Introduction

The central question in this study is:

How does the Dutch court apply the UN Convention on the Rights of the Child in its case law? The period that will be examined begins on 1 January 2002 and ends on 1 September 2011.

In the Dutch justice system a convention need not be incorporated into national legislation to be binding. The Netherlands has what is known as a monistic system, which means that a convention as such is applied in national legislation and regulations. In other words, once it has been ratified, a convention becomes part of the Dutch legal order (Nollkaemper, 2011: 488).

Whether a provision has a direct effect is irrelevant in this respect, although this is decisive for determining whether citizens are able to invoke a provision from the convention in court (Jans et al: 2011, 57).

In principle, therefore, if a convention is binding in the Netherlands, it is the law. In the Netherlands, however, the standard practice prior to ratifying a convention is to examine first whether national legislation conforms to it, and to ask whether any amendments are necessary (Nollkaemper, 2011: 494). This has been examined in detail with respect to the UN Convention on the Rights of the Child (CRC) and has led to the Sanctioning Act (Goedkeuringswet) for the CRC. The Sanctioning Act was submitted to the Dutch House of Representatives on 2 October 1992 and was adopted on 2 November 1994. The Convention became effective in the Netherlands on 8 March 1995 (Tractatenblad. 1995, 92).

During the deliberations in the House of Representatives and the Senate, the effect of the CRC was discussed at length. Remarkably, the explanatory memoranda to the Sanctioning Act do not mention the intrinsic relevance of the Convention. Overall, the process – including documents subsequently exchanged by the government – comes across as rather "defensive", including the statement:
As becomes clear in the sections on individual articles in the explanatory memorandum, we are of the opinion that Dutch law meets the requirements set by the International Convention on the Rights of the Child, including with regard to draft bills previously submitted ... (Kamerstukken II 1993/94, 22 855 (R1451), No. 6, p. 7.)

Could the ministers involved in the Sanctioning Act at the time have been overly cautious in adopting this position? It gave rise to critical questions from the House of Representatives at the time – referring to the strong influence of the European Convention on Human Rights (ECHR) on Dutch family law (Handelingen II [proceedings] 1993/94, 81, p. 5560.). The present study on how the CRC is applied in Dutch case law addresses this matter in greater detail.

Van Emmerik and Mijnarends have also emphasised the importance of the CRC as such. Van Emmerik argues that, regardless of the direct effect, “not only the court but also the government and the legislature are bound by the provisions from the CRC” (Emmerik, 2005). Mijnarends, who has examined how the CRC has affected juvenile criminal law, suggests that: “Ratification entails legal and moral commitment to accept the Committee’s monitoring powers, pursuant to Article 43ff CRC to which every state may be held” (Mijnarends, 2000: 81-91)

The explanatory memoranda to the Sanctioning Act do, however, include a fairly lengthy section on the direct effect of the CRC. Provisions have a direct effect, if, given their “nature, content and intent”, they are eligible as such; this is the standard formula, as is also used in the explanatory notes to the Sanctioning Act. Article 93 of the Dutch Constitution mentions provisions that by virtue of the content may be universally binding. Whether a universally binding provision has a direct effect is to be decided at the court’s discretion. The legislature may, of course, facilitate the judiciary in this, as expressed in the explanatory notes to the Sanctioning Act (Kamerstukken II, 22 855 (R1451), No. 3, p. 8.). In this context, the explanatory notes list the Articles from the Convention previously set forth in provisions from other human rights conventions – the ICCPR and the ECHR – based on which direct effect “is to be deemed possible or already determined”. These would be Article 7 (1), first clause, Article 9 (2), (3) and (4), Article 10 (1), second complete sentence, Article 12 (2), Article 13, Article 14, Article 15, Article 16, Article 30, Article 37 and Article 40 (2). Several articles cannot be ruled out as having a direct effect, and this definitely holds true, for example for Article 5, Article 8 (1) and Article 12 (1) (Kamerstukken II, 22 855 (R1451), No. 3, p. 9).

How has this subsequently been addressed in legal practice? Does this reflect a different practice and are other articles designated as being directly applicable, in addition to the ones listed above? One important question, for example, concerns the direct effect of Article 3, CRC, in which the best interests of the child is a primary consideration; this article is not identified as being directly applicable in the explanatory memorandum. Pulles concludes here that the same court does not provide a straightforward answer as to whether this article has a direct effect and therefore calls for a consistent line in case law (Pulles, 2011).

The period examined in this study began on 1 January 2002 and ended on 1 September 2011. In total, 1,028 rulings have been reviewed. The investigation into the