given the universal character of the United Nations Convention on Jurisdictional Immunities of States and Their Property, the Court of Appeal was correct in finding that the rule in Article 11 (2) (e) of that Convention constitutes customary international law.</td>
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38 "Voor de verdere beantwoording van de vraag of en, zo ja, vanaf welk tijdstip het leerstuk van de 'command responsibility' was geaccepteerd als algemeen beginsel van internationaal strafrecht en onderdeel vormde van het internationaal gewoonterecht heeft het hof meer in het bijzonder gekeken naar de beslissingen en uitspraken van plaatselijke rechtbanken en de diverse ad hoc tribunals."

39 "Uit de jurisprudentie van de ad hoc tribunals blijkt dat het beginsel van de 'command responsibility' thans een erkende vorm van individuele strafrechtelijke aansprakelijkheid is onder internationaal gewoonterecht en ziet op zowel interne als internationale gewapende conflicten."


Overview of references since 2005 by Dutch courts to external sources in support of finding that a norm constitutes customary international law

| Court of Appeal of The Hague, 7-7-2011, ECLI:NL:GHS GR:2011:BR0686, Prosecutor v. Joseph M. | Case law of ICTY and ICTR as support for finding that common Article 3 to the Geneva Conventions constitutes customary international law. Reference to ICTY case-law for finding that many rules in Additional Protocol II to the Geneva Conventions have customary law status. Reference to ICRC Customary law Study as evidence that the prohibition of outrages upon human dignity, in particular, humiliating and degrading treatment (as prohibited in common Article 3 to the Geneva Conventions) has a customary law character. | 16.1 16.2 17.1 | "Uit de (vaste) jurisprudentie van de internationale ad hoc tribunals volgt dat Gemeenschappelijk artikel 3, zoals omschreven in de Verdragen van Genève, de status heeft van internationaal gewoonterecht." | http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AGHS%3A2011%3ABR0686

| Supreme Court (Hoge Raad), 8 November 2011, ECLI:NL:HR:2011:BR6598, Prosecutor v. X | The Court stated that in ascertaining the parameters of the doctrine of superior responsibility, it looked at customary international law. In that context it took into consideration case law of the ICTR and ICTY. | 136 | "Bij de verdere juridische invulling van de gezagsverhouding meerdere - ondergeschikte heeft het hof aansluiting gezocht bij het internationaal oorlogsrecht, niet alleen bij het geschreven recht zoals dat in internationale overeenkomsten is neergelegd, maar ook bij het internationaal gewoonterecht, voor zover op oorlog betrekking hebbende. In verband hiermee kan worden verwezen naar de eerdergenoemde doctrine van de 'command responsibility' die, onder andere, is terug te vinden in | http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AHR:2011%3ABR6598&keyword=gewoonterecht
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| Supreme Court (Hoge Raad), 13 April 2012, ECLI:NL:HR:2012:BW1999, Association Mothers of Srebrenica et al v. the State of the Netherlands and the United Nations | Reference to ICJ judgment (Jurisdictional Immunities of the State (Germany vs. Italy)) in support of finding that there is no legal basis in international law for the position that a State does not enjoy immunity if it does not provide for an effective alternative method of dispute settlement. | 4.3.13 | “En ten slotte oordeelde het IGH in paragraaf 101 van genoemd vonnis dat in de statenpraktijk waaruit het internationaal gewoonterecht wordt afgeleid, geen grond te vinden is voor het oordeel dat naar internationaal recht aan een staat slechts immuniteit toekomt ingeval is voorzien in een effectieve alternatieve wijze van geschilbeslechting.” | http://uitspraken.rechtspraak.nl/ziendocument?id=ECLI:NL:HR:2012:BW1999&keyword=gewoonterecht


| Supreme Court (Hoge Raad) 6 September 2013, Mustafic c.s. v the State of the Netherlands | In establishing the rules developed in unwritten international law for deciding on what conditions conduct can be attributed to a State or to an international organization, the Supreme Court will refer to two sets of rules drawn up by the International Law Commission (ILC) of the United Nations, namely the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2011 (below: DARS) and the Draft Articles on the Responsibility of International Organizations of 2011 (below: DARIO)." | 3.7 | http://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Supreme-court-of-the-Netherlands/Documents/12%2003329%20(1).pdf (English translation by the court)
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<td>Supreme Court (Hoge Raad) 6 September 2013, Nuhanovic v. the State of the Netherlands</td>
<td>3.7</td>
<td>“In establishing the rules developed in unwritten international law for deciding on what conditions conduct can be attributed to a State or to an international organization, the Supreme Court will refer to two sets of rules drawn up by the International Law Commission (ILC) of the United Nations, namely the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2011 (below: DARS) and the Draft Articles on the Responsibility of International Organizations of 2011 (below: DARIO).” <a href="https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Superior-court-of-the-Netherlands/Documents/12%2003324.Ddf">Source</a></td>
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<td>Court of Appeal of The Hague, 30 April 2015, ECLI:NL:GHD HA:2015:108, 2, Prosecutor v. X</td>
<td>10.2.1, 10.4.2.3.2, 10.7, 11.3.2.2.1, 2, 11.3.2.3.1, 1.2.</td>
<td>“De Trial Chamber kwam in dit verband tot het oordeel dat 'acts or threats of violence the primary purpose of which is to spread terror' kunnen worden aangemerkt als oorlogsmeedel onder internationaal gewoonterecht. Dit werd bevestigd door de Appeals Chamber die, gelet op de opinio juris, eveneens tot het oordeel kwam dat een terroristische daad (in ieder geval sinds 1992) in het internationaal recht valt aan te merken als een oorlogsmeedel.” <a href="http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2015;1082&amp;keyword=gewoonterecht">Source</a></td>
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Overview of references since 2005 by Dutch courts to external sources in support of finding that a norm constitutes customary international law

| District Court of The Hague, 24 June 2015, ECLI:NL:RBDHA:2015:7145, Association Urgenda v. the State of the Netherlands | The Court implied that the "no harm principle" is a rule of international customary law (at least in the context of climate change). It did not however refer to an external source for this conclusion | 4.42 | "De Staat is in volkenrechtelijk opzicht gebonden aan het VN Klimaatverdrag, het Kyoto Protocol (met het bijbehorende Doha Amendement zodra dit geldig krijgt) en het "no harm"-beginsel." | http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL|RBDHA:2015:7145 |