The implementation of international law in the national legal order

A legislative perspective

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Summary Contents

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List of abbreviations

CAT	Convention against Torture
CCTMW	Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal
CDWDW	Convention concerning Decent Work for Domestic Workers
CESCR	Committee on Economic, Social and Cultural Rights
CFR	Charter of Fundamental Rights of the EU
ChUN	Charter of the United Nations
CITES	Convention on International Trade in Endangered Species
CJEU	Court of Justice of the European Union
CPPCG	Convention for the Prevention and Punishment of the Crime of Genocide
CTOC	Convention against Transnational Organised Crime
EC	European Commission
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
FCTC	Framework Convention on Tobacco Control
ICAO	International Civil Aviation Organisation
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSFT	International Convention for the Suppression of the Financing of Terrorism
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHR	International Health Regulations
ILC	International Law Commission
ILO	International Labour Organisation
IMF	International Monetary Fund
LoN	League of Nations
MLC	Maritime Labour Convention
OECD	Organisation for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations

UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCCR	Vienna Convention on Consular Relations
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation
WMO	World Meteorological Organisation

1 Introduction

1.1 Background of the study

1.1.1 The state and the implementation of international law

It is a truism that the international legal system is, especially when compared to national legal systems, a largely horizontal and decentralised legal order. This nature of the international legal order, which is ultimately the result of the sovereignty and equality of its original and primary legal subjects, states, becomes visible both in the development of international law and in its realisation.[1] In the absence of a central legislative authority which has the power to impose binding rules upon the system's legal subjects, legal norms have been developed by the primary subjects themselves.[2] As soon as the norms have emerged, most notably through treaties or custom, states themselves are entrusted with the task of enforcing the imposed rules by what has been called 'self-help'.[3] Although the imposition of enforcement measures or sanctions for alleged violations of international law by states may have some supra-national aspects, these procedures depend, directly or in directly, on the consent of states. The prominent position of states is, however, not confined to *inter*-state matters; the state may also contribute to the realisation of international law in matters that are subject to regulation by international law and that possess a more *intra*-state character, such as an individual seeking access to justice for an alleged violation of applicable human rights standards by the state's security services.

In general, international law relies to a large extent on the machinery of the state for the realisation of its policy aims and values on the domestic level. This is the result of the importance of state organs for the realisation of international law: decisions rendered by national courts may refer to applicable international law, a state's executive may be involved in the education of its military personnel in accordance with obligations deriving from the law of armed conflict, or the national legislature may provide for the establishment of jurisdiction for the punishment of certain terrorist acts. Although the implementation of international law could be entrusted to

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1 Cassese distinguishes between three functions: law making, law determination and law enforcement. Law determination and law enforcement may be considered to fall under the header 'realisation'. A. Cassese, *International law* (2nd edn OUP, Oxford 2005) 5-6. See also M.N. Shaw, *International law* (6th edn CUP, Cambridge 2008) 6.

2 Lauterpacht, E. (ed), *International law, being the collected papers of Hersch Lauterpacht*, vol I, *The General Works* (CUP, Cambridge 1970) 13-16.

3 Ibid 13-14.

multiple organs of the state, the interest of scholars has been selective and primarily focused on the activities of national courts, in particular in the way they apply international law.[4]

Although courts indeed play an important role in the application and implementation of international law on the domestic level, this almost exclusive emphasis on the contribution of judges is too narrow. The present study departs from the observation that under current international law, national legislatures, similar to the state's judiciary or executive, are also endowed with the task of implementing international law in the domestic legal order. It seeks to establish whether the current international regulation of implementing legislation is adequate for this task to be completed successfully.

1.1.2 The national legislature under international law: position

The term 'national legislature' used in this study must be understood as an autonomous concept, independent from the meaning attributed to it in the various domestic legal systems. Across the globe state legislatures have been given various names, including 'Parliament' in the United Kingdom and France, 'Congress' in the United States, 'National People's Congress' in China, 'States-General' in the Netherlands, 'Diet' in Japan, 'National Assembly for the Federation' in Nigeria, 'Federal Assembly' in Russia, 'National Assembly of People's Power' in Cuba. The legislature is one of the three branches of government, or *trias politica*, an idea often associated with the French thinker Montesquieu. In his *De l'esprit des lois*, published in 1748, he observed that in each state there were three sorts of powers: the legislative power, the executive power and the power of judging. 'By the first', Montesquieu writes, 'the prince or magistrate makes laws for a time or for always and corrects or abrogates those that have been made'.[5]

While organs with legislative powers nowadays often reflect the will of the population, or at least pretend to reflect that will, the (alleged) legitimacy of the organ is by no means a defining element. What counts, is the attribution of legislative powers. The term 'national legislature' will therefore be used to refer to a common denominator which can be found in any political community which constitutes a state and may be defined as 'the part of government which exerts a legislative power, i.e. which is concerned with making and changing the law'.[6] Although this seems to be a simple, adequate and useful definition, an international legal perspective, adopted in this study, may require some modification with the use of legal concepts

4 This will be further discussed in section 1.4 on the relevance of the research.

5 C. de Montesquieu, *The spirit of the laws*, A. M. Cohler et al. (eds), (Cambridge texts in the history of political thought, CUP, Cambridge 1989) 156-157.

6 R. Scruton (ed), *The Palgrave MacMillan dictionary of political thought* (3rd edn Palgrave Macmillan Publishers, Basingstoke 2007) 388.

that are more common in international legal practice. For the purpose of this book, we therefore propose the following definition of 'national legislature':

A state organ which under national law has been entrusted with the power to adopt legislation.

Four elements of this definition deserve some clarification. First, the adjective 'national' in the title of this section is a reference to the state, the primary legal subject of the international legal order. The phrase 'national legislature' therefore must be understood as the legislature of the state; legislatures that are not part of a state, most notably legislative bodies of international organisations[7], fall outside the scope of the present study, with the exception of the legislative quality standards developed in the framework of the European Union. Similarly, an extensive elaboration of the significance of the term 'state' will not be part of this book. It suffices to say that a state should possess all of the following qualifications: a permanent population, a defined territory, government and the capacity to enter into relations with other states.[8] Once an entity meets these criteria, it is believed to acquire international legal personality and, as a consequence, the capacity to have rights and duties under international law. Contrary to the state, the national legislature does not possess international legal personality; as will be discussed below, the national legislature is merely an organ of an international legal person: the state.

Second, law-making authority usually is attributed to several organs of the state. As a result, the legislature will in practice often be composed of two or more state organs which draft and adopt laws in a joint effort. For example, article 42, first paragraph, of the Constitution of South Africa provides that Parliament consists of the National Assembly and the National Council of Provinces. After a bill is adopted by Parliament, the assent (and signature) of the president is required before the bill becomes law. All three institutions participate in the legislative process.[9] Similarly, the adoption of federal laws in Germany often require the involvement of the federal government, the Bundestag and the Bundesrat.[10] Furthermore, the composition of the various national entities involved in the legislative process may be dependent upon a particular policy field. Under the South

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7 A case in point is the European Parliament, the (co-)legislative body of the European Union. Pursuant to article 14, first paragraph, of the Treaty on European Union, 'the European Parliament shall, jointly with the Council, exercise legislative and budgetary functions […]'. Treaty on European Union (consolidated version) OJ 2012, C 326, 1.

8 Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1936) 3802 LNTS 165 (Montevideo Convention) art 1.

9 Constitution of the Republic of South Africa 1996 art 42, second paragraph, and 79 <https://www.gov.za/documents/constitution-republic-south-africa-1996> (accessed 29 March 2018).

10 Basic Law for the Federal Republic of Germany 1949 art 76-78 <https://www.bundesregierung.de/Content/EN/StatischeSeiten/breg/basic-law-content-list.html> (accessed 29 March 2018).

African Constitution, legislative authority of the 'national sphere of government' is attributed to Parliament, whereas the provincial legislatures and municipal councils possess legislative powers in the 'provincial and local spheres of government' respectively.[11] The Basic Law of Germany, on the other hand, expressly stipulates what policy fields fall within the legislative competence of the Federation or of the states and hence whether the federal Bundestag or the legislatures of the states will have legislative authority.[12] In short, even when taking into account the differences between states and the various political systems they embody, the term 'legislature' is not static; much depends on the division of competence between the national government and the regional or local governments, or between multiple organs on the national level. Given this state of affairs, Karpen rightly asserts, it is legitimate to speak of a 'network of decision-making processes in legislation'.[13]

Third, not all stakeholders *de facto* involved in the legislative process are part of the national legislature. In this study, as already stated above, the scope of the term 'national legislature' will be limited to encompass only those actors that have been endowed with legislative powers under domestic law. Interest groups, whether they represent business interests or 'public' interests, thus cannot be considered part of the national legislature.

Fourth, how should the term 'legislation' be understood? Laws that have been adopted by the national legislature are commonly referred to as legislation. Legislation contains general and abstract norms which can (and should) be applied or observed repeatedly in a infinite number of cases. In this respect they can be clearly distinguished from judicial law-making, which in principle is limited to the circumstances of a particular case. Legislation must be understood as to encompass primary legislation adopted by parliaments and secondary laws, regulations and decrees.[14]

From an international legal perspective, the national legislature is a *de iure* organ of the state of which it is part.[15] This legal bond could be derived from the international law of state responsibility, as codified in the International Law Commission's (ILC) Draft Articles on the Responsibility of States for Internationally Wrongful Acts, article 4 of which provides:

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11 Constitution of the Republic of South Africa (n 9) art 43, sub a and b.

12 Basic Law for the Federal Republic of Germany (n 10) art 70-74.

13 U. Karpen, 'Introduction' in: U. Karpen and H. Xanthaki (eds), *Legislation in Europe. A comprehensive guide for scholars and practitioners* (Hart Publishing; Oxford and Portland, Oregon, 2017) 1-16, 5-6.

14 Cf. ibid, 2.

15 As opposed to *de facto* organs of the state, which include, for example, persons or entities, not being state organs, that are empowered by the law of that state to exercise elements of governmental authority and whose conduct, for purposes of responsibility, will be attributed to the state. Draft Articles on Responsibility of States for Internationally Wrongful Acts art 5. ILC, 'Report of the International Law Commission on the Work of its Fifty-Third Session (23 April–1 June and 2 July–10 August 2001)' UN Doc A/56/10, 26.

> '1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.'[16]

In other words, the national legislature must be considered an agent through which the state, itself nothing more than an abstraction, acts on the international legal stage. The obvious fact that any state is composed of several state organs, each with its own tasks and position within that state, is deliberately pushed aside in the text of article 4; the fragmentation or separation of power within the state is irrelevant, at least from the perspective of the international law of state responsibility.[17] This idea is often referred to as the 'unity of the state' principle.[18] As a consequence, its conduct will be attributed to the state of which it is part from the moment any domestic entity qualifies as state organ.[19] If the conduct constitutes a breach of the state's international obligations, it will amount to an internationally wrongful act for which the state bears responsibility.[20] In the view of the International Court of Justice (ICJ), this is a 'well-settled rule of international law, which also is of a customary character'.[21]

As emphasised by the ILC in article 4, first paragraph, cited above, the nature of the body's functions (whether legislative, executive or judicial, or 'any other') is not relevant for the determination whether a particular body may be labelled 'state organ'. The question arises how it could be determined whether an entity is a state organ. The second paragraph provides a clear answer to this question: entities which have the status of state organ under the domestic law of the state must be considered as such under international law. Nevertheless, entities which derive their status as a state organ from national practice instead of national law, may also qualify as state organ in accordance with article 4; state organs include, but are not

16 Draft Articles on Responsibility of States for Internationally Wrongful Acts (n 15) art 4.

17 D. Momtaz, 'Attribution of conduct to the state. State organs and entities empowered to exercise elements of governmental authority' in: J. Crawford, A. Pellet and S. Olleson (eds), *The law of international responsibility* (OUP, Oxford 2010) 237-246, 239.

18 ILC (n 15) 40. Or, phrased differently, 'the agents of the State used to be treated as identical with it'. Momtaz (n 17) 237.

19 As a consequence, the state organ itself does not bear international responsibility for its conduct (whether wrongful or not); since the national legislature itself does not have international legal personality, its actions must be attributed to the legal person of which the legislature is an organ: the state.

20 Draft Articles on Responsibility of States for Internationally Wrongful Acts (n 15) art 2 jo. art 1.

21 *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, par. 62.

limited to, entities which are part of the state machinery in accordance with the law of that state.[22]

On the basis of the reasoning presented above, acts committed by a state's armed forces and judgments passed by its courts must be attributed to the state of which they are part.[23] Similarly, the national legislature must be considered a state organ, since its position and functions will be enshrined in many, if not all, modern constitutions.[24] Indeed, it seems impossible to think of an entity that on the one hand meets our definition of 'national legislature', while on the other hand could not be qualified as 'state organ'. Article 1, paragraph 1, of the Constitution of the United States stipulates that 'all legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives'.[25] Pursuant to article 79, first paragraph of the 1995 Constitution of the Republic of Uganda, '[…] Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda'.[26] Another example is the 2008 Constitution of Myanmar, article 96 of which provides that 'the [bicameral parliament] Pyidaungsu Hluttaw shall have the right to enact laws for the entire or any part of the Union [of Myanmar] […]'.[27] Therefore, the legislative organs mentioned in these respective constitutional provisions can be labelled as 'state organs'.

1.1.3 National legislation under international law

Closely related to the position of the national legislature in the international legal sphere is the question how domestic legislative acts (legislation) should be viewed from an international legal perspective. An answer has been provided by the Permanent Court of International Justice (PCIJ) in 1926 in

22 This view, that has been advanced by the ILC, has been supported by, and is based on, case law produced by the ICJ in the *Armed Activities Case*, in which the Court held that the conduct of soldiers of the Uganda People's Defence Force (UPDF) in the territory of the Democratic Republic of Congo was attributable to Uganda '*by virtue of the military status and function of* Ugandan soldiers […]'. *Case concerning Armed activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, par. 213.

23 '[…] the courts are regarded in the same way as any other organ of the state, the acts of which, if they breach the state's international obligations, will entail its responsibility'. S. Olleson, 'Internationally wrongful acts in domestic courts. The contribution of domestic courts to the development of customary international law relating to the engagement of international responsibility', 26 Leiden Journal of International Law 3 (2013) 615-642, 618-619. See also: Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights (n 21) par. 63.

24 Momtaz (n 17) 239.

25 Constitution of the United States 1787 <https://www.senate.gov/civics/constitution_item/constitution.htm> (accessed 29 March 2018).

26 Constitution of the Republic of Uganda 1995 <http://www.statehouse.go.ug/government/constitution> (accessed 29 March 2018).

27 Constitution of the Republic of the Union of Myanmar 2008 (Ministry of Information, 2008) <http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf> (accessed 29 March 2018).

Certain German Interests in Polish Upper Silesia. This case centered on the expropriation of 'certain German interests' in Polish Upper Silesia by the Polish authorities, about which the German Empire complained before the PCIJ. The German Empire submitted that the Polish expropriation laws constituted a breach of several provisions of the Versailles Treaty and that several expropriation measures regarding specified properties contravened a treaty concluded between Poland and Germany. The PCIJ famously considered:

> 'It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.'[28]

The Court thus viewed domestic legislative acts as 'mere facts' under international law. This means that the acts do not constitute a source of international law and thus do not have intrinsic legal value in the international legal order, contrary to its legal value in the domestic legal order. On the other hand, they are not legally irrelevant on the international plane; as the PCIJ noted, an investigation of the application of those domestic laws may be required to determine whether the state has respected its obligations under international law. This legal significance thus consists of an indication or evidence of an answer to the question whether a particular state has acted in accordance with its obligations under international law.[29] More recently, the same approach was taken by the ICJ in 2005 when it discussed the possible value of domestic law in the settlement of a border dispute between Benin and Niger. The ICJ had to determine the course of the boundary between the two states on a particular date in the past. To this end, it had to examine the French colonial law which had applied prior to the specified date as this law might contain an indication of the existing legal titles. The ICJ referred to an earlier case in which it stated:

> 'When reference is made to domestic law in such a context, that law is applicable "not in itself (as if there were a sort of *continuum juris*, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of […] the colonial heritage"'.[30]

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28 *Case concerning Certain German Interests in Polish Upper Silesia* (Merits) [1926] PCIJ Rep Series A No 7, 19. Also *M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v Guinea)* (Judgment of 1 July 1999) ITLOS Reports 1999, par. 120.

29 G. Arangio-Ruiz, ´International law and interindividual law' in: J. Nijman and A. Nollkaemper (eds), *New perspectives on the divide between national and international law* (OUP, Oxford 2007) 15-52, 20.

30 *Frontier Dispute (Benin v Niger)* (Judgment) [2005] ICJ Rep 90, par. 28; *Frontier Dispute (Burkina Faso v Republic of Mali)* (Judgment) [1986] ICJ Rep 554, par. 30.

In the international legal perspective taken in *Certain German Interests* and *Frontier Dispute*, legislative acts are not fundamentally different from legal decisions or administrative measures taken by other state bodies; the qualification of the national legislature as a state organ puts it on the same footing as any other state organ. As a result, conduct of other state organs must be treated in the same manner as legislative acts. In the *Avena* case, the ICJ expressed the opinion that in order to determine whether the United States had acted in accordance with its treaty obligations, the ICJ was entitled to assess decisions of domestic courts. Just as in the *LaGrand Case*, the *Avena Case* concerned a dispute about the 1963 Vienna Convention on Consular Relations (VCCR). The claims submitted by Mexico were, among others, that the United States, by arresting, detaining, trying, convicting and sentencing 54 Mexican nationals on death row, had violated the VCCR; and that the United States was under the obligation not to apply its national 'procedural default' rule[31], or any other doctrine of municipal law, to preclude the exercise of the rights afforded by article 36 VCCR. In its first objection against the ICJ's jurisdiction, the United States complained that the suggested findings about the United States criminal justice system would constitute an illegitimate interference with that system and as such would amount to the abuse of its jurisdiction by the ICJ. In response, the ICJ held:

> 'The Court would recall that its jurisdiction in the present case has been invoked under the Vienna Convention and Optional Protocol to determine the nature and extent of the obligations undertaken by the United States towards Mexico by becoming party to that Convention. If and so far as the Court may find that the obligations accepted by the parties to the Vienna Convention included commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law. The Court is unable to uphold the contention of the United States that, as a matter of jurisdiction, it is debarred from enquiring into the conduct of criminal proceedings in United States courts.'[32]

The above suggests an approach taken by the PCIJ and ICJ in which they maintained a clear distinction between international law and national law. This means that legislative acts in the domestic legal sphere do not possess the quality of law in the international legal sphere. However, they can have legal significance under international law, as we have seen.

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31 This rule has been described as 'a federal rule that, before a state criminal defendant can obtain relief in federal court, the claim must be presented to a state court. If a state defendant attempts to raise a new issue in a federal *habeas corpus* proceeding, the defendant can only do so by showing cause and prejudice. Cause is an external impediment that prevents a defendant from raising a claim and prejudice must be obvious on its face. One important purpose of this rule is to ensure that the state courts have an opportunity to address issues going to the validity of state convictions before the federal courts intervene.' *LaGrand Case (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, par. 23.

32 Ibid, par. 28.

1.1.4 The national legislature under international law: four roles

To complete our exploration of preliminary matters, it is useful to further contemplate the roles that can be attributed to national legislatures under international law. Or, to be more precise, national legislation may be relevant from an international legal perspective in four respects.

First, the national legislature's conduct may constitute evidence for the emergence of a new rule of customary international law. Since customary international law will be discussed more thoroughly in Chapter 3, for now it may suffice to note that legislation has been analysed in order to establish the possible existence of state practice.[33] As regards the second constituent element of customary international law, *opinio iuris*, it may come as a surprise that national legislative acts have not been mentioned explicitly as a source of *opinio iuris* in international case law. Whereas the extreme view that national legislation cannot be a source of *opinio iuris* probably goes too far[34], the question remains why national laws have not been referred to for the purpose of demonstrating *opinio iuris*. The method which the International Criminal Tribunal for the Former Yugoslavia (ICTY) has used for the determination of the (possible) existence of a rule of customary international law, suggests a blurring of the distinction between both its constituent elements: state practice and *opinio iuris*. In other words, the tribunal may treat state practice *itself* (consisting of the enactment of national legislation), as a reflection of a sense of legal obligation (*opinio*

33 *Fisheries Case (United Kingdom v. Norway)* (Judgment) [1951] ICJ Rep 116, p. 131. *Nottebohm Case (Liechtenstein v. Guatamala)* (Second phase) [1955] ICJ Rep 4, p. 22. *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium)* (Judgment) [2002] ICJ Rep 3, par. 58. *Prosecutor v Stanislav Galić* (Appeals Chamber judgment) IT-98-29-A (30 November 2006) par. 94-98. Also *Prosecutor vs. Dario Kordić and Mario Čerkez* (Appeals Chamber judgment) IT-95-14/2-A (17 December 2004) par. 65-66.

34 The topic was touched upon in the Dissenting Opinion of Judge Van den Wyngaert accompanying the *Arrest Warrant* judgment, in which she assessed the claim that a state may only establish universal jurisdiction of certain crimes if the alleged offender is present on its territory. She stated: 'There is no customary international law to [the effect that universal jurisdiction *in absentia* is prohibited] either. The Congo submits there is a state practice, evidencing an *opinio juris* asserting that universal jurisdiction, *per se*, requires the presence of the offender on the territory of the prosecuting State. Many national systems giving effect to the obligation *aut dedere aut judicare* and/or the Rome Statute for an International Criminal Court indeed require the presence of the offender. This appears from legislation and from a number of national decisions including the Danish *Saric* case, the French *Javor* case and the German *Jorgic* case. However, there are also examples of national systems that do not require the presence of the offender on the territory of the prosecuting State. Governments and national courts in the same State may hold different opinions on the same question, which makes it even more difficult to identify the *opinio juris* in that State. And even where national law requires the presence of the offender, this is not necessarily the expression of an *opinio juris* to the effect that this is a requirement under international law. National decisions should be read with much caution.' *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium)* (Judgment) (Dissenting Opinion of Judge Van den Wyngaert) [2002] ICJ Rep 137, par. 55.

iuris) on behalf of that state. Under those circumstances, a separate discussion of *opinio iuris* can be considered redundant. This approach was taken by the Appeals Chamber in *Prosecutor v. Stanislav Galić*. In this case, the Appeals Chamber investigated the existence of a customary international norm establishing individual criminal responsibility for violations of the prohibition to spread terror among the civilian population. The Appeals Chamber stated that 'individual criminal responsibility […] can be inferred from, *inter alia*, state practice indicating an intention to criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals'. After brief remarks concerning a report of a commission established by an international conference and the conviction of a person for similar conduct by a Croatian municipal court, it proceeded to discuss national legislation on this topic. Following the discussion of the relevant domestic legislation, the Appeals Chamber concluded that the principle of individual criminal responsibility for the crime of spreading terror was of a customary nature.[35] Apparently, it deemed a separate discussion of relevant *opinio iuris* unnecessary.

Second, domestic legislation may be a useful instrument for the interpretation of treaty provisions. In order to determine the content of an international legal obligation which has been laid down in a treaty, recourse may be had to national legislation. The legal basis of this practice can be found in article 31 of the Vienna Convention on the Law of Treaties (VCLT), which provides, as a general rule, that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[36] Moreover, there shall be taken into account, together with the context 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[37] Taking into account the subsequent practice of the parties to the treaty is a manner to identify the intention of the parties after the conclusion of a treaty, when this intention of the parties cannot be derived from the text of the treaty itself.[38] The agreement would lead to an authoritative interpretation which must be read in the relevant treaty, thereby potentially achieving the same result as an amendment of the treaty provisions. For the sake of legal certainty, international courts tend to maintain high, but diverging, thresholds for accepting

35 *Prosecutor v. Stanislav Galić* (n 33).

36 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31, first paragraph.

37 VCLT art 31, third paragraph, sub b.

38 J.-M. Sorel and V. Boré Eveno, 'Article 31 of the 1969 Vienna Convention' in: O. Corten and P. Klein (eds), *The Vienna Convention on the Law of Treaties. A Commentary,* vol I (Oxford Commentaries on International Law, OUP, Oxford 2011) 804-837, 826.

subsequent practice.[39] The question arises whether national legislation can amount to 'subsequent practice' in the sense of article 31, third paragraph, sub b, VCLT and, if so, under what conditions.[40] As a point of departure, the formulation of 'subsequent practice' is such that it may be considered a 'catch-all' supplement to the rather restrictive requirement of (formal) 'subsequent agreement' in accordance with article 31, third paragraph, sub a.[41] With the broad scope of the term 'practice' in mind, there seems to be no ground for a *a priori* preclusion of national legislation as a means of interpretation of treaty provisions.[42] As the national legislature can be considered an organ of the state [party to a treaty], its conduct could in principle amount to relevant 'subsequent practice'.[43] This point came to the fore in *Case Concerning the Dispute Regarding Navigational and Related Rights*, in which the ICJ had to decide whether a provision of the Treaty of Limits, concluded by Costa Rica and Nicaragua in 1858, transferred upon Costa Rica a right of free navigation on the San Juan river. Article VI of the treaty granted to Costa Rica a perpetual right of free navigation 'con objetos de comercio'.[44] Costa Rica propagated a broad interpretation of this provision and argued that it encompassed both the transport of goods and the transport of passengers.[45] The Court agreed and based its finding on an evolutive interpretation of the term 'commerce'.[46] In his Separate Opinion, however, Judge Skotnikov pointed to the fact that Nicaragua had applied national regulations to the transport of passengers by Costa Rican companies:

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39 A. Orakhelashvili, *The interpretation of acts and rules in public international law* (Oxford Monographs in International Law, OUP, Oxford 2008) 358-365; G. Nolte, 'Subsequent practice as a means of interpretation in the jurisprudence of the WTO Appellate Body', in: E. Cannizzaro (ed), *The law of treaties beyond the Vienna Convention* (OUP, Oxford 2011) 138-144, 141-143; Sorel and Boré Eveno (n 38) 826-829.

40 I. Würth, 'Treaty interpretation, subsequent agreements and practice, and domestic constitutions' in: G. Nolte (ed) *Treaties and subsequent practice* (OUP, Oxford 2013) 154-159, 155-158.

41 R. Moloo, 'When actions speak louder than words. The relevance of subsequent party conduct to treaty interpretation', 31 *Berkeley Journal of International Law* (2013) 39-88, 64.

42 As Hafner points out, 'in any case, the author [of subsequent practice] must be an individual or entity whose acts are attributable to the state in question, provided that its act evidences a certain constant pattern of state conduct'. G. Hafner, 'Subsequent agreements and practice. Between interpretation, informal modification and formal amendment' in: G. Nolte (ed), *Treaties and subsequent practice* (OUP, Oxford 2013) 105-122, 113.

43 G. Nolte, 'Subsequent agreements and subsequent practice of states outside of judicial or quasi-judicial proceedings. Third report for the ILC Study Group on Treaties over time' in: Idem (ed), *Treaties and subsequent practice* (OUP, Oxford 2013) 307-386, 310.

44 *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213, par. 37 and 42. Also Moloo (n 41) 65-66.

45 *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 44) par. 45 and 59.

46 The Court held: '[E]ven assuming that the notion of "commerce" does not have the same meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty.' *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (n 44) par. 70. Also M. Kohen, 'Keeping subsequent agreements and practice in their right limits' in: G. Nolte (ed), *Treaties and subsequent practice* (OUP 2013) 34-45, 40-41.

> 'Nicaragua submits evidence that at the time the Treaty of Limits was concluded and for more than 100 years thereafter, it alone controlled the commercial transport of passengers. Be that as it may, it is clear that Costa Rican-operated tourism on the San Juan River has been present for at least a decade, and to a substantial degree. Nicaragua has never protested. This is in contrast to Nicaragua's treatment of police vessels, which it has repeatedly asserted have no right whatsoever to travel on the San Juan. Nicaragua has not only engaged in a consistent practice of allowing tourist navigation by Costa Rican operators, but has also subjected it to its regulations. This can be seen as recognition by Nicaragua that Costa Rica acted as of right. […] In my view, the subsequent practice in the application of the Treaty suggests that the Parties have established an agreement regarding its interpretation: Costa Rica has a right under the 1858 Treaty to transport tourists.'[47]

Thus, in Judge Skotnikov's Separate Opinion, regulation by the Nicaraguan national authorities was an element which he interpreted as a permission expressed by Nicaragua to the practice of the Costa Rican tourist operators. Nevertheless, it will often be hard to derive from, or in response to, a piece of national legislation an 'agreement of the parties'. Agreement presupposes some level of awareness. National legislation is, however, first and foremost a domestic affair; states do not have an obligation to keep themselves informed about the enactment of legislation within other states' national jurisdictions.[48] The criterion of awareness will thus not easily be met. On the other hand, if a state adheres, as would become visible from a national law, to a certain interpretation of a treaty provision to which it is bound and this interpretation is brought officially to the attention of the other state parties, this may be accepted as subsequent practice modifying the interpretation of that treaty provision; provided, of course, that the other states' actions demonstrate 'agreement' to this interpretation. There are many ways in which states can demonstrate agreement, including through inaction, the validity of which may vary from case to case.[49]

Similarly, in its case law the European Court on Human Rights (ECtHR) frequently investigates the possible existence of 'international and European consensus' in the interpretation of the obligations laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[50] In the view of the ECtHR, the ECHR should be consid-

47 *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) (Separate Opinion of Judge Skotnikov) [2009] ICJ Rep 283, par. 9.

48 *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, par. 266. As was noted in the Third report for the ILC Study Group on Treaties over time, '[t]he mere fact that a document is publicly accessible does not, however mean that it can be assumed that another state has knowledge of it, or that another state has even adopted a position with respect to it'. Nolte (n 43) 318.

49 Moloo (n 41) 66-68.

50 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (European Convention on Human Rights, as amended) 213 UNTS 211 (ECHR). For example, *Marckx v Belgium* (App no 6833/74) (1979) Series A no 31, par. 41 ff.

ered a 'living instrument', which requires an interpretation of its provisions 'in the light of present-day conditions'.[51] These conditions can be derived from, among other sources, domestic legislation. Contrary to the regime of the VCLT applicable to 'subsequent practice', the evolutive interpretation of the ECHR must be based on the doctrine which prescribes interpretation of the convention in accordance with the 'object and purpose of the convention'.[52]

Third, an act by the national legislature may constitute a breach of an international obligation. This breach may result from the adoption of a legislative act which contravenes a binding norm of international origin, or from the failure to adopt legislation despite an obligation thereto.[53] Arguably, in relation to the former category a distinction should be made between the adoption of a law by the national legislature, and the application of that law in a specific case. The mere adoption of a law in contravention of a state's legal obligations would not amount to an internationally wrongful act, so the argument goes; only when that law is applied in one or more specific cases, the conduct gives rise to international responsibility.[54] This will often be true, as legal consequences only arise when the law is applied to factual conduct of a legal subject. This notwithstanding, in some cases, international law may prescribe criteria that the *formulation of* the national piece of legislation should meet. In the 1923 Advisory Opinion *German Settlers in Poland*, the PCIJ made exactly this distinction between 'fact' and 'law'. Article 8 of the Polish Minority Treaty, concluded at the end of the First World War in order to provide for the protection of the interests of minorities of non-Polish origin residing on the newly established Polish territory, stipulated that 'Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security *in law*

51 *Demir & Baykara v Turkey* (App no 34503/97) ECHR 2008-V 395, par. 68; *Tyrer v the United Kingdom* (App no 5856/72 (1978) Series A no 26, par. 31; *Christine Goodwin v the United Kingdom* (App no 28957/95) ECHR 2002-VI 1, par. 74.

52 Which in turn could be based on article 31, first paragraph, of the VCLT. K. Dzehtsiarou, 'European consensus and the evolutive interpretation of the European Convention on Human Rights' 12 *German Law Journal* (2011) 1730-1745, 1739. Also J. H. Gerards, 'Judicial deliberations in the European Court of Human Rights' in: N. Huls, M. Adams and J. Bomhoff (eds), *The legitimacy of highest courts' rulings. Judicial deliberations and beyond* (TMC Asser Press, The Hague 2009) 407-436, 423.

53 Also Momtaz (n 17) 240.

54 As the ICTY put it in *Prosecutor v Anto Furundžija:* 'Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation (*lato sensu*) only when such legislation is concretely applied.' *Prosecutor v Anto Furundžija* (Trial Chamber judgment) IT-95-17/1-T (10 December 1998) par. 150. Also *German Settlers in Poland* (Advisory Opinion) [1923] PCIJ Rep Series B no 6, p. 23-24.

and in fact as the other Polish nationals'.[55] In this case the PCIJ found that 'there must equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law'.[56] This may indicate that whenever a rule of international law not only prescribes certain factual conduct by a state, but also formulates requirements the text of national laws should meet, the mere enactment of legislation without its application, may amount to an internationally wrongful act.[57]

Fourth, the national legislature may be involved in the implementation of international legal obligations in the domestic legal order. According to the PCIJ, this role is based on:

> '[…] a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken'.[58]

Arguably, this is a general principle of law, or a manifestation of the principle of *pacta sunt servanda* or of the principle of good faith, without which the international legal order would be largely dysfunctional. In addition, these basic principles have been codified in several instruments, the most important being article 2, second paragraph, of the Charter of the United Nations (ChUN). It provides that '[a]ll Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in the present Charter'.[59]

The task to which the PCIJ referred in the statement cited above, is central to the present study.

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55 Minorities treaty between the Principal Allied and Associated Powers (the British Empire, France, Italy, Japan and the United States) and Poland (adopted 28 June 1919) 225 CTS 412.

56 *German Settlers in Poland* (n 54) p. 24.

57 A closely related discussion can be discerned in the case law of the ECtHR, which has been confronted with the question whether states party to the ECHR are under the obligation to repeal domestic legislation which contravenes the provisions of that treaty, even if the relevant domestic law is not applied in practice. In *Modinos v Cyprus,* the Court suggested that the mere existence of such laws may, in absence of application in practice, amount to a breach of the ECHR. *Modinos v Cyprus* (App no 15070/89) (1993) Series A no 259, par. 22-24. This position seems to be confirmed in more recent case law, such as *A.D.T. v the United Kindom* (App no 35765/97) ECHR 2000-IX 295, par. 23 and 38 and *S.A.S. v France* (43835/11) ECHR 2014-III 341, par. 57. Also R.A. Lawson, 'Positieve verplichtingen onder het EVRM. Opkomst en ondergang van de Fair Balance-test' 20 *NJCM Bulletin* 5 (1995) 558-573, 561-562.

58 *Exchange of Greek and Turkish Populations* (Advisory Opinion) [1925] PCIJ Rep Series B No 10, p. 20.

59 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI. See also VCLT art 26.

1.2 Implementation of international law in the national legal order: a working definition

What exactly do the terms 'implementation' and 'implementing legislation' mean in the context of the fourth role of the national legislature, identified above, and in the context of the present study? The term 'implementation' originates from the Latin verb 'implēre', which means 'to fill' or 'to fulfill'. In a general, non-legal context, 'implementation' may be defined as 'the process of putting a decision or plan into effect'.[60] The *Oxford Dictionary of Law* refers to 'implementation' as 'the process of bringing any piece of legislation into force'.[61] According to Raustiala and Slaughter, implementation is 'the process of putting international commitments into practice'.[62] Although these descriptions contain useful elements, they ignore one important aspect which has been emphasised in the present study up to this point: the distinction between the international and domestic legal spheres, as discussed in the previous section. A definition of implementation which is, therefore, more suitable for the purpose of the present study of a legal character is:

> the act of putting into effect a norm of international law within the legal order of the state.[63]

The phrase 'legal order of the state' will be elaborated upon in Chapter 2, and the notion of 'norm of international law' will be further discussed in Chapter 3. Therefore, only two elements will be briefly explained here. First, implementation is an act, which will be performed by the competent organ(s) on the domestic level. These organs may be part of the executive, legislative or judicial branch of government; as we have seen, the attribution of powers by national law is decisive. Although implementation could be viewed as a single act, as it is in the definition provided above, in practice it will often encompass several, or indeed many, subsequent acts which together amount to 'implementation'. For that reason, the act of implementation may be a time-consuming endeavour. In general, implementing acts performed by the executive may require less time than implementation through legislation, although whether this is true in a particular case will probably depend upon many factors, among them the complexity of the implementation and the number of actors involved.

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60 A. Stevenson (ed), *Oxford Dictionary of English* (3rd edn OUP, Oxford 2010).

61 J. Law and E.A. Martin (eds), *Oxford Dictionary of Law* (7th edn OUP, Oxford 2009).

62 K. Raustiala, and A.-M. Slaughter, 'International law, international relations and compliance', in: W. Carlsnaes, Th. Risse and B.A. Simmons (eds), *Handbook of international relations* (Sage Publications, London 2002) 538-558, 539.

63 Cf. Jacobson and Brown Weiss, in whose opinion 'implementation refers to measures that states take to make international accords in their domestic law'. H.K. Jacobson and E. Brown Weiss, 'A framework for analysis' in: Idem (eds), *Engaging countries. Strengthening compliance with international environmental accords* (MIT Press, Cambridge MA 1998) 1-18, 4.

An implementing act performed by the national legislature will in principle start with the drafting of a legislative proposal and will not end until the enacted piece of legislation enters into force. This entire process will be governed by national (constitutional) law.[64] The content of such implementing legislation could be diverse and will, of course, depend on the substance of the contracted international legal obligation. As we will see in Chapter 3, this may include legislative measures in order to establish jurisdiction over certain (criminal) acts, to impose adequate punishment on perpetrators, the appointment of a national authority which will be entrusted with the task to carry out the prescriptions set forth in the international instrument, or the provision of some form of legal protection on the domestic level.

This brings us to the second element of the working definition presented above that deserves some clarification: the phrase 'into effect'. This term is closely linked to questions of compliance and implementation, and is often referred to as the element of effectiveness: the extent to which a norm induces changes in behavior or achieves its policy objectives.[65] Since the criterion of effectiveness is part of the normative framework that will be presented and discussed in Parts II and III, some general remarks on effectiveness suffice at this point. 'Effective implementation' must be distinguished from an 'effective (international) norm'. Although the effective implementation of an international legal norm in domestic legal orders is a *sine qua* non for the effectiveness of that norm, effective implementation will not in all cases suffice for an international norm to be labelled as 'effective'.[66] 'Effectiveness' in relation to implementation refers to the rationale behind (or: content of) the act performed by the competent actor.

64 Under European secondary legislation, however, the national legislative process has to be complemented by an additional action called 'notification', through which states inform the European Commission about the completion of the implementing process. To this end, directives often contain the following provision: 'Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field governed by this Directive.'

65 Raustiala and Slaughter (n 62) 539. Also M.E. Footer, 'Some theoretical and legal perspectives on WTO compliance' 38 *Netherlands Yearbook of International Law* (2007) 61-112, 67.

66 With regard to effective norms and their relation to the concept of 'compliance', Raustiala and Slaughter note that 'the connection between compliance and effectiveness is also neither necessary nor sufficient. Rules or regimes can be effective in any of these senses even if compliance is low. And while high levels of compliance can indicate high levels of effectiveness, they can also indicate low, readily met and ineffective standards. Many international agreements reflect a lowest common denominator dynamic that makes compliance easy but results in a negligible influence on behavior. Here is the source of the vexing question of the significance of high observed levels of compliances. From an effectiveness perspective more compliance is better, *ceteris paribus*. But regimes with significant non-compliance can still be effective if they induce changes in behavior'. Raustiala and Slaughter (n 62) 539.

It thus becomes clear that the criterion of effectiveness is inherent to the concept of implementation. In this view, there is no such thing as implementation which is not effective; the expression 'effective implementation' is a pleonasm. This notwithstanding, the central place of the criterion of effectiveness raises the question how the term 'effective' has to be understood in the context of the implementation of international law by the national legislature, whether as part and parcel of the notion of implementation or as a separate qualification. Since the national legislature acts through the adoption of legislation, it seems justified to assume that implementation of an international norm which solely requires the adoption of legislation, has succeeded when the national legislature enacts 'effective' implementing legislation. Put differently, in order to determine whether implementation was completed successfully we should at least make an assessment of the effectiveness of relevant piece of implementing legislation.

1.3 Research subject and research questions

The execution of the fourth task, the implementation of international legal obligations binding on the state of which the legislature is part, illustrates, more than the other roles mentioned above, the national legislature's contribution to the realisation of international law. It is topic of this study, the main research question of which is:

> To what is extent is domestic implementing legislation regulated by international law and to what extent is this regulation adequate?

This research question has two essential components: a descriptive analysis of international legal practice with regard to the regulation of implementing legislation and a normative assessment of this practice. This assessment seeks to establish the adequacy of international legal practice. In order to operationalise the notion of adequacy, the present study borrows from the field of legisprudence. Legisprudence is the theoretical study of legislative problems from the perspective of legal theory. As Wintgens notes:

> 'Legisprudence has as its object legislation and regulation, making use of the theoretical tools and insights of legal theory. The latter predominantly deals with the question of *application* of law by the *judge.* Legisprudence enlarges the field of study to include the *creation* of law by the *legislator.*'[67]

67 L. Wintgens, 'Rationality in legislation – Legal theory as legisprudence: an introduction' in: Idem (ed), *Legisprudence: a new theoretical approach to legislation. Proceedings of the Fourth Benelux-Scandinavian Symposium on Legal Theory* (Hart Publishing, Oxford and Portland, Oregon, 2002) 1-7, 2. Also L. Wintgens and Ph. Thion, 'Introduction' in: Idem (eds), *Legislation in context: essays in legisprudence* (Ashgate, Aldershot and Burlington 2007) ix-xiii, ix.

More specifically, Karpen explains, legisprudence is an interdisciplinary science, which encompasses the analysis of norms, research and practice of organisation and procedure, the setting of policies and adequate goals and the choice of effective and efficient means of regulation. It has both a theoretical and practical character. This means that it not only describes and analyses legislative practice, but also aims to apply its findings in practice.[68] Under this heading various aspects of legislation are discussed, including its 'quality'. In the present study, the question to what extent the regulation of implementing legislation can be considered adequate, coincides with the question to what extent this regulation ensures legislative quality. In other words, legislative quality is the yardstick through which the adequacy of international practice will be assessed.

In order to formulate an adequate answer to the main research question, several topics have to be addressed. These include the following questions: how must the relationship between international law and national law be understood?; why are national implementing measures indispensable?; from what sources do obligations to implement international law originate?; to what extent do international and European law impose legal constraints on the national legislature engaged in the act of implementation?; and to what extent do the international legal constraints on the national legislature that are currently in place correspond to quality standards applicable to legislation?

1.4 Aims and relevance of the study

The present study explores the extent to which domestic implementing legislation is governed by international law and makes an assessment of the question whether this regulation is adequate. In doing so, it intends to make a contribution to the academic debate in two ways.

First, scholarly research into the implementation of international law in the domestic legal order tends to adopt three distinct, sometimes overlapping, approaches. Some publications specifically focus on national courts

68 Karpen, 'Introduction' (n 13) 3.

as institutions which apply and develop international law in general[69], or certain branches of international law in particular.[70] This perspective may be termed the institution-oriented approach. Other publications have a particular focus on a specified international legal instrument: the instrument-oriented approach. Often they seek to provide an answer to the question how a specified legal instrument is or should be implemented on the national level.[71] A third approach can be found in publications which

69 Examples include: A. Nollkaemper, 'The role of domestic courts in the case law of the International Court of Justice' 5 *Chinese Journal of International Law* 2 (2006) 301-322; E. Benvenisti, 'Reclaiming democracy: the strategic uses of foreign and international law by national courts' 102 *American Journal of International Law* (2008) 241-274; E. Benvenisti and G. Downs, 'National courts, domestic democracy and the evolution of international law' 20 *European Journal of International Law* 1 (2009) 59-72; A. Roberts, 'Comparative international law? The role of national courts in creating and enforcing international law' 60 *International and Comparative Law Quarterly* (2011) 57-92; A. Nollkaemper, *National courts and the international rule of law* (OUP, Oxford 2011); A. Tzanakopoulos, 'Domestic courts in international law: the international judicial function of national courts' 34 *Loyola of Los Angeles International and Comparative Law Review* 1 (2011) 133-168; O. Fauchald, and A. Nollkaemper (eds), *The practice of international and national courts and the (de-)fragmentation of international law* (Hart Publishing, Oxford 2012); A. Tzanakopoulos and Ch. J. Tams, 'Introduction: domestic courts as agents of the development of international law' 26 *Leiden Journal of International Law* (2013) 531-540; W. Sandholtz, 'How domestic courts use international law' 38 *Fordham International Law Journal* (2015) 596-637; O. Grady Schwartz, 'International law and national courts: between mutual empowerment and mutual weakening' 23 *Cardozo Journal of International and Comparative Law* (2015) 587-626.

70 Examples include: I. Würth, 'International law in domestic courts and the Jurisdictional immunities of the state case' 13 *Melbourne Journal of International Law* 2 (2012) 819-837; R. O'Keefe, 'Domestic courts as agents of the development of the international law of jurisdiction' 26 *Leiden Journal of International Law* (2013) 541-558; S. Olleson, 'Internationally wrongful acts in domestic courts. The contribution of domestic courts to the development of customary international law relating to the engagement of international responsibility' 26 *Leiden Journal of International Law* 3 (2013) 615-642; S. Weill, *The role of national courts in applying international humanitarian law* (International Law in Domestic Legal Orders, OUP, Oxford 2014).

71 Examples include: M. Bothe, 'National implementation of the CWC: some legal considerations' in: M. Bothe, N. Ronzitti and A. Rosas (eds), *The New Chemical Weapons Convention: implementation and prospects* (Kluwer Law International, The Hague 1998) 543-568; J.A. Herrera, *Mexico's implementation of the Biodiversity Convention and the Cartagena Protocol in the GMO era: challenges in principles, policies and practices* (DSL thesis, Dalhousie University 2007); M. Lewis, 'China's implementation of the United Nations Convention against Transnational Organised Crime' 2 *Asian Journal of Criminology* 2 (2007) 179-196; V. Prahalad and L. Kriwoken, 'Implementation of the Ramsar Convention on wetlands in Tasmania, Australia' 13 *Journal of International Wildlife Law and Policy* (2010) 205-239; H. Sono, 'Japan's accession to and implementation of the United Nations Convention on Contracts for the International Sale of Goods (CISG)' 53 *Japanese Yearbook of International Law* (2010) 410-437; A. Chandra and A. Idrisova, 'Convention on Biological Diversity: a review of national challenges and opportunities for implementation' 20 *Biodiversity and Conservation* 14 (2011) 3295-3316; C. Rose, 'The UK Bribery Act and accompanying guidance: Belated implementation of the OECD Anti-bribery Convention' 61 *International and Comparative Law Quarterly* (2012) 485-499; W. Gullett, 'Legislative implementation of the Law of the Sea Convention in Australia' 32 *University of Tasmania Law Review* 2 (2013) 184-207.

are concerned with the (comparative) analysis of domestic constitutional systems, in particular the way international law is received in a specific national legal order.[72] This may be labelled the constitutional law-oriented approach. A particular insightful study in this regard is *International law in domestic legal systems: Incorporation, transformation, and persuasion,* edited by Dinah Shelton, which covers 27 national legal orders.[73]

Contrary to the role of domestic courts, the position of the national legislature has attracted only modest attention. In particular, publications with an institution-oriented approach are scarce. More research has been conducted on the implementation of international law by legislative means with an instrument-oriented approach. However, these publications are often limited to implementation in a specific country. Even more literature is available on the role of the national legislature, similar to the national courts, in the implementation of international law with a constitutional law-oriented approach. Nevertheless, these publications are limited to an analysis of the ways in which international legal instruments are given the quality of law in various national legal orders by legislative acts of incorporation. They must be distinguished from implementing legislation, as will be further explained in Chapter 2. In sum, despite the national legislature's prominent role in the implementation of international law, existing academic scholarship reveals some lacunae. Against this backdrop, a study which primarily concerns the role of the national legislature may enhance our understanding of the relation between international and national law and of the implementation of international law in the national legal order.

Second, and perhaps most important, the present study seeks to connect the study of public international law with academic discussions on legislative quality. It may thus bring the requirements of good legislation to the attention of international policy makers and international legal scholars.

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72 Examples include: S. Fatima, *Using international law in domestic courts* (Hart Publishing, Oxford 2005) which focuses on the English legal order; S. Marochkin, 'International law in the courts of the Russian Federation: Application of practice' 6 *Chinese Journal of International Law* 2 (2007) 329-344; V.G. Hegde, 'Indian courts and international law' 23 *Leiden Journal of International Law* 1 (2010) 53-77; J. Fleuren, 'The application of public international law by Dutch courts' 57 *Netherlands International Law Review* (2010) 245-266; O.A. Hathaway, S. McElroy and S. Aronchick Solow, 'International law at home: enforcing treaties in U.S. courts' 37 *Yale Journal of International Law* (2012) 51-106; A. Paulus, 'The judge and international custom' 12 *The Law and Practice of International Courts and Tribunals* (2013) 253-265 which focuses on the German legal order; V. Fikfak, 'International law before English and Asian courts: finding the judicial role in the separation of powers' 3 *Asian Journal of International Law* 2 (2013) 271-304; G. de Búrca, 'International law before the courts: the EU and the US compared' 55 *Virginia Journal of International Law* 3 (2015) 685-728; Ch. Okeke, 'The use of international law in the domestic courts of Ghana and Nigeria' 32 *Arizona Journal of International and Comparative Law* 2 (2015) 371-430; C. Cai, 'International law in Chinese courts during the rise of China' 110 *American Journal of International Law* 2 (2016) 269-288.

73 D. Shelton (ed), *International law in domestic legal systems: Incorporation, transformation, and persuasion* (OUP, Oxford 2011).

Simultaneously, it may inspire scholars of legisprudence to explore the phenomenon of legislation based on international legal instruments, thereby contributing to the quality of implementing legislation.

1.5 Outline, scope and methodology of the study

The present study is divided into three parts, each of which consists of at least two chapters. Part I is dedicated to a general introduction to the topic of implementation of international law. To this end, three separate subjects will be explored in this part: the context of implementation, which encompasses *inter alia* the concept of implementation and the relationship between international law and national law (Chapter 2) and the sources of law from which an obligation to adopt domestic implementing legislation may derive (Chapter 3).

In Part II, the general perspective will be abandoned. Instead, we will zoom in on the regulation of national implementing legislation under various *special* international legal regimes, such as the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and the Framework Convention on Tobacco Control (FCTC). 'Regulation' in this respect is to be understood as comprising the requirements or standards pertaining to domestic implementing legislation under each international legal regime. Part II contains a descriptive analysis of international legal practice with regard to the regulation of implementing legislation.

Generally speaking, Parts I and II of the study reflect an international legal perspective on domestic implementing legislation. As a result, the objects of analysis are general international law and particular international legal regimes. The latter category must also be considered to encompass the law of the European Union applicable to the implementation of its legal instruments. The inclusion of EU law in this study is justified, as it contains an extensive body of case law from which standards applicable to implementing legislation may be derived. This will be further explained in Part II. Other international legal regimes that will be explored originate from human rights law, international criminal law, international health law, international environmental law and international labour law. The international legal approach is also visible in the selection of sources; they will mainly include sources of an *international* character. Examples are the case law of international courts, most notably the ICJ, treaties and relevant documents drafted in the framework of international organisations. Thus, it will address neither specific national legislative acts which serve to implement international law, nor relevant case law produced by national courts.

In Part III, the findings of Part II will be assessed. This assessment encompasses a discussion of the common features of both the standards applicable to implementing legislation under the selected international legal regimes (Chapter 10). This will provide us with a comprehensive understanding of current international legal practice. Subsequently, we turn to

the question to what extent the established practice is adequate (Chapters 11 and 12) and whether there is a gap to bridge between current international legal practice and theories and practices with regard to the quality of implementing legislation. As stated above, in the present study the adequacy question coincides with the question to what extent this practice ensures legislative quality. Part III thus possesses a clear normative aspect.

As we will see, the notion of legislative quality is not uncontroversial; there seems to be no perfect agreement as to what it entails. In order to operationalise this concept, we turn to international and national approaches to legislative quality. They encompass the legislative quality policies developed in the framework of the Organisation for Economic Cooperation and Development (OECD), the European Union (EU), the Netherlands and the United Kingdom. In contrast to Parts I and II, Part III thus combines an international and a national perspective. The sources on which the findings presented in Part III are based, mainly consist of international and national policy and legal documents. In addition, we rely on academic literature on legislative quality, which is mainly derived from legisprudence. As we will see, the quest for legislative quality is firmly engrained in the legisprudential scholarship. It is an essential component of the present study's legislative perspective on the implementation of international law in the national legal order.

Part I

The implementation of international law in the national legal order

Introduction to Part I

In the present part we explore two important aspects of the implementation of international law in the national legal order. First, in Chapter 2 the context in which the implementation of international law in the national legal order takes place will be discussed. It encompasses the question how the relation between international law and national law must be understood. Furthermore, we provide an answer to the question why national implementing measures are an indispensable element of the realisation of international law. Second, we discuss the sources of law, in particular treaty law, custom and binding decisions of international organisations, from which international obligations to adopt national implementing legislation derive (in Chapter 3). As will become clear, international legal practice contains a broad variety of such obligations. In order to come to grips with this diversity, we present a categorisation of international legal obligations which address the legislature of the state.

These two aspects provide us with a general and coherent overview of the concept of implementation of international law in the national legal order and paves the way for a more detailed discussion of the national legislature's role in this process under specific international legal regimes in Part II.

2 The relation between international law and national law

2.1 Introduction

Aside from the reference to the principle *pacta sunt servanda,* which was touched upon in section 1.1, the notion of implementation, which in section 1.2 we have defined as 'the act of putting into effect a norm of international law within the legal order of the state', could be approached from a more fundamental perspective. Such an approach raises the question why it is a matter of importance that state organs, among them the national legislature, engage in implementing measures in order to give effect to international legal norms to which a state is bound. It points to one of the classical topics in international legal discourse: the relation between international law and national law.

The purpose of this chapter is to further explore the notion of implementation of international law in the national legal order. To this end, it intends to formulate an answer to two separate, but related, questions: how must the relationship between international law and national law be understood and why do we need national implementing measures? The answers to these questions provide us with theoretical insights that are indispensable for explaining the legal aspects of implementation, which will be the object of analysis in Chapter 3 and in Part II.

In the present chapter, it is argued that implementing measures by states' legislative, executive and judicial organs serve as a connection between the international legal order and the national legal orders. Without such a connection, policies entrenched in international law have no chance of fulfilling their aspirations.

2.2 Understanding the relation between international and national law

The term 'connection' presupposes the existence of separate legal orders, a topic which has been a matter of controversy in academic literature for more than a century. The debate centers around the theoretical question whether the body of international law and the body of national law are part of the same, overarching legal order and whether, as a consequence, a norm of international law possesses the quality of law in the domestic legal system, and *vice versa*. Two theoretical approaches have been proposed to provide an answer to this question: dualism and monism.[74]

74 Also J. Crawford, *Brownlie's Principles of Public International Law* (8th edn OUP, Oxford 2012) 48-50.

According to the dualist position, the international legal order and the domestic legal orders must be viewed as distinct legal orders. They are often labelled 'self-contained', a qualification that refers to the premise that only rules that exist within that system are valid legal rules.[75] As a result of this divide, a rule of international law can never *a priori* become part of national law; it must be made so by the express or implied authority of the state.[76] Famous proponents of the dualist conception of the relation between international law and national law are the Italian Dionisio Anzilotti (1867-1950) and the German Heinrich Triepel (1868-1946). The former served as a judge on the PCIJ at the time it decided the case of *Certain German Interests in Polish Upper Silesia* (as was discussed in section 1.1.3).[77]

Both jurists have asserted that there are two fundamental differences between international law and national law.[78] First, in their view, both legal systems are based on different foundations. Departing from the statement that law is a 'product of the will', Triepel in his *Völkerrecht und Landesrecht* (1899) argued that while national law flows from the will of a particular state, the source of international law can be found in the common will of multiple or many states.[79] Anzilotti has made a similar argument, but locates the source of international law in the principle of *pacta sunt servanda*.[80]

75 G. Gaja, 'Dualism. A review' in: J. Nijman and A. Nollkaemper (eds), *New perspectives on the divide between national and international law* (OUP, Oxford 2007) 52-62, 52-53.

76 Lauterpacht, *General Works* (n 2) 216.

77 Gaja suggests that it may very well have been Anzilotti who wrote the famous quote 'from the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of states […]'. G. Gaja, 'Positivism and dualism in Dionisio Anzilotti' 3 *European Journal of International Law* (1992) 123-138, 137.

78 Also J.H.W. Verzijl, *International law in historical perspective*, vol I, *General subjects* (A.W. Sijthoff, Leiden 1968) 91. Some authors consider that the second distinguishing characteristic (different subject matter) also encompasses a third feature: a difference in legal subjects between the international and national legal orders. See, for example, Lauterpacht, *General Works* (n 2) 152-153, and H. Lauterpacht (ed), *Oppenheim's International law* (8th edn Longman, Greens & Co, London 1955) 37.

79 'Nur ein zu einer Willenseinheit durch Willenseinigung zusammengeflossener Gemeinwille mehrerer oder vieler Staaten kann die Quelle von Völkerrecht sein.' H.Triepel, *Völkerrecht und Landesrecht* (Unveränderter Nachdruck 1958 Verlag von C.L. Hirschfeld, Leipzig 1899) 30-32.

80 As Anzilotti put it, '[les normes internationales] obligent en vertu du principe *pacta sunt servanda* et ne peuvent pas être abrogées sinon suivant les modes établis par le droit international; [les normes internes], au contraire, obligent, en vertu de la règle qui impose d'obéir aux commandements du législateur et elles peuvent être abrogées suivant les modes établis par le droit public interne de la communauté dont il s'agit'. D. Anzilotti, *Cours de droit international*, vol I, *Introduction et théories générales* (traduction Française d'après la troisième édition Italienne, Paris 1929) 53. Also A. Wasilkowski, 'Monism and dualism at present' in: J. Makarczyk (ed), *Theory of international law at the threshold of the 21st century. Essays in honour of Krzysztof Skubiszewski* (Kluwer Law International, The Hague 1996) 323-336, 324-325.

Second, international law and national law regulate different subject matter. National law contains norms that apply to (horizontal) legal relations among individuals or (private) legal entities within a single state, or to (vertical) legal relations between individuals and the state.[81] International law, on the other hand, governs relations between states.[82] These legal bonds are characterised by equality of the subjects involved, since one state is not hierarchically subordinate to the other. Therefore, Triepel argued, international legal relations can be said to possess a certain private legal nature.[83] Closely related to this distinguishing feature of international law is Triepel's observation that individuals cannot be subjects of the international legal order, but only objects. It follows that, if individuals acquire rights or obligations, these are of strict domestic legal nature.[84]

As a result of these distinct features, international law does not qualify as law in the national legal order,[85] unless international law has been incorporated as part of national law by custom or statute.[86] Without such an act of incorporation, it would be impossible for national courts to apply international law in a dispute before it, just as it would be logically impossible for the national legislature to adopt domestic legislation which contains a reference to a treaty, or to speak of a conflict between an international norm and a national norm.[87]

Supporters of monism, on the other hand, hold the opinion that international law and national law are part of one, integrated, legal order.[88] In principle, therefore, international and national law are both automatically

81 Triepel, *Völkerrecht und Landesrecht* (n 79) 12-13.

82 Also Gaja, 'Dualism' (n 75) 54-56.

83 Triepel, *Völkerrecht und Landesrecht* (n 79) 18-19; Gaja, 'Positivism and dualism' (n 77) 134-135.

84 Triepel, *Völkerrecht und Landesrecht* (n 79) 19-20.

85 In Anzilotti's words, '[d]u principe que toute norme n'a de caractère juridique que dans l'ordre dont elle fait partie, dérive la séparation nette entre le droit international et le droit interne en ce qui concerne la caractère obligatoire de leurs normes respectives: les normes internationales n'ont d'efficacité que dans les rapports entre les sujets de l'ordre international ; les normes internes n'ont d'efficacité que dans l'ordre étatique auquel elles appartiennent.' Anzilotti, *Cours* (n 80) 55-56. Also Gaja, 'Positivism and dualism' (n 77) 137.

86 Lauterpacht, *General Works* (n 2) 153.

87 Gaja, 'Positivism and dualism' (n 77) 134-135. According to Anzilotti, '[i]l n'y a pas là conflit de normes, mais simplement diversité d'appréciation du même fait dans des ordres juridiques différents.' Anzilotti, *Cours* (n 80) 57 and 59.

88 'The monist assertion that international law and municipal law are part of one and the same legal system finds its origin, presumably, in the consideration that whenever such an interaction occurs in practice between international and domestic norms, it manifests itself, at the international or the national level, in terms of a simultaneous impact of international and domestic norms – or, more concretely, in terms of simultaneous impact, upon the parties in a given legal relationship, of international or national legal rights or obligations. The prima facie impression is thus one of coexistence of the two sets of norms (or the two sets of legal rights and obligations within a single normative context addressing itself directly to individuals as well as States'. Arangio-Ruiz, 'International law and interindividual law' (n 29) 16.

valid. Within that unitary legal order, national law and international law are connected by delegation: national law exists as a result of delegation by international law, or *vice versa*. Accordingly, there have been two branches of monism: monism which deems international law superior to national law, and monism which maintains that national law is of a higher rank than international law.[89] The former view has proved the most influential. It is based on the idea that the demarcation of a state's sovereignty *vis-à-vis* other states, and thus their mutual existence, is derived from international law.[90] This version of the monist standpoint has been articulated by the Austrian Hans Kelsen (1881-1973), who asserted that, even though both systems are part of one single overarching legal order, national law is subordinate to international law, as its validity is derived from international law.[91] International legal norms are often 'incomplete' norms which require elaboration within the national legal sphere. 'In this sense,' Kelsen argued, 'the international legal order delegates to the national legal orders the completion of its own norms'.[92]

He did not ignore the differences between national law and international law; these differences are, in his view, however, of a relative nature. In response to the dualist claim that international and national law are based on different foundations and, therefore, must be considered distinct legal orders, Kelsen acknowledged that international law flows from different sources than national law: while the primary methods of law-making in the international legal order are custom and treaty, national law is primarily a product of custom and legislation. Nevertheless, in his view, the difference in methods of law-making is not of a principal nature; nothing prevents states, for example, from creating by treaty international legislative organs that adopt binding norms similar to national legislation.[93] In addition to the 'sources of law', i.e. the procedures of law-making, Kelsen has made an attempt to pinpoint the source of validity of international law, or the 'basic norm' (*Grundnorm*) of the international legal order, which he described as a 'hypothesis of juristic thinking, the fundamental condition under which our juristic propositions are possible'.[94] Ultimately the basic norm (in a relative sense) of national legal orders, namely the principle of effectiveness[95], leads back to this basic norm of international law:

89 Anzilotti, *Cours* (n 80) 50-51.

90 Lauterpacht, *General Works* (n 2) 152.

91 H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (Verlag von J.B.C. Mohr, Tübingen 1920) 111-112.

92 H. Kelsen, *Principles of international law* (2nd edn revised and edited by Robert W. Tucker, Holt, Rinehart and Winston Inc., New York 1966) 305.

93 Ibid, 555-556.

94 Ibid, 559.

95 The principle of effectiveness is described as follows: 'An actually established authority is the legitimate government, the coercive order enacted by this government is the legal order, a valid legal order, and the community constituted by this order is a state in the sense of international law, insofar as this order is, by and large, effective.' Ibid, 561-562.

> 'It is this general principle of effectiveness, a positive norm of international law, which, applied to an individual national legal order, provides the basic norm of that national legal order. The basic norms of the different national legal orders are, in other words, themselves based on a general norm of the international legal order.'[96]

Thus, the unity of the international and national legal orders, so the argument goes, follows from the assumption that they go back the same basic norm, which he formulated as follows: states ought to behave as they have customarily behaved.[97]

Kelsen dismissed the argument that from the alleged difference in sources, one must infer a difference in subject matter that could be regulated by international or national law.[98] According to Kelsen, there is no fundamental difference between the subject matter regulated by international and national law; every matter that is, or can be, regulated by national law is open to regulation by international law as well.[99] While dualists have defended the thesis that international law is confined to the regulation of inter-state relations, Kelsen argued that the spheres of validity of international law are, in principle, unlimited.[100] As regards the legal subjects of the respective legal orders, Kelsen noted:

> 'There is no difference between international and national law with respect to the subjects of the obligations and rights established by the two legal orders. The subjects are in both cases individual human beings. But, whereas the national legal order determines directly the individuals who, by their behaviour, have to fulfil the obligations or may exercise the rights, the international legal order leaves to the national legal order the determination of the individuals whose behaviour forms the content of the international obligations and rights. The obligations and rights which the state has under international law are the obligations and rights which individuals have in their capacity as organs of the state; and these individuals are determined by national law, the law of the state. […] Again, the two legal orders differ only in degree and not in essence.'[101]

These are the lines of argumentation along which both dualists and monists, in their own manner, have attempted to explain the relation between international law and national law. They are relevant for the present study, since they help explain why states adopt implementing measures in order to give effect to their international legal obligations.

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96 Ibid, 562. As Alfred Rub puts it: 'Gehe man dagegen vom Völkerrechtsprimat aus, so könne die Völkerrechtsnorm, derzufolge ein Staat als entstanden gelte, wenn sich die Rechtsordnung, die ihn ausmache, effektiv durchsetze, als delegierendes Bindeglied zwischen Völkerrecht und den staatlichen Rechten betrachtet werden.' A. Rub, *Hans Kelsens Völkerrechtslehre. Versuch einer Würdigung* (Schweizer Studien zum internationalen Recht 93, Schulthess Polygraphischer Verlag, Zürich 1995) 422-423.

97 Kelsen, *Principles* (n 92) 564.

98 Kelsen, *Das Problem der Souveränität* (n 91) 123-124.

99 Kelsen, *Principles* (n 92) 554-555.

100 Ibid, 551-552.

101 Ibid. Also Kelsen, *Das Problem der Souveränität* (n 91) 124-130.

2.3 Monism and dualism in contemporary international law

The depiction of the doctrinal positions held by supporters of dualism and monism raises the question to what extent contemporary international law reflects their views. As will become clear, despite the emergence of some phenomena that have been associated with monism, international law as it stands today bears more resemblance with the dualist proposition that the international and national legal orders must be considered as distinct legal systems.[102] Wasilkowski points out that the differences between international law and national law, as advanced by Triepel in *Völkerrecht und Landesrecht*, are still accurate to a large extent when it comes to the sources and subjects of the respective legal orders. Only as regards the subject matters regulated by the law, Triepel's observations are outdated, since international law and national law nowadays regulate the same subject matter to a considerable extent.[103] Arangio-Ruiz correctly notes that 'it would be superficial, however, to infer, from such a concrete "piling-up" of international and national norms (or international and national rights or obligations) in regulating the matter, that the concurrent rules must belong to one and the same system'.[104] In other words, the increasing concurrence between international and national law, still flowing from different sources of law, does not necessarily provide support for the monist doctrine at the expense of dualism.

To what extent can Wasilkowski's and Arangio-Ruiz' statements be corroborated with evidence? As regards the sources of law, there is no indication that the sources of international law and national law respectively are converging. The treatment of domestic legislation by the PCIJ in 1926 in *Certain German Interests in Polish Upper Silesia* as 'mere facts' from the standpoint of international law, as was discussed in section 1.1.3, is still dominant and is a clear indication of a dualist stance; whereas domestic legislation may be 'law' in the domestic legal order, this cannot be said of its status in the international legal order.[105] Similarly, while treaty norms will be valid law in the international legal order, they do not *a priori* possess that quality in the national legal order. Of course, some national constitutional

102 Arangio-Ruiz, 'International law and interindividual law' (n 29) 17. Nevertheless, it would go too far to conclude from this that the monists were wrong and the dualists were right, for two reasons. First, as we have seen above, monism, at least in the version defended by Kelsen, does not deny that international and national law are two normative systems. According to the monist conception, however, they are unified in one legal order. Second, Kelsen does not deny the differences between international and national law. In his view, these differences are, however, not of a fundamental nature. In other words, the fact that international law *appears* different than national law, this does not suffice to falsify Kelsen's conception of the unity of international and national law.

103 Wasilkowski, 'Monism and dualism at present' (n 80) 326-328.

104 Arangio-Ruiz, 'International law and interindividual law' (n 29) 16-17.

105 *M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v Guinea)* (n 28) par. 120 ff . *Frontier Dispute (Benin v Niger)* (n 30) par. 28; *Frontier Dispute (Burkina Faso v Republic of Mali)* (n 30) par. 30.

systems do accept international law as law in the national legal order. But they do so because they are willing to, not because international law forces them to adhere to such a monist approach. Furthermore, an international legal perspective places international law above national law. With regard to treaties, for example, a state may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.[106] Neither may a state invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties, as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. If the authority of a representative to express the state's consent to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating states prior to his expressing such consent.[107] Outside the law of treaties and the law of international responsibility, the ICJ has confirmed the 'fundamental principle of international law that international law prevails over domestic law'.[108] The aforementioned examples clearly demonstrate that international law and national law are distinct.

On the other hand, the post-1945 world has witnessed new developments relating to the sources of international law. An important example can be found in the law-making activities of international organisations, such as the adoption by two third's majorities of technical standards by the International Civil Aviation Organisation (ICAO) that are binding upon member states, or the enactment of legislation in the framework of the EU that is directly applicable in the national legal orders of its member states.[109] Although it could be argued that the adoption of such legislation in the framework of these international organisations is based on treaties, a source reserved for the domain of international law, it indicates that the clear-cut distinction between the sources of the international and national legal orders has become more complicated.[110] Despite these relatively exceptional

106 VCLT art 27; Draft Declaration on Rights and Duties of States art 13. ILC, 'Report of the International Law Commission on the Work of its First Session' (12 April-9 June 1949) UN Doc A/CN.4/13 and Corr. 1-3, 286; Draft Articles on the Responsibility of States for Internationally Wrongful Acts (n 15) art 32. Also Crawford, *Brownlie's Principles of Public International Law* (n 74) 51-52.

107 VCLT artt 46 and 47. It becomes clear from the exceptions embedded in these provisions that international law is not entirely blind to national law. This may be explained by the fact that 'it is the same government – in a wide sense- that operates in the municipal society and as a member of the international society'. Gaja, 'Dualism' (n 75) 56.

108 *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 12, par. 57. Also Crawford, *Brownlie's Principles of Public International Law* (n 74) 51-52.

109 Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (Chicago Convention) artt. 37, 54, sub 1, 90, sub a; Treaty on the Functioning of the European Union (consolidated version) OJ 2012, C 326, p. 47, art 288.

110 Wasilkowski, 'Monism and dualism at present' (n 80) 326-328.

phenomena, nevertheless, it may be concluded that in the first decades of 21st century international and national law still largely flow from their own, exclusive sources.

In relation to the objects it is evident that there has been an impressive expansion of the objects that are regulated by international law. The advance of globalisation has altered the conception of a clear divide between a state's jurisdiction based on its sovereignty, and everything beyond; to an increasing extent international relations can be characterised by an interaction and structural interdependence between states.[111] As a result, international law is no longer limited to inter-state relations concerning topics such as territory and war and peace; it also governs legal relations and behaviour that until recently have been considered to fall within the exclusive field of competence of states and their legal orders: issues relating to health, economics, labour standards, protection of the environment and space exploration.[112]

Similarly, the development of international law has led to the inclusion, to some extent at least, of individuals and legal persons as having legal personality in the international legal order.[113] Individuals are thus no longer exclusive legal subjects of the domestic legal order.[114] Obvious examples include individuals who enjoy rights enshrined in international human rights instruments, in particular those instruments that expressly address natural persons as bearers of rights. Pursuant to articles 6, first paragraph, and 7, of the International Covenant on Civil and Political Rights (ICCPR), for instance, 'every human being has the inherent right to life' and 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[115] In addition, there is some evidence that business enterprises have a responsibility to respect human rights.[116] Moreover, since the Nuremberg and Tokyo tribunals, international criminal tribunals have exercised jurisdiction over, and acknowledged the individual criminal responsibility of, individuals for war crimes, genocide and crimes against humanity. Article 1 of the Statute of the International Criminal Court (ICC) provides that it 'shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern'.[117] In *Prosecutor v. Stanislav*

111 H. Keller, *Rezeption des Völkerrechts. Eine rechtsvergleichende Studie zur Praxis des U.S. Supreme Court, des Gerichtshofes der Europäischen Gemeinschaften und des schweizerischen Bundesgerichts in ausgewählten Bereichen* (Springer Verlag, Berlin 2003) 6.

112 Shaw, *International law* (n 1) 48.

113 Wasilkowski, 'Monism and dualism at present' (n 80) 328-329.

114 D. Shelton, 'Introduction' in: Idem (ed), *International law in domestic legal systems: Incorporation, transformation, and persuasion* (OUP, Oxford 2011) 1-22, 3.

115 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976 999 UNTS 171 (ICCPR).

116 Human Rights Council, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (21 March 2011) UN Doc A/HRC/17/31.

117 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 1.

Galić, the Appeals Chamber of the ICTY found that 'customary international law imposed individual criminal liability for violations of the prohibition of terror against the civilian population.'[118] Despite the emergence of individuals and businesses as legal subjects, however, the most prominent subjects of the international legal order still are states and, to a lesser extent, international organisations.

It may be concluded that, as Arangio-Ruiz puts it, 'frequently misunderstood or ignored but never seriously challenged, these fundamental tenets of dualism have been confirmed by the practice of States throughout the 20th century and up to the present time.'[119] While this statement may be correct in relation to the fundamental tenets of dualism, some indications can be found in support of the statement that international law has, in the words of Cassese, 'pierced the armour' of domestic legal systems.[120]

2.4 Why are national implementing measures indispensable?

The picture presented above begs the question what its implications are for our main topic: the implementation of international law by state organs. In the present section it is argued that, given the current state of the law, as discussed in the previous section, domestic implementing acts (whether legislative, executive or judicial) remain of great importance in the realisation of international law. This statement can be based on both international legal and national legal considerations, which are closely related.

Sometimes national implementing measures are an essential element in the realisation of international law; without those measures, international legal instruments will not be able to produce legal and practical effects in domestic jurisdictions. A norm of this category may be found in a treaty provision which contains the obligation to take a specified action, of a legislative or other nature, in the legal order of a state party with the object of implementing the treaty's provisions.[121] As an example, we could refer to article 8, second paragraph, FCTC, which provides that 'each Party shall adopt […] effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places'.[122] The formulation of the obligation almost certainly requires the adoption of measures that serve to attain the objective set out in the provision: to provide protection against tobacco smoke etc. In general, the refusal or failure of the state authorities to adopt the said

118 *Prosecutor v. Stanislav Galić* (n 33). Also *Prosecutor vs. Dario Kordić and Mario Čerkez* (n 33).
119 Arangio-Ruiz, 'International law and interindividual law' (n 29) 20.
120 Cassese, *International law* (n 1) 165-166.
121 Verzijl, *International law in historical perspective* (n 78) 92.
122 WHO Framework Convention on Tobacco Control (adopted 21 May 2003, entered into force 27 February 2005) 2302 UNTS 166 (FCTC) art 8.

measures will entail the international responsibility of that state which after all has violated the treaty norm. In this case, the adoption of measures is required by international law. In this regard, the traditional and dominant position is that only the final result counts; the means that have brought about the result are irrelevant from the perspective of international law.[123] Dualism, in this view, implies a clear division of labour between international law and national law: states are responsible for the implementation of the contracted international legal obligations within their domestic legal orders; they may choose the most appropriate means, taking into account the attribution of competence to the various organs on the national level. In other words: a state is free to let the executive, the legislative or the judiciary apply or implement the relevant rule of international law, as long as these national arrangements do not contravene the boundaries of the relevant international obligation.

In other areas of international law, policies laid down in international legal instruments have, as Verzijl has put it, an 'immediate legislative purpose' by which the contracting parties intend to lay down rules which lend themselves to direct and repeated application by their administrative organs and their courts and are therefore intended to be 'self-executing'.[124] As a consequence, national implementing measures may not be required for the attainment of the formulated policy objectives. An example of this category, borrowed from the law of armed conflict, can be found in article 15 of the 1977 Additional Protocol II to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflict, which stipulates that 'works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population'.[125] Indeed, many international human rights obligations fall within this category as well, as we have seen in the previous section, in which we signalled the emergence of individuals as legal subjects of the international legal order. Contrary to the implementing measures described above, international legal instruments with an immediate legislative purpose do not, from an international law point of view, require national implementing legislation, provided that the international legal instrument can be relied on in the national legal order.

123 Cassese, *International law* (n 1) 167; Shelton, 'Introduction' (n 114) 3; E. Denza, 'The relationship between international and national law' in: M. D. Evans (ed), *International law* (3rd edn OUP, Oxford 2010) 411-438, 415.

124 Verzijl, *International law in historical perspective* (n 78) 92.

125 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II) art 15.

Whether the latter condition is fulfilled, depends on the state's approach to international law. International law tolerates and accommodates the diversity in the way states receive international law in their respective domestic legal systems. Somewhat confusingly, these different ways have also been characterised with the use of the terms dualism and monism. The diversity of existing systems in place reflects the absence of a global or regional consensus on the relation between international law and domestic law *from a national point of view:* states have opened up their domestic jurisdictions to international law to a varying extent. It means that the reference to 'the' national legal order in the title of the present study, is not entirely accurate: it only exists as an ideal type. The various modalities of the reception of international law in the domestic legal order range from pure monism to pure dualism, and everything in between. In this broad spectre, three concepts are of crucial importance: validity, rank and direct effect.[126]

The criterion of validity concerns the question whether international law is valid in the domestic legal order, or, in other words, whether it qualifies as law (as opposed to 'fact'). States which adhere to a strong dualist view will deny validity to international legal norms in the domestic legal order, unless a domestic (legislative) act of transformation or incorporation has attributed the quality of law to the norm at hand.[127] As stated above, while an international legal instrument may be suitable for direct application within national jurisdictions, international law does not possess the quality of law in the national legal order *a priori*; whether it is the case depends on applicable national law.[128] National law may require an express act of incorporation. This is the case in the United Kingdom where a treaty cannot be applied by national courts unless it has been expressly incorporated by an act of Parliament.[129] This practice is commonly referred to as *ad hoc* statutory incorporation, as it requires every treaty to be expressly

126 National constitutional provisions or doctrines relating to the reception of international law may, and often do, distinguish between the formal sources of international law, to which separate regimes may apply. Also Crawford, *Brownlie's Principles of Public International Law* (n 74) 55-59.

127 Keller, *Rezeption des Völkerrechts* (n 111) 7; Lauterpacht, *Oppenheim's International Law* (n 78) 37.

128 Keller, *Rezeption des Völkerrechts* (n 111) 7. This is a crucial difference between European law and 'other' forms of international law.

129 Lauterpacht, *General Works* (n 2)158-161. In the United Kingdom the conclusion of treaties is a prerogative of the executive power. The requirement that treaties must be expressly incorporated before they can be applied domestically thus ensures that the executive cannot conclude treaties that contravene pieces of legislation adopted by parliament. An exception to this general rule consists of treaties concluded by the institutions of the European Union. They are directly applicable in the legal order of the United Kingdom as a matter of European law. S. Neff, 'United Kingdom' in: D. Shelton (ed), *International law in domestic legal systems: Incorporation, transformation, and persuasion* (OUP, Oxford 2011) 620-630, 622. Also Crawford, *Brownlie's Principles of Public International Law* (n 74) 63-65.

and separately incorporated in the domestic legal order.[130] Usually this act of incorporation states that it gives effect to a particular treaty, the text of which is annexed to the act. After its incorporation, the provisions of the implementing act, not the treaty provisions itself, will be applied.[131] In contrast to treaties, customary international law is automatically incorporated into British law.[132] In states that maintain a monist approach to the reception of international law in the domestic legal order, on the contrary, a treaty itself can be considered to have the quality of law. The Supreme Court of the Netherlands, for instance, has accepted the validity of binding international treaties in the Dutch domestic legal order.[133] The argument advanced by the Court provides for the incorporation of all present and future binding international legal obligations and, therefore, is an example of what is usually termed 'automatic standing incorporation'. A similar (monist) stance is implied in article 25, first sentence, of the German Basic law, which provides that 'the general rules of international law shall be integral part of federal law'.[134] In accordance with the case law of the Federal Constitutional Court, this sentence must be understood as to refer to customary international law.[135]

'Rank' refers to the place international law occupies in the domestic hierarchy of norms, i.e. whether it is superior or inferior to norms of domestic origin. Other than one might expect, dualist jurisdictions do not necessarily express a preference for the prevalence of international law over national law (or *vice versa*); this is for the national state to decide.[136] In the United Kingdom, for example, the statutory act by which the treaty has been incorporated has the same status as any other statutory act, but will prevail over prior legislation on the basis of the principle *lex posterior derogat legi priori*.[137] In the Netherlands primacy is granted to those provisions of treaties that have the capacity to 'bind any person', a phrase which refers to

130 Dixon uses the term 'transformation' for the express domestic (legislative) act which draws a particular treaty into the body of national law. In his *Textbook on international law* the term 'incorporation' is reserved for what has been labelled 'automatic standing incorporation' above. M. Dixon, *Textbook on international law* (7th edn OUP, Oxford 2013) 98-100.

131 Neff, 'United Kingdom' (n 129) 622-623.

132 Ibid, 626-628.

133 C.W. van der Pot, *Handboek van het Nederlandse Staatsrecht* (16th edn Kluwer; Deventer 2014) 712.

134 Basic Law for the Federal Republic of Germany (n 10) art 25, first sentence.

135 H.-P. Folz, 'Germany' in: D. Shelton (ed), *International law in domestic legal systems: Incorporation, transformation, and persuasion* (OUP, Oxford 2011) 240-248, 240 and 244-245.

136 Arangio-Ruiz, 'International law and interindividual law' (n 29) 19; Gaja, 'Dualism' (n 75) 61-62.

137 S Neff, 'United Kingdom' (n 129) 629. Also Crawford, *Brownlie's Principles of Public International Law* (n 74) 64.

the self-executing character or content of the provision.[138] These provisions must be considered superior to statutory law and even to the constitution itself. In Germany, treaties have the same rank as ordinary statutes, but customary international law ranks higher than statutes.[139] Pursuant to article 55 of the French Constitution, treaty provisions prevail over French statutory acts.[140]

International law possesses 'direct effect' when individuals can invoke a norm of international law before national courts.[141] Again, it is the competent national authority, applying standards of national origin, which decides whether national implementing measures will be required or whether the international instrument may be directly applied. In a dualist state such as the United Kingdom, this problem may not exist; as we have seen above, the treaty itself is not valid in the domestic legal order; it thus cannot be invoked by individuals before national courts.[142] In order to determine whether a treaty provision may have direct effect, judges in the Netherlands will again have to investigate whether the particular provision could be considered to 'bind any person'. If answered in the affirmative, this will thus have a double effect: it may not only be invoked before national courts by individuals, but also be of superior rank compared to legislation of domestic origin, as stated in articles 93 and 94 of the Dutch Constitution. Under Dutch law, customary international law cannot possess direct effect.[143] In France, similar conditions relating to the substance of the norm have to be fulfilled in order to be relied upon before by individuals national courts.[144]

The foregoing could be summarised as follows. International legal obligations will often give rise to the adoption of measures on the national level. Whether this is the case, first and foremost depends on the substance of the international legal obligation. While some international obligations may impose a duty on state parties to adopt domestic measures in order to achieve a specified policy aim, other norms may be interpreted as having 'immediate legislative effect'. The former will often require the adoption of an *act of implementation*. Second, the persisting dominance of dualism has enabled states to develop and maintain various ways to receive

138 Constitution of the Kingdom of the Netherlands 2008 (Ministry of the Interior and Kingdom Relations, Constitutional Affairs and Legislation Division 2008) art 94 <https://www.government.nl/binaries/government/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008/the-constitution-of-the-kingdom-of-the-netherlands-2008.pdf> (accessed 29 March 2018); Hoge Raad (Supreme Court) 30 May 1986, NJ 1986, 688 (Spoorwegstaking).

139 Basic Law for the Federal Republic of Germany (n 10) art 25, second sentence; Folz, 'Germany' (n 135) 245.

140 Deccaux, E., 'France' in: D. Shelton (ed), *International law in domestic legal systems: Incorporation, transformation, and persuasion* (OUP, Oxford 2011) 207-239, 216.

141 Keller, *Rezeption des Völkerrechts* (n 111) 11-16.

142 Crawford, *Brownlie's Principles of Public International Law* (n 74) 64.

143 Van der Pot, *Handboek van het Nederlandse Staatsrecht* (n 133) 716.

144 Deccaux, 'France' (n 140) 228-230.

international law in their national legal orders. As a consequence, an *act of incorporation* may be required before the international instrument could be applied directly.

Acts of implementation and acts of incorporation differ in at least two respects. First, whereas implementing acts may be required to elaborate or complement an international legal norm binding upon the state in order to ensure the realisation of the policy aims (usually defined in the international instrument), acts of incorporation do not constitute such elaboration. Instead of elaborating or complementing international legal obligations, they serve the sole purpose of attributing the quality of law to existing provisions of international origin in the domestic legal order. Second, the legal obligation to adopt an implementing act solely originates from an international legal instrument. An act of incorporation, by contrast, is primarily required by the national constitutional law of a state that does not accept the validity of international law in the domestic legal order without a domestic (legislative) act to that effect. Thus acts of implementation and acts of incorporation can be clearly distinguished from a theoretical point of view. From a practical point of view, however, it is perfectly conceivable that a national piece of legislation performs both an international legal instrument's *implementation* and *incorporation*; in the end, much depends on each national legal order's specific features.

2.5 Conclusion

If we return to the question that appears in the title of section 2.4, the foregoing has made clear that the need for implementing measures in a broad sense (thus also encompassing acts of incorporation) by state organs can be explained partly by reference to international law, and partly by reference to national law. First, the current state of international law to a large extent presumes the existence of a divide between international and national law. Despite the appearance of 'monist' elements in contemporary international law, it still heavily relies upon state organs for the fulfilment of its policy objectives. This dependence comes with a significant freedom in the implementation of international law in the national legal order. Second, states can make arrangements for the reception of international law in their domestic jurisdictions as they see fit. Some states do not accept the validity of international law in the domestic legal order, unless their authorities have adopted an act of incorporation to that effect. Therefore, incorporation is indispensable as it may be the only way for international law to become law within the national legal order. Either way, national measures aimed at the implementation or incorporation of international law remain of utmost importance for the realisation of its objectives.

3 Sources of obligations to adopt implementing legislation

3.1 Introduction

In the previous chapter we clarified the relation between the international legal order and domestic legal systems in abstract terms. Moreover, we established that the motives for the adoption of national implementing measures in a broad sense may find its origins in international law and national law. The present chapter provides an answer to the question which international legal norms could possibly give rise to the adoption of implementing measures by the national legislature. Its aim is to complete the general discussion of the concept of international law's implementation in the national legal order.

The present chapter focuses on implementing measures that involve action by the national legislature; implementing measures taken by state organs attributed with powers other than legislative, such as the executive or judicial branch of government, will fall beyond its scope. It is important to note that it is often difficult to conclude on the basis of an international legal instrument *alone* whether implementing measures are required in a specific national legal order and, if so, which state organ comes into play. In the previous chapter we have already seen that much depends on each national legal order's specific features, in particular its written or unwritten constitutional law. This means that the overview provided in the present chapter cannot serve as a sufficient justification for the conclusion that *a particular state* is under the obligation to adopt national implementing legislation in order to observe the international legal instrument at hand or, conversely, that the adopted legislative measures should be limited to matters expressly addressed in the international legal instrument.[145] In sum, even though this chapter primarily concerns national implementing measures of a legislative nature, national implementing practice will often be less clear-cut than the international legal instrument at hand suggests.

Another remark concerns the choice of sources in this chapter. The international legal provisions will be discussed separately on the basis of the formal source of international law from which the obligation flows: treaties, customary law and binding decisions of international organisations. There

145 For instance, section 4 (5) of the Human Rights Act 1998 specifies which judicial authorities of the United Kingdom can make a so-called 'declaration of incompatibility' if they are satisfied that British subordinate legislation is incompatible with the rights embedded in the ECHR. The need for such specification cannot be derived from the text of the ECHR itself; this national implementing provision must therefore be considered the product of national (legal) considerations. Human Rights Act 1998 <https://www.legislation.gov.uk/ukpga/1998/42/contents> (accessed 29 March 2018).

is no fundamental reason why other sources of international law, most notably soft law instruments, should be excluded from the present study. Nonetheless, for reasons of space, this chapter is limited to the sources of international law which possess an unquestionably binding character, thus excluding soft law instruments. Furthermore, the sources which, due to their function, are unlikely to contain legal obligations to adopt national implementing measures from the outset, such as general principles of law, have been left out of the analysis.[146] As a result, this chapter is limited to the binding sources of international law which, as appears from international practice, provide for the lion's share of international legal obligations to adopt national implementing legislation.[147]

3.2 Treaties

3.2.1 Treaties as a source of law

Article 38 of the Statute of the ICJ, which contains the most authoritative enumeration of the sources of law of the international legal order, refers to treaties as 'international conventions, whether general or particular, establishing rules expressly recognised by […] states'.[148] Pursuant to article 2, first paragraph, sub a, VCLT, a treaty is an 'international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.[149] This definition is believed to be part of customary law.[150] Nowadays it is no longer only states which conclude treaties; also international organisations can be party to treaties, either with states or with other international organisations.[151] Treaties may be considered the most important source of international law, since they reflect the express consent of the parties to the treaty.[152]

146 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (ICJ Statute) art 38, first paragraph, sub c.

147 Article 38, first paragraph, sub d, of the ICJ Statute refers to 'judicial decisions' as a '*subsidiary* means for the determination of the rules of law'. In other words, case-law can be relied on as evidence for the existence of law; it cannot, however, be considered to constitute 'law' similar to treaty law, customary law or binding decisions of international organisations. In the present section, therefore, case-law will not be discussed separately, but will be referred to subsidiarily in the context of the discussion of treaty law, customary law and binding decisions of international organisations.

148 ICJ Statute art 38, first paragraph.

149 VCLT art 2, first paragraph, sub a.

150 Aust, A., *Modern treaty law and practice* (CUP, Cambridge 2000) 14.

151 The applicable law of treaties is codified in the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (VCLTIO) (adopted 21 March 1986, not yet in force) UN Doc A/CONF.129/15.

152 Shaw, *International law* (n 1) 94.

As the PCIJ put it in *Certain German interests in Polish Upper Silesia*, 'a treaty only creates law as between the States which are parties to it'.[153] In this respect, treaties that have been concluded between states may be considered 'analogous in nature to contracts between private individuals'.[154] Similar to agreements between private individuals, a treaty which has come into force is binding upon the parties and must be performed by them in good faith: *pacta sunt servanda*.[155]

A common division distinguishes law-making treaties from other treaties. Law-making treaties differ from other treaties because the former contain rules that are suitable for general and repeated application.[156] They resemble the concept of legislation as it is commonly understood in the national legal domain.[157] In the previous chapter we have already described this category as having, as Verzijl put it, 'immediate legislative purpose'.[158] Treaties which lack this law-making nature often possess a content of a more contractual nature and could therefore be referred to as 'treaty-contracts'.[159] Law-making treaties tend to have a large number of parties, whereas treaty-contracts usually have only a small number of parties.[160] Examples of law-making treaties are the VCLT, which contains a general legal regime applicable to the conclusion, validity and interpretation of treaties, and the four 1949 Geneva Conventions which regulate the conduct of hostilities during armed conflict (*ius in bello*).[161]

For the present study, law-making treaties are of lesser importance than 'treaty-contracts'. The 'legislative' nature of the former makes it suitable for general and repeated application.[162] Their norms can be applied directly; it does not require implementation of its rules through legislation on the domestic level.[163] On the other hand, 'treaty contracts' do not always contain obligations for the state parties, either expressly of implicitly, to engage in

153 *Case concerning Certain German Interests in Polish Upper Silesia* (n 28) 29.
154 Lauterpacht, *General Works* (n 2) 58.
155 VCLT art 26 and VCLTIO art 26.
156 Also Crawford, *Brownlie's Principles of Public International Law* (n 74) 95.
157 Also Lauterpacht, *General Works* (n 2) 59.
158 Verzijl, *International law in historical perspective* (n 78) 92.
159 Shaw, *International law* (n 1) 94.
160 Ibid, 95. The number of state parties is, however, not a distinctive element. Lauterpacht distinguishes between law-making treaties which contain *particular* international law due to a small number of parties, and law-making treaties which contain *general* international law due to a large number of parties. Lauterpacht, *Oppenheim's International Law* (n 78) 28.
161 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.
162 Section 2.4.
163 Except for, as was discussed in section 2.4, acts of incorporation in dualist states.

implementing measures in order to comply with the contracted obligations. A case in point may be an alliance treaty such as the North Atlantic Treaty, which stipulates that 'the Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened'.[164] In other words, a treaty may not require implementing measures if it does not intend to regulate subject matter *within* the jurisdiction of a state.[165] In short, not all treaties require implementation on the domestic level. Even less require implementation by legislative means. Whether it does, depends on its text and the substance of the norms at hand. These norms, to the extent that they are part of an international convention or treaty, will be the subject of the following section.

3.2.2 Treaties as a source of obligation to adopt implementing measures

Treaties include, more often than any other source of international law, obligations to adopt implementing legislation on the domestic level. They come in various shapes and can only be discussed indicatively here. By far the largest category of norms which is of relevance to the present study consists of treaty provisions that require or suggest the adoption of domestic legislation or other measures in order to achieve an expressly defined policy aim. A few examples may suffice to prove this point:

> 'States Parties shall enact laws and adopt strategies to fight corruption through the establishment of independent anti-corruption institutions';[166]

> 'Each Contracting State agrees to adopt all practicable measures, through the issuance of special regulations or otherwise, to facilitate and expedite waterborne transportation between the territories of the Contracting States, and to prevent unnecessary delays to vessels, passengers, crews, cargo and baggage in the administration of the laws relating to immigration, public health, customs, and other provisions relative to arrivals and departures of vessels';[167]

> 'Each Party shall undertake measures to prevent and control activities related to land and/ or forest fires that may lead to transboundary haze pollution, which include […] [d]eveloping and implementing legislative and other regulatory measures, as well as programmes and strategies to promote zero burning policy to deal with land and/ or forest fires resulting in transboundary haze pollution';[168]

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164 North Atlantic Treaty (adopted 4 April 1949, entered into force 24 August 1949) 34 UNTS 243, art 4.

165 A. Aust, *Modern treaty law and practice* (3rd edn CUP, Cambridge 2013) 181.

166 African Charter on Values and Principles of Public Service and Administration (adopted 31 January 2011, entered into force 23 July 2016) art. 12, first paragraph. <https://au.int/en/treaties> (accessed 29 March 2018).

167 Inter-American Convention on Facilitation of International Waterborne Transportation (adopted 7 June 1963, entered into force 11 January 1981) 1438 UNTS 169 (Convention of Mar del Plata) art 1.

168 ASEAN Agreement on Transboundary Haze Pollution (adopted 10 June 2002, entered into force 25 November 2003) art 9, sub a. <http://agreement.asean.org> (accessed 29 March 2018).

> 'The Parties shall adopt where appropriate legislation, regulations or administrative measures to restrict the availability (including provisions to control movement, possession, importation, distribution and sale) as well as the use in sport of banned doping agents and doping methods and in particular anabolic steroids';[169]

> 'Each Party shall adopt and implement […] effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places';[170]

> 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.[171]

The treaty provisions referred to above expressly refer to the adoption of 'legislation', 'regulations', 'laws' etc. However, it must be kept in mind that many international conventions resort to more broader terms, such as 'measures'. For instance, article VI, first paragraph, of the African Convention on the Conservation of Nature and Natural Resources, provides:

> 'The Parties shall take effective measures to prevent land degradation, and to that effect shall develop long-term integrated strategies for the conservation and sustainable management of land resources, including soil, vegetation and related hydrological processes'.[172]

In addition to treaty provisions that contain an express obligation to adopt implementing measures, either through legislation or other means, international conventions may impose obligations to adopt implementing measures in an implicit manner as well. In this context we could refer to the so-called positive obligations under the ECHR. Pursuant to article 1 ECHR, 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.[173] While this general provision may be seen as the source of the positive obligations arising out of the ECHR, it has only legal value in a particular case when it is read in conjunction with one or more of the document's substantive rights. For instance, the ECtHR has held that the obligation to protect the right to life, laid down in article 2 ECHR, requires 'by implication that there should be some form of effective official investigation when individ-

169 Anti-Doping Convention (adopted 16 November 1989, entered into force 1 March 1990) ETS no 135, art 4, first paragraph.

170 FCTC art 8.

171 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (CESCR) art 2, first paragraph.

172 African Convention on the Conservation of Nature and Natural Resources (adopted 11 July 2003) art VI, first paragraph. <https://au.int/en/treaties> (accessed 29 March 2018).

173 Similar provisions can be found in article 2 ICCPR, and article 2 of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San José, Costa Rica).

uals have been killed as a result of the use of force by, *inter alios*, agents of the state'.[174] In a number of cases, the ECtHR has established, either implicitly or expressly, the existence of a positive obligation to enact national legislation in order to comply with the obligation set forth in article 1 ECHR. This particular regime will be further discussed in Chapter 4.

The use of both the broad notion of 'measures' and the more specific 'domestic legislation' or similar terms, raises the question how the preference for one approach could be justified. The Committee on Economic, Social and Cultural Rights (CESCR), the treaty body that has been established to monitor the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), maintains the view that in order to fulfil the above-cited obligation embodied in article 2, first paragraph, ICESCR, the adoption of legislation is often 'highly desirable' and in some cases even 'indispensable', for instance with regard to discrimination.[175] This statement is largely based on the presumption that it 'may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures'.[176] Although this may be true, the argument does not explain why the requirement of 'legislative measures' is expressly included in the treaty provision; the drafters could have considered that it is for the state parties to choose the necessary means, legislative or other, to achieve the aims laid down in the ICESCR.

The view expressed in relation to article 8, second paragraph, FCTC, cited above, may be more convincing. According to the 'guiding principles' for the implementation of this provision, legislation has a distinct and significant advantage compared to non-legislative implementing measures:

> 'Legislation is necessary to protect people from exposure to tobacco smoke. Voluntary smoke free policies have repeatedly been shown to be ineffective and do not provide adequate protection. In order to be effective, legislation should be simple, clear and enforceable.'[177]

In other words, the requirement to adopt *legislation* in order to provide the necessary protection against tobacco smoke is justified by the argument that this objective cannot be achieved through the adoption of *non-mandatory* smoke free policies. Hence, in this particular context, the means and the aim of implementation seem to merge; the adoption of legislation has become part and parcel of compliance with the treaty provision.

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174 *McCann and others v the United Kingdom* (App no 18984/91) (1995) Series A no 324, par. 161.

175 CESCR, 'General Comment no. 3: the nature of states parties' obligations (art. 2, Par.1, of the Covenant)' (14 December 1990) UN Doc E/1991/3, par.3.

176 Ibid.

177 WHO, *WHO Framework Convention on Tobacco Control. Guidelines for implementation* (World Health Organisation, Geneva 2013) 21 <http://apps.who.int/iris/bitstream/10665/80510/1/9789241505185_eng.pdf> (accessed 29 March 2018).

The opposite view was taken by the drafters of the Anti-Doping Convention, which was already referred to above. The explanatory report to the Convention does not contain any indication why article 4, first paragraph, expressly refers to 'legislation' and 'regulations'. On the contrary, it emphasises the primary role for states to make an assessment of the nature of the required measures:

> 'Because of the wide variety of constitutional arrangements within the states which have participated in the elaboration of the Convention […] the Convention tries to avoid setting out a rigid model for legislation or implementation. The Convention recognizes that many actors will be involved and that Parties will use the structures and bodies which are most appropriate to it'.[178]

Nevertheless, there are treaties in the context of which the adoption of legislation, as opposed to the adoption of other measures, may be considered important for the fulfilment of the applicable treaty obligation. These treaties may be found in the field of criminal law, or closely related thereto. In contrast to the treaty provisions discussed above, in the field of criminal law and international humanitarian law, states have accepted more narrowly circumscribed obligations that will often address national legislatures. Examples include treaty provisions that serve to penalise certain conduct. Article 146 of the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War stipulates that:

> '[t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article'.[179]

The so-called 'grave breaches' that is referred to include, among others, the following acts against a person who is entitled to protection in accordance with the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, or compelling a protected person to serve in the forces of a hostile Power.[180] The objective of article 146, first paragraph, of the Convention is clear: the severity of the acts enumerated in article 147 makes it imperative to prevent this type of conduct. This must be done by the enactment of domestic legislation that provides for the perpetrator's punishment.

178 Council of Europe, 'Explanatory report to the Anti-Doping Convention', par. 33 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/135> (accessed 29 March 2018).

179 Geneva Convention Relative to the Protection of Civilian Persons in Time of War art 146, first paragraph.

180 Ibid, art 147.

As was stated by the ICTY, the absence of such legislation could be inconsistent with the general obligation, codified in article 1 of the Convention, to 'undertake to respect and to ensure respect for the present Convention in all circumstances'.[181]

It is interesting that during the drafting of the Geneva Conventions the International Committee of the Red Cross (ICRC) had expressed the wish to draw up a law that would serve as a model for the domestic laws that state parties would have to enact in order to fulfil the obligation laid down in article 146. This would help to achieve some uniformity in the penalisation of grave breaches of the Convention. However, during the discussions it became clear that the adoption of penal law was considered to be too closely tied to a state's sovereignty; in the commentary to the Fourth Geneva Convention, which was drafted under the supervision of the ICRC, it is noted that 'it is above all in the definition of breaches that uniformity must be sought; the fixing of the sentence and the procedure to be followed are thought to be matters for municipal law in each country'.[182]

The obligation to criminalise certain acts in domestic legislation and to provide for appropriate penalties can be found in other international legal instruments as well. Article 4 ICSFT, for instance, provides:

> 'Each State Party shall adopt such measures as may be necessary:
> (a) To establish as criminal offences under its domestic law the offences set forth in article 2;
> (b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences […].'[183]

Many of the conventions that have been adopted in order to combat acts of terrorism also contain provisions that serve to establish jurisdiction over certain terrorist crimes. One example can be found in article 7, first paragraph, ICSFT, which provides:

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181 *Prosecutor v Zejnil Delalic, Zdravko Mucic (aka "Pavo"), Hazim Delic and Esad Landž (aka "Zenga")* (Appeals Chamber judgment) IT-96-21-A (20 February 2001) par. 167.

182 J. Pictet, (ed), *Commentary on the Geneva Conventions of 12 August 1949,* vol IV, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, Geneva 1958) 591.

183 International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 (ICSFT) art 4. Other examples with (almost) identical provisions can be found in article 4 of the International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256; article 2 of the International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205; article 2, second paragraph, of Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167; article 5 of the International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 13 April 2005, entered into force 7 July 2007) 2445 UNTS 89.

> '[e]ach State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when [the] offence is committed in the territory of that State […].'[184]

In its *Suppressing the Financing of Terrorism: a Handbook for Legislative Drafting*, the International Monetary Fund (IMF) has provided some guidance as to how the provisions of the ICSFT should be implemented.[185] Although the choice for implementation through legislative means seems to be presupposed in the document, the handbook recommends that states should make an assessment whether elements of the convention could be implemented without resort to legislation. Whether this is the case, it is stated, depends on the monist or dualist characteristics of the legal system involved; the handbook suggests that domestic implementing legislation may not be required in countries where ratified international treaties have the force of law.[186]

In the same vein, in the *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto*, it is argued that the implementation of the United Nations Convention against Transnational Organised Crime (CTOC) may vary from state to state: whereas in 'monist' states ratification and subsequently official publication may suffice for the fulfilment of the Convention's provisions, in 'dualist' states the enactment of domestic implementing legislation would be required.[187] Although this may be evident on an abstract level, as we have discussed in the previous chapter, it does not explain why the CTOC contains an obligation to adopt 'such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally' the participation in an organised criminal group (article 5, first paragraph).[188] Again, the reference to 'legislation' in the treaty text

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184 ICSFT art 7, first paragraph, sub a. Other examples with (almost) identical provisions can be found in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents art 3; International Convention for the Suppression of Acts of Nuclear Terrorism art 9, first paragraph; International Convention for the Suppression of Terrorist Bombings art 6, first paragraph; International Convention against the Taking of Hostages art 5, first paragraph.

185 International Monetary Fund, *Suppressing the Financing of Terrorism. A handbook for legislative drafting* (International Monetary Fund, Washington 2003) <https://www.imf.org/external/pubs/nft/2003/SFTH/pdf/SFTH.pdf> (accessed 29 March 2018).

186 Ibid, 39-40.

187 UNGA 'Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum, Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto' (3 November 2000) UN Doc A/55/383/Add1, 6.

188 Furthermore, article 34, first paragraph, of the Convention, stipulates that '[e]ach State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention'.

seems to be the consequence of the drafters' estimation that the treaty could only be successfully complied with after the enactment of domestic legislation. It cannot, however, be unambiguously verified on the basis of the *travaux préparatoires* of the CTOC.[189]

Perhaps we should not attribute too much weight to the reference to domestic 'legislation' as a method of implementation of a treaty. Its inclusion in the text of the treaty may be inspired by an assessment made by the drafters that states cannot successfully implement the treaty provisions in their domestic legal orders with administrative measures alone; the adoption of legislation is considered inevitable. Similarly, international conventions pertaining to criminal law will often require the adoption of domestic legislation, since the drafters may realise that the entrenchment of the *nulla poena sine lege* and *nullum crimen sine lege* principles will render the implementation of the convention impossible without the enactment of legislation. Only in legal orders that possess strong monist features, the treaty itself may satisfy the condition of legality. In other words, there is little evidence that the specific obligation to adopt legislation, in contrast to other implementing measures, is considered to be an important aspect of the more general obligation to adopt implementing measures; the attainment of a treaty's policy objectives remains the primary concern.

3.3 Customary law

3.3.1 Custom as a source of law

Article 38, first paragraph, of the Statute of the ICJ, refers to customary international law as 'international custom, as evidence of a general practice accepted as law'.[190] Customary law is an important source of international law, even though some argue its value has diminished considerably during the past decades.[191] As can be derived from article 38 of the Statute of the ICJ, two conditions have to be fulfilled for a norm to acquire customary

189 As appears from the history of the drafting process of the Convention, the reference to 'legislative and other measures', which eventually has become part of article 5, first paragraph, cited above, was inserted in the final stage of the negotiation process, probably for reasons of consistency. See UNGA 'Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on its Tenth Session, held in Vienna from 17 to 28 July 2000 (11 September 2000) UN Doc A/AC.254/34, par.14. Early proposals for provisions that are similar to article 5, first paragraph, such as the obligation to criminalise corruption (article 8, first paragraph), expressly made reference to 'legislative and other measures'. This formulation has not been disputed, however. UN Office on Drugs and Crime, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organised Crime and the Protocols thereto* (United Nations, New York 2006) 75-86.

190 ICJ Statute art 38, first paragraph, sub b.

191 Shaw, *International law* (n 1) 73-74; Cassese, *International law* (n 1) 165-166.

status.[192] These two conditions are often called the 'objective' and 'subjective' (or: 'psychological') elements. The objective element consists of a general practice adhered to by states, whereas the subjective element refers to the conviction of states that the practice is required by law: *opinio iuris sive necessitatis*.[193] While at first sight the distinction between state practice and *opinio iuris* has been consistently upheld by the ICJ, a closer look raises various questions. According to some authors, the distinction between the objective and subjective element is difficult to maintain as we can only learn about the 'conviction' of states (*opinio iuris)* through their actions.[194] In a number of cases the ICJ has indeed derived the existence of *opinio iuris* from a general practice.[195]

As regards the objective element, the state practice will have to meet certain criteria in order to be able to contribute to the emergence of a new rule of customary international law. In the *Asylum Case,* the ICJ stated that 'a customary rule must be in accordance with a constant and uniform usage practiced by the State in question'.[196] This criterion was further specified *North Sea Continental Shelf* in 1969, when it held that 'state practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked'.[197] This threshold was somewhat lowered in *Military and Paramilitary Activities in and against Nicaragua*, when the ICJ considered that:

> '[…] for a rule to be established as customary, the corresponding practice must [not] be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.'[198]

192 As the ICJ put it: 'It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states […]'. *Case concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Judgment) [1985] ICJ Rep 13, par. 27. Also *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, par. 64.

193 C. Dahlman, 'The function of *opinio iuris* in customary international law' 81 *Nordic Journal of International Law* 3 (2012) 327-339, 329-330.

194 For an overview of this debate, see J. Kammerhofer, 'Uncertainty in the formal sources of international law: Customary international law and some of its problems' 15 *European Journal of International Law* 3 (2004) 523-553, 525-532. Also M. Byers, *Custom, power and the power of rules: International relations and customary international law* (CUP, Cambridge 1999) 136-141.

195 Crawford, *Brownlie's Principles of Public International Law* (n 74) 8.

196 *Asylum Case (Colombia v Peru)* (Judgment) [1950] ICJ Rep 266, p. 14.

197 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgment) [1969] ICJ Rep 3, par. 74.

198 *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, par. 186.

Another issue concerns the actors involved. What forms of state behaviour could possibly amount to 'state practice'? As a general rule, the conduct of all organs of officials competent to act on behalf of the state on the international plane could be relevant for the emergence of customary international law.[199] Arguably, the rules of the law of international responsibility relating to the attribution of conduct to states, as was discussed in Chapter 1, may provide some guidance for the determination whether the organ's conduct amounts to state practice. The ICTY has noted that for the development of customary international law pertaining to armed conflict, state practice should primarily be sought in such elements as official pronouncements of states, military manuals and judicial decisions.[200] The ICJ has accepted administrative acts or attitudes, acts of the judiciary and treaties as examples of state practice. Furthermore, it may also include national legislative acts.[201]

The subjective element, or *opinio iuris*, will be fulfilled if states behave in conformity with the rule because they believe the law requires them to do so. This element thus distinguishes customary law from mere usages or habits. In *North Sea Continental Shelf*, the ICJ held:

> 'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.'[202]

It thus becomes apparent that the concept of *opinio iuris* contains some problematic aspects, as it *presupposes* the existence of a norm of (customary) international law. In absence of such a norm, how could states hold the

199 J. Wouters, 'Bronnen van het internationaal recht' in: N. Horbach, R. Lefeber and O. Ribbelink (eds), *Handboek Internationaal recht.* (TMC Asser Press, The Hague 2007) 81-122, 86; P. Daillier, M. Forteau and A. Pellet, *Droit international public* (8th edn LGDJ, Paris 2009) 355-356. Brownlie mentions 'diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decision and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly' as possibly relevant sources. I. Brownlie, *Principles of public international law* (6th edn OUP, Oxford 2003) 6.

200 *Prosecutor v. Duško Tadić aka 'Dule'* (Decision on the defence motion for interlocutory appeal on jurisdiction) IT-94-1 (2 October 1995) par. 99.

201 A. Pellet, 'Article 38' in: A. Zimmermann et al. (eds), *The Statute of the International Court of Justice. A commentary* (2nd edn OUP, Oxford 2012) 731-870, 815-816. Also Shaw, *International law* (n 1) 82.

202 *North Sea Continental Shelf Cases* (n 197) par. 77.

opinion that international law requires them to behave as they do?[203] Be that as it may, for the purpose of this study, a more urgent question than this 'chronological paradox'[204] seems to be in what ways states can express *opinio iuris.* In general, it has to be deduced from a state's actions or statements, expressed by the same organs and officials that are also able to perform state practice. Important elements include the voting behaviour of states in the United Nations General Assembly (UNGA)[205], military manuals and the adoption of conventions[206], resolutions adopted by the Institute of International Law[207], proposals of states submitted during the drafting of international conventions and adopted recommendations of drafting committees[208], agreements between states and non-governmental

203 Lauterpacht, *General Works* (n 2) 63; H. Thirlway, 'The sources of international law' in: M.D. Evans, *International law* (3rd edn OUP, Oxford 2010) 91-117, 98-99; Kammerhofer, 'Uncertainty in the formal sources of international law' (n 194) 534; Dahlman, 'The function of *opinio iuris*'(n 193) 330-335.

204 Byers, *Custom, power and the power of rules* (n 194) 130-133.

205 In *Case concerning Military and Paramilitary Activities in and against Nicaragua*, for example, the ICJ concluded that the prohibition on the use of force, enshrined in the UN Charter, was also part of customary international law. It looked into the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (UNGA Res 25/2625 (XXV) (25 October 1970)). *Case concerning Military and Paramilitary Activities in and against Nicaragua* (n 198) par. 188. Also *Prosecutor v Thomir Blaskic,* (Appeals Chamber judgment) IT-95-14-A (29 July 2004) par. 158; *Legality of the Threat or Use of Nuclear Weapons* (n 192) par. 70; *Western Sahara* (Advisory Opinion) (Separate Opinion of Judge Dillard) [1975] ICJ Rep 116, p. 121.

206 *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) (Dissenting Opinion of Judge Torres Bernárdez) [1998] ICJ Rep 582, par. 272; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Separate Opinion of Judge Khasawneh) [2004] ICJ Rep 235, par. 3; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation* (Advisory Opinion) (Dissenting Opinion of Judge Moreno Quintana) [1960] ICJ Rep 150, p. 177; *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, also known as "Vlado"* (Trial Chamber judgment) IT-95-16-T (14 January 2000) paras 531-533; *Prosecutor v Blagoje Simić, Miroslav Tadić and Simo Zarić* (Trial Chamber judgment) IT-95-9-T (17 October 2003) par. 121 and 153; *Prosecutor v Duško Tadić* (Appeals Chamber judgment), IT-94-1-A (15 July 1999) par.223; *Prosecutor v Milorad Knrojelac* (Appeals Chamber judgement) IT-97-25-A (17 September 2003) par. 221; *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (Trial Chamber judgment) IT-96-23-T & IT-96-23/1-T (22 February 2001) par. 495; *Prosecutor v Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić* (Trial Chamber ex parte confidential decision on the prosecution motion under Rule 73 for a ruling concerning the testimony of a witness) IT-95-9 (27 July 1999) par. 74; *Prosecutor v. Anto Furundžija* (n 54) par. 227.

207 *Prosecutor v Stanislav Galić* (Trial Chamber judgment) IT-98-29-T (5 December 2003) par. 45.

208 Also *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland)* (Merits) (Judgment) [1974] ICJ Rep 3, par.13; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Merits) [1974] ICJ Rep 175, par. 13; *Prosecutor v Pavle Strugar, Miodrag Jokic and others* (Trial Chamber decision on defence preliminary motion challenging jurisdiction) IT-01-42-PT (7 June 2002) par. 19; *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (n 205) par. 503 and 541. *Prosecutor v Radislav Krstić* (Trial Chamber judgment) IT-98-33-T (2 August 2001) par. 541.

organisations[209], *amicus curiae* letters submitted by states[210], resolutions adopted by the United Nations Security Council (UNSC)[211] and official proclamations issued by states.[212]

3.3.2 Custom as a source of obligation to adopt implementing measures

Norms of customary international law usually do not require implementation on the domestic level. There may, however, be exceptions: international crimes such as torture and genocide. These exceptions are believed to be part of a special branch of customary law, a category which is often referred to as *ius cogens*. *Ius cogens* has been authoritatively defined as 'a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[213] Candidates which have been mentioned often include the prohibition of genocide, the prohibition of slavery, the prohibition of torture, the prohibition of racial discrimination, the prohibition of the use of force in violation of the UN Charter and the right to self-determination of peoples. In the context of the law of treaties, a violation of such a peremptory norm of general international law will render the conflicting treaty void, either *ab initio* or from the moment the *ius cogens* norm has emerged.[214] Outside the context of the law of treaties, however, *ius cogens* norms may also have considerable influence.

In the field of international criminal law the ICTY in *Furundžija* explored the substance of the prohibition of torture under international law. After establishing its customary status under the international law of armed conflict and international human rights law, and its *ius cogens* character,[215] the Trial Chamber held:

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209 *Prosecutor v Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić* (Trial Chamber ex parte and confidential separate opinion of Judge David Hunt on prosecutor's motion for a ruling concerning the testimony of a witness) IT-95-9 (27 July 1999) par. 23.

210 *Prosecutor v. Duško Tadić aka 'Dule'* (Decision on the defence motion for interlocutory appeal on jurisdiction) (n 200) par. 83.

211 *Armed activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) (Separate Opinion of Judge Simma) [2005] ICJ Rep 334, par. 11; *Prosecutor v. Duško Tadić aka 'Dule'* (Decision on the defence motion for interlocutory appeal on jurisdiction) (n 200) par. 133.

212 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgment) (Dissenting Opinion of Judge Lachs) [1969] ICJ Rep 218, p. 235.

213 VCLT art 53.

214 Ibid, art 64.

215 *Prosecutor v. Anto Furundžija* (n 54) par. 134-146. Also *Al-Adsani v the United Kingdom* (App no 35763/97) ECHR 2001-XI 79, par. 61.

> '[I]n the case of torture, the requirement that States expeditiously institute national implementing measures is an integral part of the international obligation to prohibit this practice. Consequently, States must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.'[216]

The Trial Chamber thus advanced the view that the prohibition of torture must be interpreted in a manner as to encompass an accompanying obligation to adopt national implementing measures. The motivation for this particular interpretation remains somewhat unclear, although the Trial Chamber referred to the ECtHR's judgment in *Soering*.[217] The ECtHR did not, however, discuss the possible existence of an obligation to adopt implementing legislation; it was requested to determine whether a violation of article 3 ECHR could be established 'where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.[218] The question hence remains whether it could be deduced from the *Furundžija* decision that any obligation which has acquired the status of *ius cogens* under international law, automatically includes an obligation to adopt legislation on the domestic level. There seems to be no evidence for such a claim.[219]

Arguably the Trial Chamber in *Furundžija* implicitly referred to the Convention against Torture (CAT), the provisions of which include obligations to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction, to ensure that all acts of torture are offences under its criminal law, and to make these offences punishable by appropriate penalties.[220] In other words, the Trial Chamber in the *Furundžija* decision may have established the elevation of treaty norms, codified in the CAT, into rules of customary law with a *ius cogens* character. Nevertheless, the qualification of a rule as a peremptory norm of general international law as such does not suffice to accept the existence of an accessory obligation to adopt domestic legislation. This interpretation may be supported, albeit not in a conclusive manner, by the reasoning followed by the Trial Chamber. It stated:

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216 *Prosecutor v. Anto Furundžija* (n 54) par. 149.

217 Ibid, par. 148.

218 *Soering v the United Kingdom* (App no 14038/88) Series A no 161, par. 86.

219 Moreover, it is hard to see why states should enact legislation in order to implement international obligations which have an *inter*-state, instead of an *intra*-state, character, such as the universally recognised prohibition of the acquisition of territory by the use of force.

220 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, artt 2, first paragraph, and 4, first and second paragraph.

> '[this universal revulsion against torture], as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination. The prohibition against torture exhibits three important features, which are probably held in common with the other general principles protecting fundamental human rights.'[221]

The three elements to which the Trial Chamber referred, were 'the prohibition even covers potential breaches', 'the prohibition imposes obligations *erga omnes*', and 'the prohibition has acquired the status of *ius cogens*'.[222] The Trial Chamber then proceeded to discuss these three elements separately. In relation to the first element, it indeed found that the prohibition of torture comprises the obligation of states, as cited above, to 'expeditiously institute implementing measures'. Therefore, the reasoning advanced by the Trial Chamber seems to suggest that the *ius cogens* character of the prohibition of torture as such is not decisive when confronted with the question whether an accompanying obligation to adopt domestic implementing measures exists; more important is the interpretation of the substance and scope of the treaty and customary norm.

Similar reasoning may apply to the obligation to prevent genocide, which must be distinguished from the prohibition to *commit* genocide.[223] As part of this obligation, article V of the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) provides:

> 'The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.'[224]

Could this obligation be considered to be part of customary international law? The duty to prevent genocide, codified in article I CPPCG, may indeed be part of customary law.[225] In its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* the ICJ stated that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any

221 *Prosecutor v Anto Furundžija* (n 54) par. 148.

222 Ibid, par. 148-157.

223 The latter norm, the prohibition to commit genocide, has been recognised as a norm of *ius cogens*. See J. Wouters and S. Verhoeven, 'The prohibition of genocide as a norm of *ius cogens*' 5 *International Criminal Law Review* (2005) 401-416, 404-405.

224 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention) art V.

225 W. Schabas, *Genocide in international law: The crime of crimes* (2nd edn CUP, Cambridge 2009) 524 and 526.

conventional obligation'.[226] This may be understood as a finding by the court that the provisions of the CPPCG, including article V, have emerged as rules of customary law.[227] In a separate opinion to the *Case concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide*, judge *ad hoc* Vukas stated that 'in any event, it is necessary to stress that, even in the period before the establishment of the [Federal Republic of Yugoslavia], Serbia was obliged to prevent and punish the crime of genocide, as the provisions of the Genocide Convention had for a long time before the 1990s formed a part of general customary international law of a peremptory nature (*jus cogens*).'[228] This conclusion with regard to the customary nature of the obligations set out in the CPPCG seems convincing, given the fact that a similar accompanying obligation has been read into the prohibition of torture as well. On the other hand, 'principles underlying the Convention' and the provisions of the Convention itself may not be identical.[229] In the absence of an unequivocal and authoritative opinion on the subject, this customary status of the obligation to adopt domestic implementing measures may continue to be surrounded with some controversy.

In sum, although not uncontroversial, the prohibition of torture and genocide and its implied obligations to adopt domestic implementing measures providing for, as an example, the criminality and punishment by adequate penalties of these crimes on the domestic level, may be scarce examples of customary international law as a source of obligation to adopt national (legislative) implementing measures. Both cases concern treaty obligations which have been elevated to customary status (and perhaps even possess the character of *ius cogens*). Given the fact that acts of genocide and torture constitute the most heinous crimes in the international community, the overall image is that only in exceptional circumstances customary international law may give rise to the obligation to adopt (legislative) implementing measures on the national level.

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226 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion [1951] ICJ Rep 15, p. 12. Also *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction of the Court and Admissibility of the Application) (Judgment) [2006] ICJ Rep 6, par. 64; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, par. 161.

227 Also Schabas, *Genocide in international law* (n 225) 58.

228 *Case Concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Preliminary Objections) (Separate Opinion of Judge *ad hoc* Vukas) [2008] ICJ Rep 549, par. 17.

229 Cf. H. de Pooter, 'The obligation to prevent genocide. A large shell yet to be filled', 17 *African Yearbook of International Law* (2011) 285-320, 294. De Pooter holds the opinion that 'the interpretation unanimously given to this statement is that the obligations contained in the Genocide Convention are part of customary international law'.

3.4 Binding decisions of international organisations

3.4.1 Binding decisions of international organisations as a source of law

Since the 19th century international law has witnessed the emergence of international organisations as legal subjects in the international legal domain. Well-known examples include the United Nations (1945), the Council of Europe (1949), the North Atlantic Treaty Organisation (1949), the Organisation of American States (1951), the European Coal and Steel Community (1952), the European Economic Community (1958), the Organisation for Economic Co-operation and Development (1961), the Organisation of African Unity (1963), the European Union (1992), the World Trade Organisation (1995) and the African Union (2001).[230] International organisations have been established for a wide range of purposes and, as a result, have been attributed with varying powers and functions. They share, however, some characteristics. First, international organisations tend to be products of cooperation between states.[231] Second, the existence of international organisations often derives from treaties.[232] Third, and arguably most importantly, the newly created organisation must, at least to a certain extent, possess a will distinct of the will of its member states, in order to distinguish the organisation from other entities that are merely agents of, or instruments at the hands of, states.[233]

Three elements may provide an indication as to whether a particular organisation can be considered an international organisation in the sense of possessing international legal personality: whether the entity possesses treaty-making capacity, whether it has the right to send and receive legations and whether it can bring international claims.[234] There is some measure of circularity in these criteria; a similar blurring of fact and law may be discovered in *Reparation for Injuries*, in which the ICJ had to determine whether the United Nations (UN) had the capacity to bring a claim against the state in which one of its officials had been murdered. To this

230 The years mentioned refer to the dates of entry into force of the constituent documents.

231 Nevertheless, there are examples of international organisations which, in cooperation with states, participate in the establishment of *other* international organisations. The European Communities, one of the European Union's predecessors, was a founding member of the World Trade Organisation (Marrakesh Agreement establishing the World Trade Organisation (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3, art XI, first paragraph).

232 For instance, article 1 TEU provides that '[b]y this treaty, the High Contracting Parties establish among themselves a European Union […]'. An exception to the general rule that international organisations are established by treaty may be found in the United Nations Children's Fund (UNICEF) which was established by a resolution of the United Nations General Assembly (UNGA res 57 (11 December 1946)).

233 J. Klabbers, *An introduction to international institutional law* (2nd edn CUP, Cambridge 2009) 6-12.

234 Ibid, 40.

end, the ICJ had to investigate whether the UN possessed international legal personality. It held that 'the [UN] was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane'.[235]

If it is established (or assumed) that an entity is an international legal subject and, as a consequence, is capable of bearing rights and obligations under international law, the question arises how an international organisation receives its powers. This conferral of powers will often be based on an express attribution of powers of the founding entities to the organisation.[236] This principle may be derived from *Jurisdiction of the European Commission of the Danube between Galatz and Braila*, in which the PCIJ held:

> 'As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has the power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it'.[237]

In addition to attribution, powers may also be 'implied'.[238] The doctrine of implied powers provides for an expansion of an international organisation's powers and has been accepted by the ICJ in *Reparation for Injuries* in relation to the UN, about which the court noted that 'under international law, the [UN] must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties'.[239] Similar argumentation applies to the EU.[240]

Thus, whether expressly attributed or implied, the organisation's founding fathers have delegated powers to the newly created organisation.[241] The nature of these powers could be diverse, among them the competence to adopt 'internal' norms which regulate organisation matters.

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235 *Reparation for Injuries Suffered in the Service of the United Nations* (Advisor Opinion) [1949] ICJ Rep 174, p. 179.

236 In general on this topic, J. Erne, 'Conferral of powers by states as a basis of obligation of international organisations' 78 *Nordic Journal of International Law* 2 (2009) 177-199.

237 *Jurisdiction of the European Commission of the Danube between Galatz and Braila* (Advisory Opinion) [1927] PCIJ Rep Series B no. 14, p. 64. In addition to this general rule, the principle of attribution may be codified in the constituent treaty of an organisation. Article 5, first and second paragraph, TEU, provides that 'the limits of Union competences are governed by the principle of conferral. […] Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.

238 Klabbers, *International institutional law* (n 233) 59-64.

239 *Reparation for Injuries Suffered in the Service of the United Nations* (n 235) p. 182.

240 CJEU, *ERTA*, case 22/70, judgment of 31 March 1971, ECLI:EU:C:1971:32, par. 17-19 and 27.

241 Klabbers, *International institutional law* (n 233) 185-186.

Examples in the sphere of the UN may be found in decisions of the UNGA pertaining to the admission of new member states, voting procedures or the apportionment of the budget.[242] They should be distinguished from the power to produce legal rules which address other entities, most notably states, beyond the structure of the organisation itself. It would seem obvious that such 'external' law-making competence of an international organisation cannot be based on implied powers; such a power will require an express act of attribution since 'it cannot be assumed that states have ceded sovereign prerogatives to make law'.[243] Therefore, law-making powers will be enshrined in the constituent treaty of the organisation, which has been labelled a 'general rule of modern international institutional law'.[244] From the principle that a treaty does not contain obligations for third parties without its consent, as codified in article 34 VCLT, it may be induced that 'law' produced by an international organisation is only binding upon its member states.[245]

A closer look at the products of external law-making powers of international organisations makes clear that a distinction should be made between binding and non-binding decisions of international organisations, although this strict dichotomy may be difficult to consistently uphold in practice.[246] The non-binding category is often referred to as 'recommendations'. In contrast to binding decisions of international organisations, recommendations do not have the capacity to create obligations for its addressee(s).[247] Resolutions adopted by the UNGA (which are not of an 'internal' nature) are generally considered to possess such character. Article 10 ChUN, for instance, endows the UNGA with the power to 'discuss any questions or any matters within the scope of the present charter […] and […] [to] make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters'.[248] Despite its non-binding character, however, resolutions adopted by the UNGA, and soft law in general, may reflect the emergence of a new rule of customary law,

242 M. Divac Öberg, 'The legal effects of resolutions of the UN Security Council and General Assembly in the jurisprudence of the ICJ' 16 *European Journal of International Law* 5 (2006) 879-906, 883.

243 J. Alvarez, *International organisations as law-makers* (OUP, Oxford 2005) 120. Also N. Buchowska, 'The issue of nullity of law-making resolutions of international organisations' 28 *Polish Yearbook of International Law* 9 (2006-2008) 9-23, 13-14.

244 H. Schermers and N. Blokker, *International institutional law* (5th edn Martinus Nijhoff Publishers, Leiden & Boston 2011) 825.

245 Alvarez, *International organisations as law-makers* (n 243) 120-121.

246 N. Blokker, 'Decisions of international organisations: the case of the European Union' 30 *Netherlands Yearbook of International Law* (1999) 3-44, 6-8.

247 Divac Öberg, 'The legal effects' (n 242) 880.

248 ChUN art 10. Other provisions containing the powers of the General Assembly to make 'recommendations' include articles 11, first and second paragraph, 12, first paragraph, 13, first paragraph, and 14, of the UN Charter.

a process which has been referred to as the 'hardening of soft law'.[249] The legal basis of other examples of non-binding decisions made by organs of international organisations may be found in article 23 of the Constitution of the WHO, which provides that 'the Health Assembly shall have authority to make recommendations to Members with respect to any matter within the competence of the Organisation', or article 5, sub b, of the Convention on the OECD, according to which 'the Organisation may make recommendations to Members' in order to achieve its aims.[250]

Perhaps the most prominent example of binding decisions made by international organisations consists of decisions of the UNSC. In general, whether a specific UNSC resolution will be binding upon its addressees, depends on the intent of the UNSC, which may be derived from the language used, the background of its drafting and the Charter provisions invoked.[251] In case of the so-called enforcement actions of the UNSC under Chapter VII ChUN in response to any threat to the peace, breach of the peace or act of aggression, such intent may be established.[252] The binding character of these measures flows from articles 25 and 48, first paragraph, ChUN, which stipulate that 'the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter', and that 'the action required to carry out decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations, or by some of them, as the Security Council may determine'.[253] Several other international organisations have been endowed with the task of producing legal rules which are more or less binding upon the member states, including the EU, the ICAO, the World Meteorological Organisation (WMO) and the WHO.[254]

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249 C. Chinkin, 'Normative development in the international legal system' in: D. Shelton (ed), *Commitment and compliance. The role of non-binding norms in the international legal system* (OUP, Oxford 2000) 21-42. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ noted 'that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*'. *Legality of the Threat or Use of Nuclear Weapons* (n 192) par. 70.

250 Constitution of the World Health Organisation (adopted 22 July 1946, entered into force 7 April 1948) 14 UNTS 185 (Constitution of the WHO); Convention on the Organisation for Economic Co-Operation and Development (adopted 14 December 1960, entered into force 30 September 1961) 888 UNTS 179 (Convention on the OECD).

251 *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, p. 53. Also Divac Öberg, 'The legal effects' (n 242) 885.

252 ChUN art 39.

253 Also Divac Öberg, 'The legal effects' (n 242) 884-885.

254 See references in (n 109). Also Convention of the World Meteorological Organisation (adopted 11 October 1947, entered into force 23 March 1950, as amended) 77 UNTS 143 (WMO Convention) artt 8, sub d, and 9; Constitution of the WHO artt 21 and 22.

It has been argued that decisions of international organisations, whether binding or not, cannot be regarded as a formal source of law. In absence of a criterion for distinguishing non-law from law in the international community, as noted by Klabbers, this debate may however of interest more to scholars than to legal practitioners.[255] Supporters of this view point to article 38, first paragraph, of the Statute of the ICJ. The exclusion of decisions of international organisations from the enumeration of the sources of law primarily reflects international legal practice at the time the Statute was drafted. As will be demonstrated in the next section, examples of binding decisions of international organisations, without exceptions, date back to the post-1945 era, or, more specifically, to the period of time following the drafting of the Statute of the ICJ. Malanczuk has argued that acts of international organisations may not be a separate source of law, since international organisations possess legislating power on the basis of a treaty. It is the constituent treaty of the organisation, he suggests, which grants the organisation's decisions their legal character.[256] Although it is true, as we have seen, that law-making powers of an international organisation require a legal basis in the constituent treaty of the organisation, it may go too far to conclude from this that the treaty constitutes the ultimate and exclusive source of law from which a decision of an international organisation derives its character as law. At some point, it seems, such an instrument may possess an autonomous legal character which is no longer a mere derivate from the constituent treaty. Contemporary international law has demonstrated that legal obligations could very well spring from decisions of international organisations. Therefore, some authors acknowledge the status of decisions of international organisations as a source of law.[257] As a result, the more practical view, for the present study at least, would be that decisions of international organisations must be considered a source of obligation to the extent that they are binding on the addressee.[258]

3.4.2 Binding decisions of international organisations as a source of obligation to adopt implementing measures

Some (binding) law produced by the aforementioned organisations may entail the obligation of member states to adopt legislative measures on the domestic level. Examples include UNSC resolutions 1373 and 1540, adopted in 2001 and 2004 respectively, as part of the global effort to combat terrorism

255 J. Klabbers, *International law* (CUP, Cambridge 2013) 38.

256 P. Malanczuk, *Akehurst's Modern introduction to international law* (7th edn Routledge, New York 1997) 53.

257 R. Wessel, 'Informal international law-making as a new form of world legislation?' *International Organisations Review* 8 (2011) 253-265.

258 Also H. Thirlway, *The sources of international law* (OUP, Oxford 2014) 21-23, and Alvarez, *International organisations as law-makers* (n 243) 588-601.

and the spread of weapons of mass destruction.[259] Prior to 2001, the 'legislative' capacity, in the sense of the power to lay down legal norms which are suitable for general and repeated application, of the UNSC was largely rejected.[260] In the wake of the events of September 11, 2001, however, the UNSC resorted to legislative measures, acting under Chapter VII ChUN, to attain its policy aims.[261] These measures will often require the adoption of domestic legislation in order to comply with the obligation, imposed by resolution 1373, to 'ensure that […] terrorist acts are established as serious criminal offences in domestic laws and regulations'.[262] In relation to weapons of mass destruction, the UNSC in resolution 1540 decided that all states 'in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-state actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons […]'.[263] Talmon has noted that the phrase 'in accordance with their national procedures' was added to meet the concerns of several states that resolution 1540 would involve action by their legislators. Therefore, he has pointed out, 'a legislative resolution cannot provide more than a framework to be filled in by national legislatures'.[264] In order to ensure and monitor the implementation process of the resolutions 1373 and 1540, the UNSC also provided for the establishment of so-called 'compliance committees', which monitor the implementation progress of the member states.[265]

It has been a matter of debate whether the UNSC is legally entitled to impose such obligations on states; it is not evident that the UNSC has the competence thereto. Some commentators point to the broad powers attributed to the UNSC under the ChUN and infer from this the competence to impose upon the member states of the United Nations the obligations cited above (although in practice, they argue, this power may be subject

259 UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 and UNSC Res 1540 (28 April 2004) UN Doc S/RES/1540.

260 M. Fremuth and J. Griebel, 'On the Security Council as a legislator: a blessing or a curse for the international community?' 76 *Nordic Journal of International Law* (2007) 339-361, 339-340.

261 The revolutionary nature of resolution 1373 was recognised in an early stage by Szasz. P. Szasz, 'The Security Council starts legislating' 96 *American Journal of International Law* 4 (2002) 901-905.

262 UNSC Res 1373 (n 259) par. 2, sub e.

263 UNSC Res 1540 (n 259) par. 2.

264 S. Talmon, 'The Security Council as world legislature', 99 *American Journal of International Law* (2005) 175-193, 188-189. In relation to resolution 1540, see P. Crail, 'Implementing UN Security Council resolution 1540. A risk-based approach' 13 *Nonproliferation review* 2 (2006) 355-399.

265 UNSC Res 1373 (n 259) par. 6 and UNSC Res 1540 (n 259) par. 4.

to important limitations).[266] Others hold the opposite view that the UNSC exceeded its powers when it adopted the resolutions 1373 and 1540, as valid enforcement measures 'have to be of a concrete character responding to a concrete threat'. In their opinion, the regime laid down in the resolutions is intended to apply generally and repeatedly, and thus does not meet this criterion.[267] This problem will not be solved until the resolutions have come under review by the ICJ, which is unlikely to occur.[268]

In addition to the obligations laid down in the resolutions discussed above, domestic implementing legislation may also be required in order to execute sanctions which have been enacted by the UNSC. In this particular context, sanctions may be understood as coercive measures taken against a target state or entity in application of a decision of the UNSC.[269] The competence to adopt sanctions is based, similar to the power to adopt resolutions such as 1373 and 1540, on article 41 ChUN, which provides that 'the Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures […]'. Sanctions are often of an economic, diplomatic or financial nature and include prohibitions of export and import, prohibition of services, prohibition of movement of funds, freezing of funds and assets, prohibition of air, sea and land communications, severance or reductions of diplomatic and other official relations, and restrictions on the movement of persons.[270] In response to the invasion of Kuwait by Iraqi forces in 1990, for instance, the UNSC adopted resolutions 661 and 670 in which it imposed an embargo on the import and export of commodities and goods to and from Iraq and Kuwait, financial and economic sanctions, including the freezing of assets, and a ban on all means of transport to Iraq and Kuwait, including air traffic.[271]

Similar to the aforementioned provisions of the 'legislative' resolutions 1373 and 1540, sanctions may give rise to the adoption of domestic legislation.[272] UN member states are at liberty to treat sanctions as 'self-executing' provisions, in theory at least. Then the sanctions could be applied directly in the domestic legal order, as a result of which monist states would not

266 For example Talmon, 'The Security Council as world legislature' (n 264) 192, and L.M.H. Martínez, 'The legislative role of the Security Council in its fight against terrorism: legal political and practical limits' 57 *International and Comparative Law Quarterly* 2 (2008) 333-360.

267 Fremuth and Griebel, 'On the Security Council as a legislator' (n 260) 350.

268 Ibid, 357.

269 G. Abi-Saab, 'The concept of sanction in international law' in: V. Gowlland-Debbas (ed), *United Nations sanctions and international law* (Kluwer Law International, The Hague 2001) 29-41, 39.

270 V. Gowlland-Debbas, 'Sanctions regimes under article 41 of the UN Charter' in: Idem (ed), *National implementation of United Nations sanctions. A comparative study* (Martinus Nijhoff Publishers, The Hague 2004) 3-31, 6-7.

271 UNSC Res 670 (25 September 1990) UN Doc S/RES/670 and UNSC Res 661 (6 August 1990) UN Doc S/RES/661. Also Gowlland-Debbas, 'Sanctions regimes' (n 270) 8-9.

272 Talmon, 'The Security Council as world legislature' (n 264) 176.

require implementing legislation. Gowlland has pointed out, however, that sanctions adopted under article 41 ChUN often have been assimilated to *non*-self-executing treaty obligations.[273] For this reason, and because of the importance of an expedient implementation of the sanctions by states and the fact that sanctions often constitute an infringement of constitutionally protected rights, such as the protection of property, some states have adopted 'enabling legislation': prior framework legislation through which the sanctions could be executed on the domestic level. The majority of states, nevertheless, has relied on other measures in order to fulfil their obligation to comply with the sanctions resolutions, such as legislation not necessarily linked to acts by the UNSC or through the adoption of *ad hoc* legislation in response to a particular sanctions resolution.[274]

Also in the framework of the WHO, the adoption of decisions by one of the organisation's organs may give rise to the obligation to adopt national legislation. Pursuant to article 21 of the Constitution of the WHO, the Health Assembly, in which the member states are represented, shall have the authority to adopt regulations concerning sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease. These regulations will be binding upon member states unless they choose to opt out in accordance with article 22 of the Constitution of the WHO. As Schermers and Blokker have noted, '[i]n view of this discretion accorded to the member states, these "regulations" more closely resemble conventions with a negative ratification procedure […] than binding acts of the organisation'.[275] On the basis of these provisions, the WHO has facilitated the drafting of the 2005 International Health Regulations (IHR), the history of which may be traced back to 1851, when European states present at the International Sanitary Conference in Paris acknowledged the need for international cooperation to combat the spread of infectious diseases, in particular cholera.[276] The 2005 IHR entered into force in 2007.

The aim of the IHR is to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.[277]

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273 V. Gowlland-Debbas, 'Implementing sanctions resolutions in domestic law' in: Idem (ed), *National implementation of United Nations sanctions. A comparative study* (Martinus Nijhoff Publishers, The Hague 2004) 33-73, 40.

274 Ibid, 41-45.

275 Schermers and Blokker, *International institutional law* (n 244) 794-795.

276 D. Fidler, 'From international sanitary conventions to global health security: the new International Health Regulations' 4 *Chinese Journal of International Law* 2 (2005) 325-392, 329.

277 International Health Regulations (adopted 23 May 2005, entered into force 15 June 2007) 2509 UNTS 79 (IHR) art 2.

Member states are called upon, it is stated, to implement fully the IHR in accordance with […] the principles embodied in article 3.[278] The term 'implementation' in article 3 does not necessarily refer to implementation through legislation; the diverse nature of the provisions contained in the IHR will often require other than legislative measures, such as the obligation for state authorities to communicate with the WHO in case of public health emergencies of international concern.[279] In practice, however, the IHR seem to anticipate that states would resort to legislation in order to give effect to its norms. Strictly speaking, the IHR do not, however, prescribe the adoption of legislation; the modality of implementation, through legislation or other measures, is left for the domestic jurisdictions to decide. Against this background, article 59, third paragraph, speaks of full adjustment of 'domestic legislative and administrative arrangements' with the IHR.[280]

Another category of binding decisions of international organisations as a source of obligation to enact domestic legislation consists of what may be called 'technical standards': instruments that have been adopted by, among others, the ICAO and the WMO.[281]

According to articles 37 and 54, sub l, of the Chicago Convention, the Council of the ICAO has the task to 'adopt and amend, from time to time, as may be necessary, international standards and recommended practices and procedures […] concerned with the safety, regularity and efficiency of air navigation as may from time to time appear appropriate'. Standards have been defined as 'any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety of international air navigation and to which Contracting States will conform in accordance with the Convention'. ICAO standards differ from 'recommended practices' in that the uniform application of the latter is recognised as merely 'desirable'; the member states will 'endeavour to conform'.[282] Furthermore, the Chicago Convention stipulates that '[e]ach contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organisation in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.[283] A recent instrument adopted by the Council ('Annex 19') focuses on 'safety management' and includes provisions on personnel licensing, operation of aircraft, airworthiness of aircraft, air traffic services, aircraft accidents and incident investigation and aero-

278 WHO (Resolution of the World Health Assembly) 'Revision of the International Health Regulations' (23 May 2005) WHA 58.3.

279 IHR art 6, first paragraph.

280 The IHR will be further discussed in Chapter 7.

281 Chicago Convention and WMO Convention. Also Alvarez, *International organisations as law-makers* (n 243) 111 and 223-224.

282 R. Abeyratne, *Convention on International Civil Aviation: A Commentary* (Springer International Publishing, Cham 2014) 418.

283 Chicago Convention art 37.

dromes. These standards and procedures require a two-third majority in the Council and become effective within three months after its submission to the member states, unless in the meantime a majority of states register their disapproval with the Council.[284] If a state finds it 'impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard', the member state should notify ICAO.[285]

Similar competences have been bestowed upon the Congress of the WMO, which has the power to adopt regulations 'prescribing the procedures of the various bodies of the organisation, in particular the general, technical, financial and staff regulations'. The body of technical regulations is the product of WMO's 'external' law-making power. States must do their utmost to implement the decisions of Congress. If, however, any member finds it impracticable to give effect to some requirement laid down in a technical regulation adopted by the congress, such member should inform the secretary-general of the WMO whether its inability to give effect to it is provisional or final, and state its reasons therefor.[286] Technical regulations encompass 'standard practices and procedures' and 'recommended practices and procedures'. 'Standard' practices and procedures 'shall be the practices and procedures which it is necessary the members follow or implement'. Similar to the instruments adopted by ICAO, this element distinguishes the 'standards' from the 'recommended' practices and procedures; the latter is merely 'desirable' to be followed and implemented.[287] In other words, the power of the WMO to take decisions which are binding upon the member states becomes visible through the adoption of the 'standard practices and procedures'. They include various norms of a highly technical nature, such as norms on general meteorological standards, meteorological service for international air navigation, hydrology and quality management.[288] Although the provisions cited above may give member states an opportunity to 'opt-out', and therefore justify the conclusion that the international standards and recommended practices adopted by the ICAO and the WMO, may not be, strictly speaking, binding decisions, in practice they are considered to have normative force for the member states who have not opted out, as a consequence of which they may be referred to as 'legislation'.[289]

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284 Ibid, art 90, sub a.

285 Ibid, art 38.

286 WMO Convention artt 8, sub d, and 9.

287 World Meteorological Organization, *Technical regulations*, I, *General meteorological standards and recommended practices* (WMO-no. 49, Geneva 2015) ix-x.

288 WMO *Technical regulations* (WMO-no. 49) (4 vols). <http://www.wmo.int/pages/governance/policy/tech_regu_en.html> (accessed 29 March 2018).

289 In relation to ICAO, see Abeyratne, *Convention on International Civil Aviation* (n 282) 426.

How is the implementation by member states of 'technical standards' that have been adopted by the ICAO and the WMO, to be executed? The aforementioned provisions of the Convention of the WMO and the Chicago Convention do not specify an obligation to adopt legislation as such. Whereas the WMO's technical regulations are silent on the modality of implementation,[290] the harmonisation efforts of ICAO seem to premise the adherence to its norms through the adoption of national legislation. Section 2.1.6 of the 'Safety Oversight Manual' of ICAO provides:

> 'It is the obligation of each State to approve and maintain regulations and the supporting procedures in order to implement the ICAO [standards and recommended practices] within the State. The [Regional Safety Oversight Organisation, a regional organisation affiliated with ICAO,] may assist its member States by developing a generic set of civil aviation legislation and regulations for member States to adapt and use to harmonize their own national legislation and regulations.'[291]

Arguably the most developed form of international norms that contain obligations for member states to adopt national implementing legislation may be found in the legal acts issued by the institutions of the EU. One of the pillars of European law can be traced back to the famous judgments of the Court of Justice (CJEU) of the (then) European Communities in the *Van Gend en Loos* and *Costa Enel* cases that were delivered in the early 1960's. In *Van Gend en Loos,* the CJEU was asked whether the Treaty of the European Economic Community had direct application within the territory of its member states. The CJEU dismissed the argument advanced by the Belgian and Dutch Governments to the effect that it had no jurisdiction, since it concerned a matter of national constitutional law to be decided upon by the national courts. Instead, the CJEU held that 'the [European Economic] Community constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights. […] Independently of the legislation of the member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights […]'.[292]

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290 In relation to the 'Global Atmosphere Watch' it is provided that 'all activities connected with its implementation in the territories of individual countries should be the responsibility of the countries themselves and should, as far as possible, be met from national resources'. WMO, *Technical regulations* I (n 287) 12.

291 International Civil Aviation Organisation, *Safety oversight manual part B: Establishment and management of a Regional Safety Oversight Organisation* (2nd edn International Civil Aviation Organisation, Montréal 2011) par. 2.1.6. The fact that the adoption of legislation is merely one of several relevant elements which determine the level of compliance with ICAO norms, may also be derived from ICAO's Universal Safety Oversight Audit Programme Continuous Monitoring Approach (USOAP CMA). This monitoring mechanism quantifies the level of 'effective implementation' on the basis of multiple factors, which include legislation, organisation, licensing, operations, airworthiness, accident investigation, air navigation services and aerodromes. Results available through http://www.icao.int/safety/Pages/USOAP-Results.aspx (accessed 29 March 2018).

292 CJEU, *Van Gend en Loos,* case 26/62, judgment of 5 February 1963, ECLI:EU:C:1963:1, p. 12.

In *Costa v. Enel*, the CJEU elaborated the concept of the autonomous legal order and decided that 'the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question'.[293] In other words, European law not only applies *qua* European law in the legal orders of member states, but also prevails over their domestic laws. As a result of these monist features, the European legal order relates to domestic legal orders in a fundamentally different manner compared to the 'non-European' international legal order, as we have seen in Chapter 2. These features are relevant for the implementation of legislative instruments adopted in the framework of the EU, as they explain why member states are under the obligation to implement the adopted European laws: were this obligation absent, European law would be dependent upon the willingness of member states to maintain its supremacy over domestic laws.[294]

Implementation in relation to directives comprises three distinguishable activities: transposition, application and enforcement. 'Transposition' refers to the European directive's translation into provisions of national law. After the adoption of these measures, the applicable domestic legal norms should be applied by the competent authorities in concrete cases. Were a breach of the implementing legislation to occur, member states have a duty to enforce compliance, for instance through the imposition of penalties.[295]

The legal basis of member states' obligation to implement legislative instruments that have been adopted by the EU institutions, can be found in the treaties, the legislative instrument itself, and in the so-called principle of effectiveness.

First, article 288 of the Treaty on the Functioning of the European Union (TFEU), imposes the obligation on member states to ensure the fulfilment of directives' aims. The application of article 291 TFEU may produce the same result as regards other binding instruments of EU law, as it prescribes that 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts'.[296] Secondly, the adopted instrument itself usually contains a provision that calls upon the member states to

293 CJEU, *Costa v ENEL,* case 6/64, judgment of 15 July 1964, ECLI:EU:C:1964:66, p. 593-594.

294 This is not to say that in practice the implementation of European law is carried out without problems. See, for example, Mastenbroek, E., *The politics of compliance. Explaining the transposition of EC directives in the Netherlands* (PhD thesis Leiden University 2007), in particular sections 1.1-1.3. For a more recent discussion of problems (and efforts to overcome those problems) relating to compliance with EU law, see W.J.M Voermans, 'Implementation. The Achilles heel of European integration' 2 *The Theory and Practice of Legislation* 3 (2015) 343-359.

295 Mastenbroek, *The politics of compliance* (n 294) 19.

296 Also M. Klamert, *The principle of loyalty in EU law* (OUP, Oxford 2014) 13 and 263.

ensure the application of the directive or regulation concerned within the member states' legal orders. In directives this provision is often phrased in the following terms:

> 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this [legislative instrument] by [date]. They shall immediately inform the Commission thereof.'

Thirdly, in order to adhere to the aforementioned obligations, '[t]he measures taken by the Member States must be such as to ensure that a directive is fully effective, in accordance with the objective which it pursues'.[297] Arguably, this reference to the principle of effectiveness must be viewed as having an autonomous legal character which flows from its recognition as a principle of EU law. However, as appears from the case law of the CJEU, it is closely related to the principle of sincere cooperation or the principle of loyalty as embodied in article 4, third paragraph, of the Treaty on European Union (TEU).[298] It stipulates that, 'the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'.[299] This norm may be labelled a 'principle of Union law', the influence of which has increased considerably during the past decades. It applies across the whole range of European Union law, although its legal consequences may depend on the particular circumstances in which it is invoked.[300] Given this state of affairs, in the context of implementation, the principle of effectiveness can be considered complementary to the principle of loyalty as codified in article 4, third paragraph, TEU.

297 CJEU, *Von Colson,* case C-14/83, judgment of 10 April 1984, ECLI:EU:C:1984:153, par. 15. See also CJEU, *Royer,* case C-48/75, judgment of 8 April 1976, ECLI:EU:C:1976:57, par. 73; CJEU, *Adeneler and others,* case C-212/04, judgment of 4 July 2006, ECLI:EU:C:2006:443, par. 93; CJEU, *Boehringer Ingelheim,* case C-348/04, judgment of 26 April 2007, ECLI:EU:C:2007:249, par. 58; CJEU, *Gallotti,* joined cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95, judgment of 12 September 1996, ECLI:EU:C:1996:323, par 14; CJEU, *Rosado Santana,* case C-177/10, judgment of 8 September 2011, ECLI:EU:C:2011:557, par. 50; CJEU, *Juuri,* case C-396/07, judgment of 27 November 2008, ECLI:EU:C:2008:656, par. 26; CJEU, *Impact,* case C-268/06, judgment of 15 April 2008, ECLI:EU:C:2008:223, par. 40.

298 M. Accetto and S. Zleptnig, 'The principle of effectiveness. Rethinking its role in Community law' 11 *European Public Law* 3 (2005) 375-403, 387, 390-391 and 402.

299 TEU art 4, third paragraph. Also TFEU art 197, first paragraph, which provides that the 'effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest'.

300 Klamert, *The principle of loyalty* (n 296) 233 and 250-251.

3.5 Categories of norms addressing the national legislature

The overview of legal norms which flow from the sources of international law and which may give rise to the adoption of domestic legislation, presented in the previous sections, could also be approached from the perspective of the norms themselves, instead of the sources from which they derive. This standpoint provides us with the opportunity to categorise the various norms which address the national legislature. In doing so, we can establish to what extent international legal norms address national legislatures.

International legal norms could be divided into two categories: norms that require implementation within domestic legal systems and norms that do not require implementation within domestic legal systems. If an international instrument does not intend to regulate matters within jurisdictions of states, because the material scope of application is confined to purely inter-state matters, such as an alliance treaty, or when the international instrument is of such nature that it is suitable for direct application by state organs, such as 'law-making treaties', implementation on the domestic level may not be imperative.

Norms that do require implementation by states, on the other hand, could be (sub)divided into three groups: norms that will be implemented by the state's executive, by its judiciary and by its legislature. It is the latter (sub)category that concerns us here, which in turn encompasses norms that *expressly* prescribe the implementation by the national legislature and norms which *implicitly* prescribe the implementation by the national legislature. An example of former may be found in resolution 1540 of the UNSC, which was discussed above, and which prescribes that all states:

> 'in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-state actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons […]'.[301]

The crucial issue here is that in principle this obligation could only be complied with through the adoption of legislation. Put differently, in this case, it not only prescribes the *objective* to be achieved (the prohibition for non-state actors to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons), but also the *means* that will lead to the achievement of the objectives (the adoption and enforcement of appropriate effective laws).

An implicit obligation to adopt domestic legislation, on the other hand, determines which objectives have to be achieved, but does not prescribe legislation as a means to achieve those objectives. In this case, the relevant international legal obligation could, at least in theory, be implemented

301 UNSC Res 1540 (n 259) par. 2.

without resort to legislative measures. The implementation of 'technical standards', discussed above in relation to the WMO and the ICAO, could fall within this category as they do not prescribe implementation by legislative means. Another example may be found in article 5, first paragraph, FCTC, which provides that:

> '[e]ach Party shall develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with this Convention and the protocols to which it is a Party.'[302]

A less obvious example may be found in article 5, third paragraph, ICSFT, which states that:

> '[e]ach State Party shall ensure, in particular, that [liable] legal entities […] are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.'[303]

Furthermore, pursuant to article 13 ECHR,

> '[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.[304]

Although it is hard to see how these provisions could be implemented by states that value the rule of law *without* the adoption of domestic legislation, the adoption of legislation is not *de iure* required by the international norm.

Another obligation that falls in this category, is article 5 of the International Convention for the Suppression of Terrorist Bombings, which stipulates that:

> '[e]ach State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature'.[305]

While express reference is made to the phrase 'domestic legislation', it appears from the formulation of the treaty provision that the choice for legislation is an optional one. Thus, again, the adoption of domestic legislation is not mandatory from an international legal point of view. But how could be determined whether an obligation to implement a particular

302 FCTC art 5, first paragraph.
303 ICSFT art 5, third paragraph.
304 ECHR art 13.
305 Ibid, art 5.

international legal obligation implies an obligation for the national legislature to initiate the enactment of implementing measures, as opposed to an obligation for the executive or the judiciary? As we have seen, an analysis of the international legal norm does not suffice, since the norm does not compulsory prescribe the entity the action of which is required. The answer must be found in domestic law. If the international norm tolerates implementation by other entities than the national legislature, it falls to the state to determine which one of its organs has the responsibility to adopt implementing measures. In other words, the division of powers on the domestic level will be decisive.[306]

3.6 Conclusion

From the survey of international legal obligations referring expressly or implicitly to the adoption of domestic legislation, the following conclusions may be drawn.

First of all, national legislative measures which implement international law will often derive from treaty law. Treaty practice provides us with an extensive and varied range of obligations which address the national legislatures of state parties. Only in exceptional cases, as accepted by the ICTY in *Furundžija*, an obligation to adopt domestic legislative measures may be premised on the basis of customary international law. Similarly, there are, apart from the EU's legislative instruments, no more than a few examples of binding decisions of international organisations which have given rise to the adoption of legislation on the domestic level. Overall, a distinction must be made between norms that require implementation within domestic legal systems and norms that do not require implementation within domestic legal systems. The former category could be (sub)divided into norms that require action by the state's executive, legislative and judicial authorities respectively.

Second, international obligations which require the adoption of domestic implementing measures often leave a significant measure of freedom to the states which are bound. In general, international instruments calls upon states to take action. This action will, nevertheless, often be formulated in terms of policy objectives to be achieved, instead of *means to* obtain those policy objectives. This may not come as a surprise, since it is of utmost importance, from the perspective of international policy makers at least, that no state party will be confronted with international legal impediments if they endeavour to ensure the application of the relevant instrument in their respective legal orders. In other words, the general formulation

306 In some instances, other international legal provisions than the one which has to be implemented may influence the selection of the state organ. An example can be found in international human rights law, which provides that individuals should have access to an independent judiciary.

commonly adhered to in international legal obligations to adopt domestic implementing measures, serves to accommodate the diversity in the world's national legal orders. This leads us back to the important role played by national law, which may be said to 'fill the gaps' whenever an international legal instrument is inconclusive with regard to matters of implementation, as will often be the case. It underlines the fact that the implementation of international law in the national legal order, including implementation through legislative means, is a matter of 'connecting' international law and national law.

Part II

The regulation of implementing legislation under selected international legal regimes: legislative standards

Introduction to Part II

In the previous part, we have identified the international legal sources from which a state obligation to adopt implementing legislation may originate. In order to complete our analysis of current international legal practice in relation to implementing legislation, the following question must be answered: to what extent is domestic implementing legislation regulated by international law? The purpose of Part II is to provide an answer to that question.

In this regard 'regulation' is understood as comprising the standards of an international origin which should be observed by the national legislature which is engaged in the implementation of international law in the domestic legal order. In other words, it consists of prescribed features of domestic implementing legislation (encompassing both substantive and formal requirements) or legislative procedure. They will be referred to as 'legislative standards'. They may include, for instance, a duty to punish violations of the legal provisions in force, or a duty to periodically evaluate domestic measures. Legislative standards *complement* the original obligation to adopt domestic implementing legislation with specific guidance on how that obligation must be performed.

The concept of legislative standards originates from the field of legisprudence and is closely related to the notion of legislative quality. In this view, the quality of a domestic piece of implementing legislation depends on the measure of adherence to legislative standards: limited adherence leads to 'poor' quality and a large measure of adherence may result in 'high' quality. Of course, such legislative quality cannot be captured in quantita-

tive terms; it requires an assessment of a qualitative nature. The statement that adherence to legislative standards enhances the quality of any piece of (implementing) legislation raises the question on the legitimacy of their use in legislative practice: to what extent could this statement be underpinned with evidence? This question will be left aside for the moment, but will be revisited in Part III. At this point, it is important to place not too much emphasis on the notion of legislative quality; in the present part we seek to identify legislative standards pertaining to implementing legislation in general, irrespective of whether they can be said to enhance legislative quality.

The survey included in this part will focus on legislative standards that have been codified. They primarily consist of legislative standards of a legally binding nature, such as norms included (or read) in the applicable treaty. Often, however, legislative standards cannot be derived from the text of the treaty alone. In those cases, other sources will be resorted to, such as 'legislative guides', if available. The legal force of those documents may not be similar to the legal obligation to adopt implementing legislation, but they may contain legislative standards nonetheless. Although the distinction between mandatory and non-mandatory legislative standards is relevant to a certain extent, there does not seem to be a convincing argument why our inquiry should be limited to legislative standards of the former category. Furthermore, we seek to identify legislative standards that have been made part, through codification, of *international* law. This implies that domestic attitudes towards implementing legislation, which may consist of an elaborate legislative policy or other means, remains outside the scope of this part; they will be addressed in Part III.

It is often and rightly asserted that legislative standards do not exist under *general* international law; in this view, it is entirely left to states to determine the means and methods of implementation within their jurisdictions, as long as the choice of means and methods leads to conduct which is consistent with the relevant binding legal obligation. Cassese has pointed out that:

> '[a]part from the general rule barring States from adducing domestic legal problems for not complying with international law, and the treaty or customary rules […] that impose the obligation to enact implementing legislation, international law does not contain any regulation of implementation. It thus leaves each country *complete freedom* with regard to how it fulfils, nationally, its international obligations'.[307]

Therefore, in the present part the focus shifts from *general* international law to *special* international legal regimes in order to provide an answer to the question to what extent international standards pertaining to implementing legislation can be inferred from those regimes. They include human rights law, EU law, criminal law, health law, environmental law and labour law.

307 Cassese, *International law* (n 1) 219-220.

As will become clear, the regimes included in this part provide for several standards applicable to domestic implementing legislation.

For the sake of brevity, in this part only a limited number of international legal regimes will be discussed. As a result, of course, they do not perfectly coincide with current international practice in general. Nevertheless, the selection presented below is intended to give a fair impression of the variety of ways in which implementing legislation is regulated under international law. To this end, it is important to explicate the grounds that have led to the inclusion of a particular regime in this part. They include, first and foremost, the diversity of subject matter that is covered by a particular regime; in other words, the regimes included in this part represent a broad spectre of policy fields. Such a broad view is justified in order to avoid too much reliance on legislative standards that might be typical for a certain policy field. Second, it focuses on regimes that have a global scope, as opposed to regimes with a regional character which only address states of a certain region. Although there is no fundamental reason for the exclusion of regional regimes, the lack of space may be a sufficient justification for a more narrow scope. Therefore, in principle, the examination contained in this part is limited to legal regimes that are truly international in scope. The third consideration is an exception to the second. In contrast to the truly global legal regimes, two regimes of a European nature will be discussed below as well: the law of the ECHR and the law of the EU. This exception can be justified by the fact that the courts which have jurisdiction to solve legal disputes arising from these instruments, namely the ECtHR and the CJEU, have produced a vast amount of case law pertaining to implementing legislation, which has remained unrivalled by any other international court.[308] The authoritative legislative standards that have been formulated by these courts are not only unique in quantitative terms, but are also highly relevant for the present study, as they provide insight into the way in which *courts* have proceeded to assess domestic implementing legislation. In this regard, they differ from the other regimes included in this chapter, for which there are no international judicial decisions on their implementation. Fourth, the selection of international legal regimes that can be found in Part II is the product of a more practical consideration. A prerequisite for inclusion in the present part is the simple availability of legislative standards in the legal instrument itself or in the relating documents. In other words, international legal regimes that do not at least slightly indicate the way in which its norms should be implemented on the domestic level, have been left aside. This constitutes an important limitation on the conclusions which could be drawn from the present part's findings: whereas they shed light on the substance of the legislative standards applicable to the instrument's

308 Admittedly, the case law of the Inter-American Court of Human Rights might also be provide authoritative interpretations relating to domestic legislation through which international law (the American Convention on Human Rights) is implemented. Unfortunately, its case law is only partly accessible in English.

implementation, they do not provide insight into the number of international legal regimes which include such standards.

On the basis of the aforementioned considerations, the remainder of this part is dedicated to an overview of the regulation of implementing legislation under selected international legal regimes.

4 Legislative standards as part of human rights law

4.1 Implementation of positive obligations under the European Convention on Human Rights

4.1.1 General

The post-1945 era has witnessed the emergence of various human rights treaties, which depart from the premise that individuals, as humans, are inherently entitled to certain basic rights that should not be infringed upon by others, most notably by state authorities. A useful perspective that has been adopted in order to categorise the obligations flowing from human rights treaties, distinguishes between negative and positive obligations.[309] Negative obligations, in short, are norms under which states are obliged to refrain from conduct that may constitute a violation of the rights to which their citizens are entitled. Positive obligations, in contrast, encompass norms that compel states to actively take measures in order to ensure the full application of the rights entrenched in the applicable treaty.[310] This section focuses on the latter category and addresses the question what legal requirements apply to the legislative measures that have been taken by states in order to comply with their positive obligations.

The exact scope and content of the positive obligations depend on the applicable right and on the context in which it is relied on. As we have seen in section 3.2.2, they may include, but are not limited to, the duty to adopt legislative measures. In contrast to negative human rights obligations, the established positive obligations do not only provide protection to individuals vis-à-vis the state, but are also intended as safeguards for individuals in relation to possible violations conducted by other private entities.[311] Were

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309 J.-F. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights* (Human Rights Handbooks no. 7, Council of Europe, Strasbourg 2007) 5.

310 Mowbray, in his book on positive obligations flowing from the ECHR, argues that the key characteristic of positive obligations is 'the duty upon states to undertake specific affirmative tasks'. A.R. Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford 2004) 2.

311 As the Human Rights Committee put it, 'the positive obligations on States Parties […] will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities'. UN Human Rights Committee, 'General Comment no. 31: the nature of the legal general obligation imposed on states parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, par. 8.

such a violation to occur, the state, depending on the circumstances, may be under the obligation to investigate and punish the harm inflicted upon its citizen. Although positive obligations may be found under several international human rights regimes, the ECtHR has developed the most elaborate case law relating to the doctrine of positive obligations. For this reason, this section focuses on the positive obligations flowing from the ECHR.

In section 3.2.2 it was argued that the source of any positive obligation to adopt implementing legislation can be found in article 1 ECHR, read in conjunction with its (other) substantive provisions. The question arises to what extent the ECtHR has formulated rules that govern the fulfilment of positive obligations by the authorities of the states party to the ECHR. In this regard, it must be pointed out that the ECtHR has consistently held that:

> 'where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues to ensure Convention rights, and even if the State has failed to apply one particular measure provided by domestic law, it may still fulfil its positive duty by other means'.[312]

This starting point applies to positive measures in general, which also include measures that comprise the enactment of legislation.[313] However, as may be derived from the ECtHR's case law, the freedom to choose the means necessary to comply with the positive obligations entrenched in the ECHR has been circumscribed in several ways. For the purpose of the present study, it is relevant to explore the circumstances in which the ECtHR has demanded the adoption of domestic legislation to comply with the positive obligation of the relevant provision of the ECHR. In addition, this section will examine whether the ECtHR indicates what elements such legislation should contain, and how it should be applied in practice. The scope and substance of the positive obligations depend on the right that is at stake; the duty to adopt implementing legislation may vary from one Convention right to the other. For reasons of space, the present section is limited to articles 2, 4, 5, 8 and 10 of the ECHR. As a result, it must be emphasised, relevant case law developed under other provisions of the ECHR, will not be discussed here. Therefore, we must be aware that the analysis contained in section 4.1 cannot an exhaustive discussion of all posi-

312 For example *Budayeva and others v Russia* (App no 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02) ECHR 20 March 2008, par. 134.

313 Arguably, the Court attaches greater importance to the result that is produced by a domestic measure than to the nature, either legislative or non-legislative, of the measure. In *Brincat and others v Malta,* which concerned the right to life, the Court expressed the view that 'while there is a primary duty to put in place a legislative and administrative framework, it cannot rule out the possibility, *a priori*, that in certain specific circumstances, in the absence of the relevant legal provisions, positive obligations may nonetheless be fulfilled in practice.' *Brincat and others v Malta* (App no 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11) ECHR 24 July 2014, par. 112.

tive obligations under the ECHR. However, this limitation will not prevent us from obtaining a fair impression of the subject matter.

4.1.2 Content of the Convention

4.1.2.1 Right to life

Article 2 ECHR embodies probably the most fundamental principle of the Convention: the right to life. The positive obligations that flow from this provision can be summarised by the responsibility of a state party to 'take appropriate steps to safeguard the lives of those within its jurisdiction'[314], which was stated in *Öneryildiz v. Turkey*. This case concerned a methane explosion at the site of a rubbish tip at the outskirts of Istanbul, Turkey, which had resulted in the deaths of thirty-nine people living in the vicinity. Prior to the accident, experts had concluded that the rubbish tip posed an imminent danger to the health of the area's inhabitants and to the surrounding environment. The question arose whether Turkey had failed to meet its obligations under article 2 ECHR. The ECtHR expressed the view that article 2 'entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.[315] This framework should encompass 'effective criminal-law provisions to deter the commission of offences against the person, backed up by lawenforcement machinery for the prevention, suppression and punishment of breaches of such provisions'.[316] In the particular context of dangerous activities, such as the collection of waste in *Öneryildiz v. Turkey*, it added that:

> 'special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. […] In any event, the relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels.'[317]

Instead of formulating the requirement that the legislative and administrative framework applicable to dangerous activities should guarantee 'effective protection' to the rights involved, the Court chose to enumerate

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314 *L.C.B. v the United Kingdom* (App no 23413/94) ECHR 9 June 1998, par. 36.

315 *Öneryildiz v Turkey* (App no 48939/99) ECHR 2004-XII 79, par. 89.

316 *Osmanoğlu v Turkey* (App no 48804/99) ECHR 24 January 2008, par. 72. See also *Ghimp and others v Moldova* (App no 32520/09) ECHR 30 October 2012, par. 43, in which the Court held that 'the domestic legal system [is required] to demonstrate its capacity to enforce criminal law against those who have unlawfully taken the life of another'.

317 *Öneryildiz* (n 315) par. 90 and *Budayeva* (n 312) par. 132.

the different features that should be included in the framework. From the ECtHR's perspective, this level of detail may be justified by the importance of the interests that were at stake: individuals' lives.

In *Opuz v. Turkey*, the ECtHR reached a similar conclusion with regard to the obligation to adopt an 'effective deterrent' legislative framework. However, the subject matter was different. In this case, a woman, the applicant's mother, had died as a result of domestic violence committed by the applicant's husband. The applicant complained that the authorities had failed to provide sufficient protection to the applicant's mother and herself. The ECtHR was confronted with the question whether the criminal law provisions pertaining to the punishment of domestic violence lived up to Turkey's obligations under article 2 ECHR. These provisions contained *inter alia* the requirement that criminal investigations would not start until it was established that the acts had led to a minimum of ten days sickness for work. The Court considered that:

> '[…] the application of the above-mentioned provisions and the cumulative failure of the domestic authorities to pursue criminal proceedings against [the victim] deprived the applicant's mother of the protection of her life and safety. In other words, the legislative framework then in force, particularly the minimum ten days' sickness unfitness requirement, fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims.'[318]

Thus, similar to the Court's reasoning in *Öneryildiz*, it placed the notion of 'effectiveness' at the heart of its evaluation of domestic law in the light of article 2 ECHR. It did not, however, specifically enumerate the elements which should have been included in the domestic legislative framework.

In addition to the obligation to put in place a deterrent legislative and administrative framework, states have a duty to ensure that the framework is 'properly implemented' and that breaches of the right to life are repressed and punished.[319] This entails the obligation to perform an independent and impartial official investigation into the circumstances of the breach of the right to life.[320]

In *Vo v. France* the ECtHR clarified what the obligation to 'properly implement' the domestic legal framework could entail in the field of public health. In this case, a woman's pregnancy had to be terminated as a result of a doctor's mistake.[321] French criminal law did not offer an effective remedy against the unintentional destruction of a fetus, and the question thus arose whether this amounted to a breach of France's positive obligations under

318 *Opuz v Turkey* (App no 33401/02) ECHR 2009-III 107, par. 145.

319 *Öneryildiz* (n 315) par. 91. Also *Guiliano and Gaggio v Italy* (App no 23458/02) ECHR 2011-II 275, par. 298 and *Fanziyeva v Russia* (App no 41675/08) ECHR 18 June 2015, par. 51.

320 *Fanziyeva* (n 319) par. 51.

321 *Vo v France* (App no 53924/00) ECHR 2004-VIII 67, par. 89.

article 2 ECHR. After it had pointed to the lack of consensus in Europe as to the question whether a fetus could be regarded as a 'person' that is entitled to the right to life, it decided, nonetheless, to consider the alleged failure of the French authorities under article 2 ECHR and held:

> 'The positive obligations require States to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. They also require an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable'.[322]

In the present case, the 'effective judicial system' did not, in the view of the ECtHR, necessarily require a remedy of a criminal legal nature. In the sphere of medical negligence, the availability of civil redress or disciplinary measures would suffice to fulfil the positive obligations under article 2. Therefore, the ECtHR found no violation of the right to life.[323] More generally, the ECtHR has held that where an infringement on the right to life has not been intentional, article 2 ECHR does not necessarily require recourse to criminal prosecution.[324]

In view of the above, it must be concluded that article 2 ECHR, as interpreted by the ECtHR, imposes some constraints on the national legislature that takes appropriate measures to protect the lives of the citizens that it represents. These constraints cannot conceal, however, the significant amount of latitude that is allowed to states. As the ECtHR has eloquently summarised this state of affairs:

> 'In principle, States should have the discretion to decide how a system for the implementation of a regulatory framework protecting the right to life must be designed and implemented. What is important, however, is that whatever form the investigation takes, the available legal remedies, taken together, must amount to legal means capable of establishing the facts, holding accountable those at fault and providing appropriate redress. Any deficiency in the investigation, undermining its ability to establish the cause of the death or those responsible for it, may lead to the finding that the Convention requirements have not been met […]'.[325]

4.1.2.2 Prohibition of slavery and forced labour

Pursuant to article 4 ECHR, no one shall be held in slavery or servitude and no one shall be required to perform forced or compulsory labour. From this

322 Ibid, par. 89. Also *Kudra v Croatia* (App no 13904/07) ECHR 18 December 2012, par. 103 and *Bajić v Croatia* (App no 41108/10) ECHR 13 November 2012, par. 89.

323 *Vo* (n 321) par. 90 and 95.

324 *Anna Todorova v Bulgaria* (App no 23302/03) ECHR 24 May 2011, par. 73. Also, in relation to the protection of life from road traffic accidents, *Ciobanu v Moldova* (App no 62578/09) ECHR 24 February 2015, par. 32.

325 *Ciobanu* (n 324) par. 33. Also *Zubkova v Ukraine* (App no 36660/08) ECHR 17 October 2013, par. 37.

provision the ECtHR has derived various positive obligations, such as an obligation to investigate cases of potential human trafficking in an effective and independent manner.[326]

In addition, the ECtHR has identified a positive obligation to adopt domestic legislation of a criminal nature to penalise the acts referred to in article 4, and to enforce that legislation in practice.[327] As a justification for this interpretation of article 4, it pointed *inter alia* to the fact that this provision, together with articles 2 and 3 ECHR, 'enshrines one of the basic values of the democratic societies making up the Council of Europe' from which no derogation is permitted.[328]

In *Siliadin v. France,* the ECtHR investigated French criminal legal provisions applicable to the case of a Togolese woman who had come to France as a minor, and who was held in servitude and subjected to forced labour for several years. The applicant complained that French criminal law had not afforded her sufficient protection against the situation and had made it impossible to punish the offenders. The relevant provisions of the French Criminal Code did not expressly criminalise acts of servitude or forced labour; instead, it referred to acts of 'exploitation through labour and subjection to working and living conditions that are incompatible with human dignity'. The ECtHR referred to its earlier case law and seems to have attached great importance to the required 'effectively deterrent' character of domestic legislation. In the present case, this effective deterrent character was not sufficiently present in the French penal provisions in force at the time, as had become clear from the different interpretations that had been adhered to by several French courts. Therefore, the French legislation in force did not afford the applicant 'practical and effective protection against the actions of which she was a victim'.[329] It thus found a breach of article 4 ECHR.[330]

The positive obligations under article 4 also include the more specific obligation of states to put in place a legislative and administrative framework to prohibit and punish trafficking, as was established by the ECtHR in *Rantsev v. Cyprus and Russia.* Moreover, states are under the obligation to adopt adequate measures regulating businesses often used as a cover for human trafficking and a state's immigration rules must 'address relevant

326 *Rantsev v Cyprus and Russia* (App no 25965/04) ECHR 2010-I 65, par. 288.

327 *Siliadin v France* (App no 73316/01) ECHR 2005-VII 333, par. 89 and 112. For a discussion of this case, see H. Cullen, '*Siliadin v France.* Positive obligations under article 4 of the European Convention on Human Rights' 6 *Human Rights Law Review* 3 (2006) 585-592, 587-589; A. Nicholson, 'Reflections on *Siliadin v. France.* Slavery and legal definition' 14 *International Journal of Human Rights* 5 (2010) 705-720, 707.

328 *Siliadin* (n 327) par. 82 and 112.

329 As Nicholson puts it, 'we see the court […] re-affirming that the requirement that laws be effective requires more than the creation of relevant laws'. Nicholson, 'Reflections on *Siliadin v. France*' (n 327) 707.

330 *Siliadin* (n 327) par. 142-149. Also *C.N. and V. v France* (App no 67724/09) ECHR 11 October 2012, par. 105-108, in which the Court reached the same conclusion.

concerns relating to encouragement, facilitation or tolerance of trafficking'.[331] In this case, the ECtHR stated that, similar to the conclusion it had drawn in *Siliadin v. France,* 'the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking'.[332] The ECtHR had to determine whether the legislative and administrative framework currently in place in Cyprus could offer such 'practical and effective protection'. Whereas the Cypriot legislation prohibiting trafficking and sexual exploitation was considered to be in conformity with the demand imposed by article 4 ECHR, the ECtHR identified a number of weaknesses as regards the Cypriot immigration policy, in particular in relation to the regime of 'artiste' visas.[333] Under this regime, visas were issued to foreign nationals who went to work in Cypriot cabarets, musical-dancing places or other forms of night entertainment. It was widely known, however, that the women to whom these visas were issued, would in practice become victims of human trafficking.[334] After the analysis of several aspects of this visa regime, the ECtHR concluded that the applicable immigration regulations did not meet the standard laid down in article 4. This case demonstrates that the criminalisation in domestic law of certain acts that fall within the scope of article 4, as was required by the Court in *Siliadin,* may not be sufficient to pass the test of practical and effective protection; other branches of domestic laws may also require modification.[335]

4.1.2.3 Right to liberty and security

Article 5 ECHR, according to which everyone is entitled to a right to liberty and security of person, encompasses a positive obligation upon states to 'take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge'.[336] There is only scarce evidence in the case law of the ECtHR, however, that article 5 ECHR may require the enactment of measures of a *legislative* nature.[337]

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331 *Rantsev* (n 326) par. 284-285.

332 Ibid, par. 284.

333 Ibid, par. 290-291.

334 For a more extensive discussion of the facts of the case, see J. Allain, '*Rantsev v Cyprus and Russia*' 10 *Human Rights Law Review* 3 (2010) 546-557, 547-550.

335 See also R. Piotrowicz, 'States' obligations under human rights law towards victims of trafficking in human beings. Positive developments in positive obligations' 24 *International Journal of Refugee Law* 2 (2012) 181-201, 196.

336 *Storck v Germany* (App no 61603/00) ECHR 2005-V 111, par. 102 and *Stanev v Bulgaria* (App no 36760/06) ECHR 2012-I 81, par. 120.

337 These measures may not, however, expand the grounds on the basis of which an individual may be deprived of his personal liberty. See for example *Ostendorf v Germany* (App no 15598/08) ECHR 7 March 2013, par. 87.

In *Lobanov v. Russia*, the applicant, a Russian national, had been convicted by a Kazakh court for the commission of drug-related offences. He had been sentenced to five years imprisonment. After having served more than one year of his prison term in Kazakhstan, the applicant was transferred to Russia, at his request. Meanwhile, however, the Kazakh court had conducted a supervisory review of Mr. Lobanov's case, which led to a reclassification of the facts and a reduction of the sentence. It ordered the immediate release of the convict, who at the time was detained in a Russian prison to serve the remainder of his prison term. Mr. Lobanov, however, was not released until almost four months after this order. Subsequently he brought proceedings against the Russian authorities seeking compensation for damages he had incurred during the almost four months'-period of his illegitimate detention. His request was rejected. Before the ECtHR the issue was raised whether the delay in his release from prison could be reconciled with the provisions contained in article 5, which permits infringements upon an individual's liberty only in case of lawful arrest or detention. While some delay in the execution of an order to release a prisoner is often inevitable, the ECtHR argued, especially when the order has to be carried out by the authorities of another state, as in the case of Mr. Lobanov, it held that:

> 'the State must put in place a legislative and administrative framework which would ensure that each and every step required for a person's release in such a situation is taken promptly and diligently.'[338]

In the present case, the ECtHR found that the delay in the execution of the order to release Mr. Lobanov was too long and clearly demonstrated neglect on the part of the Russian authorities. Therefore, it found it a violation of article 5.[339]

However, it remains unclear what standards the required 'legislative and administrative framework' should meet. Indeed, it seems that the ECtHR is indifferent with regard to the manner in which it will be implemented, as long as it achieves the aim that is part of article 5 ECHR: to rule out unnecessary delay in the execution of an order to release a detainee.

4.1.2.4 Right to respect for family and private life

Under article 8 everyone has the right to respect for his private and family life, his home and his correspondence. Again, to observe this right, states may be required to adopt domestic legislation. In *Sari and Çolak v. Turkey*, the ECtHR held that the state's failure to provide practical and effective protection against violations of the right of persons in police custody to communicate with family members, constituted a breach of article 8.[340] Similarly, in

338 *Lobanov v Russia* (App no 16159/03) ECHR 16 October 2008, par. 49.
339 Ibid, par. 47-50.
340 *Sari and Çolak v Turkey* (App no 42596/98) ECHR 2006-V 295, par. 37. Also *Uçar v Turkey* (App no 52392/99) ECHR 11 April 2006, par. 141.

cases of medical negligence, states are under the obligation to 'maintain and apply in practice an adequate legal framework enabling victims to establish any liability on the part of the physicians concerned and to obtain appropriate civil redress, such as an award of damages, in appropriate cases'.[341]

Another interesting case in this respect was *A., B. & C. v. Ireland*, which concerned the question whether the Irish policies in the field of abortion were in accordance with the ECHR. The Irish Constitution contained a provision which stipulated that the state 'acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right'.[342] This provision, laid down in article 40, third paragraph, sub 3, had been interpreted by the Irish Supreme Court as permitting abortion only in cases where it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health of the mother, including a risk of self-harm, which can only be avoided by a termination of the pregnancy. One of the applicants, who had received chemotherapy as part of cancer treatment, had complained that due to the failure of the Irish legislature to provide an effective and accessible procedure, she had not been able to establish whether she qualified for a lawful abortion in Ireland on the ground of a risk to her life or her pregnancy. The ECtHR was thus confronted with the question whether there was a positive obligation on the state to provide for such an effective and accessible procedure under article 8 ECHR.

The ECtHR noted that the constitutional provision, including its explanation by the Supreme Court had been formulated in broad terms. This contributed to a sense of legal insecurity, as the applicant and her doctor ran the risk of criminal prosecution if they would decide to end her pregnancy in contravention of applicable provision. This uncertainty could have been removed if the Irish national legislature would have adopted legislation to implement the relevant provision of the Irish constitution, as the Irish courts had suggested on various occasions. Against this background, the ECtHR held that:

> 'the authorities failed to comply with their positive obligation to secure to the […] applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with […] the Constitution. Accordingly, the Court finds that there has been a violation of Article 8 of the Convention.'[343]

341 *S.B. v Romania* (App no 24453/04) ECHR 23 September 2014, par. 66 and 81.

342 Constitution of the Republic of Ireland 2015 art 40.3.3 (The Stationery Office, Dublin 2015) <https://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/February_2015_-_Constitution_of_Ireland_.pdf> (accessed 29 March 2018).

343 *A., B. & C. v Ireland* (App no 25579/05) ECHR 2010-VI 185, par. 267-268.

Thus, the ECtHR found that the sole absence of domestic legislation which would clarify the boundary between lawful and unlawful abortions amounted to a breach of the right to respect for the private life of the applicant. The ECtHR seems to attribute considerable importance to the demand of legal certainty; arguably, the notions of legal certainty and effective protection under article 8 ECHR are closely connected. This may not be surprising given the fact that in the case before it, a violation of the domestic legislative framework could very well have resulted in the criminal prosecution of the person. Nevertheless, it would go too far to infer from this the existence of a separate and *general* criterion of legal certainty that is applicable to domestic implementing legislation. Instead, it will depend on the circumstances, such as the threat of criminal prosecution, whether an effective protection of the right laid down in article 8 ECHR requires a clear legal framework.

4.1.2.5 Right to freedom of expression

Article 10, first paragraph, ECHR, stipulates that everyone has the right to freedom of expression. The ECtHR has accepted that, under circumstances, this provision, read in conjunction with article 1 ECHR, may impose the obligation upon states to adopt legislative measures in order to comply with their positive obligations under the ECHR. In *Centro Europa 7 S.R.L. and Di Stefano v. Italy,* an Italian broadcasting company had obtained a license for nationwide television broadcasting. According to the license, the company was entitled to three frequencies covering 80% of national territory. However, the license also referred to the national frequency-allocation plan, which would provide for the allocation of the frequencies to the holders of a license. This plan was, nevertheless, not implemented by the Italian authorities. As a result, the company was not able to broadcast until ten years later, as it had not been given any frequencies to which it was entitled on the basis of the license.

Did the Italian state act in contravention of its obligations under the ECHR? The ECtHR emphasised the principal importance of pluralism and the right to freedom of expression for the proper functioning of democracy. In Italy, media pluralism had come under pressure, it was feared, as two companies commanded more than 90% of the television audience, thus creating a duopoly (both of which happened to lie in the hands of one man: business man and Italy's then prime minister, Mr. Berlusconi). Against this backdrop, the ECtHR held that:

> 'to ensure true pluralism, […] it is necessary […] to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed'.[344]

344 *Centro Europa 7 S.R.L. and Di Stefano v Italy* (App no 38433/09) ECHR 2012-III 339, par. 130.

To this end, the Italian state was under the positive obligation to 'put in place an appropriate legislative and administrative framework to guarantee effective pluralism'.[345] While the applicant company had obtained a broadcasting license, this license had remained without practical purpose as the Italian authorities had failed to allocate frequencies to the license-holder. This amounted to a 'substantial obstacle' to the applicant company's right to impart information and ideas. The ECtHR thus found a violation of article 10 ECHR.[346]

In the present case, the ECtHR did not elaborate on the content of the 'appropriate legislative and administrative framework' that it had perceived as necessary for the compliance with article 10 ECHR. It only referred to the purpose it should serve: to guarantee effective media pluralism in the country.

4.1.3 Legislative standards

4.1.3.1 Effectiveness

What legislative standards could be derived from the case law discussed above and from the ECHR? It has become clear that the ECtHR's case law in relation to this kind of implementing legislation has provided some guidance as to the criteria that must be observed by national legislatures in order to respect their obligations under the ECHR. First and foremost, this is the criterion of effectiveness, which has led the ECtHR to investigate whether the laws adopted on the domestic level ensure the *effective protection* of the applicable ECHR rights. This has been eloquently phrased by the ECtHR itself, which on several occasions has stated that '[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[347] As has been noted by Xenos, 'the principle of effectiveness is approached as an objective factor to guide the determination of the content of positive obligations'.[348] Thus, what could be expected from a state in the case at hand in order to meet the requirements entrenched in the ECHR, is identical to the answer to the question what amounts to the effective protection of individuals under the applicable right. As we have seen in *Lobanov,* a legislative and administrative framework will meet the standard of effective protection under article 5 ECHR if it ensures that 'each and every step required for a person's release in such a situation is taken promptly and diligently'.[349] Similarly, under article 10 ECHR, the effective protection of a person's right to freedom of expression

345 Ibid, par. 134 and 156.
346 Ibid, par. 138.
347 *Airey v Ireland* (App no 6289/73) ECHR 9 October 1979, par. 24.
348 D. Xenos, *The positive obligations of the state under the European Convention of Human Rights* (Routledge, London 2012) 91.
349 *Lobanov* (n 338) par. 49.

may only be complied with if the applicable domestic legal framework guarantees 'effective pluralism'.[350]

In addition to the aim that the domestic implementing legislation should achieve, the ECtHR on several occasions has indicated which material elements it should consist of. In *Öneryildiz*, the ECtHR pointed out the elements that should be included in the domestic legal framework that is applicable to dangerous activities such as the collection of waste. In *Rantsev*, the ECtHR held that the states' law-making activities must go beyond the mere prohibition and punishment of trafficking; domestic legislation should also include adequate measures regulating businesses often used as a cover for human trafficking and a state's immigration rules must 'address relevant concerns relating to encouragement, facilitation or tolerance of trafficking'. As we have seen above, in cases of medical negligence, states are under the obligation to put in place an 'adequate legal framework enabling victims to establish any liability on the part of the physicians concerned and to obtain appropriate civil redress, such as an award of damages, in appropriate cases'. These stipulations of the content of the legislative measures cannot be considered an end in itself; rather they must be seen as a means to ensure 'effective protection' of the individual in a specific case.

4.1.3.2 Non-discrimination

A legislative standard that has not been mentioned in the context of the discussion of the various ECHR rights above, consists of the prohibition of discrimination. Pursuant to article 14 ECHR,

> 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

Non-discrimination, of course, is at the heart of the ECHR system. It must therefore also be considered to apply to domestic legislation that has been enacted by state parties in order to fulfil the positive obligations under the ECHR. From this point of view, the exclusion of certain minorities from the scope of a particular positive obligation to adopt domestic implementing legislation, will certainly amount to a breach of the ECHR on the part of the state.

Two examples from the ECtHR's case law may support this view. The case *Eremia v. Moldova* concerned a woman who had been the victim of domestic violence by her husband. Before the ECtHR the question was raised whether the Moldovan state, which had not protected her from domestic violence and had not prevented the recurrence of such violence, had failed to discharge its obligations under article 3 ECHR. This article

350 *Centro Europa 7 S.R.L. and Di Stefano* (n 344) par. 134 and 156.

embodies *inter alia* the prohibition of inhuman and degrading treatment.[351] The ECtHR found, in accordance with its case law, that article 3 requires:

> 'on the one hand, setting up a legislative framework aimed at preventing and punishing ill-treatment by private individuals and, on the other hand, when aware of an imminent risk of ill-treatment of an identified individual or when ill-treatment has already occurred, to apply the relevant laws in practice, thus affording protection to the victims and punishing those responsible for ill-treatment'.[352]

With regard to the former obligation, the ECtHR established that a legislative framework to take measures against persons accused of family violence was indeed present in Moldova in accordance with article 3 ECHR.[353] As regards the obligation to apply the laws in force, however, the ECtHR concluded that the Moldovan authorities had failed to comply with the positive obligation entrenched in article 3. In short, it based its finding on evidence that the authorities had refused to take action in order to prevent further domestic violence against the applicant, even though they had been well aware that the applicant was in jeopardy.[354] For the purpose of the present section, the more interesting aspect of this case was that the applicant also complained of a breach of the prohibition of discrimination as covered by article 14 ECHR. The applicant argued that the domestic violence of which she was a victim, was gender-based. The failure of the state authorities to adequately respond to the imminent threats against the applicant, despite available information to this effect, thus amounts to discrimination on the basis of gender, she claimed.[355] The ECtHR sided with the applicant and found a breach of article 14 in conjunction with article 3 ECHR, as it concluded that:

> 'the authorities' actions were not a simple failure or delay in dealing with violence against the first applicant, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman'.[356]

While *Eremia v. Moldova* concerned the discriminatory nature of the *application in practice* of the domestic laws in force, in contravention of the articles 3 and 14, the ECtHR discussed the discriminatory nature of domestic laws itself in *Marckx v Belgium*. In this case the ECtHR was requested to assess the Belgian laws applicable to the establishment of maternal affiliation of a woman's child which was 'illegitimate' in the sense that the mother was unmarried at the time of birth. Under Belgian law, no legal bond between an unmarried mother and her child arose from the mere fact of birth;

351 *Eremia v the Republic of Moldova* (App no 3564/11) ECHR 28 May 2013, par. 40.
352 Ibid, par. 56.
353 Ibid, par. 57.
354 Ibid, par. 66.
355 Ibid, par. 82.
356 Ibid, par. 89.

maternal affiliation was not established until after voluntary recognition by the mother or a court ruling. In this respect, the legal position of unmarried mothers differed from married mothers: whereas an unmarried mother had to take steps in order to ensure her recognition as the child's mother before the law, the latter were recognised automatically as the child's mother upon the presentation of a birth certificate.[357] Did this distinction amount to discrimination as prohibited under article 14 of the Convention? The ECtHR answered in the affirmative as the distinction could not be 'objectively and reasonably justified'.[358]

From the foregoing it may be concluded that the adoption of discriminatory domestic laws in order to give effect to positive obligations under the ECHR, or their application in practice, may constitute a breach of the ECHR. Therefore, the ECtHR's case law seems to support that the view that non-discrimination must be considered to apply as a legislative standard to domestic legislation that is adopted as part of the positive obligations under the ECHR.

4.1.3.3 Enforcement, remedies and 'proper implementation'

Another element of the national legislative frameworks that states are required to adopt in order to fulfil their positive obligations under the ECHR, consists of enforcement. As we have seen above, the articles 2 and 4 ECHR demand states to criminalise certain unlawful acts. States must ensure that the necessary criminal law provisions are in place to prosecute any person suspected of the intentional taking of human life. Similarly, under article 4, states have a duty to adopt domestic legal provisions which prohibit and punish human trafficking. In other situations, the enforcement of the applicable domestic legal framework can be secured through the presence of provisions of a non-criminal nature, such as legal procedures to obtain civil redress in case of damage as a result of medical negligence, as we have seen in the context of the discussion of article 8 ECHR.

At this point we should also refer to article 13 ECHR on effective remedies, which reads:

> 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.[359]

If a person enjoys a right under domestic implementing legislation on the basis of a positive obligation which originates from the ECHR, he should be able to have a remedy to enforce that right. The contours of the 'effective remedy' which is imperative under the ECHR, can be summarised as

357 *Marckx v Belgium* (n 50) par. 14 and 35.
358 Ibid, par. 43.
359 ECHR art 13.

follows. First of all, it is not needed that a violation of the latter right is established beyond doubt before claiming a violation of article 13; in order to invoke article 13 ECHR, it suffices to bring an 'arguable complaint'.[360] State parties enjoy some discretion in the implementation of this provision within their national legal orders, in particular with regard to the form of remedies.[361] However, the competent national authority must deal with the substance of the complaint and be in the position to grant appropriate relief.[362] What amounts to an effective remedy clearly depends on the specific situation in which the claimant finds itself, such as a deprivation of liberty.[363] In the end the crucial test is whether the remedy is effective 'in practice as well as in law'.[364]

The adoption of implementing legislation will not always suffice to fulfill the obligations under the ECHR; states may also be under the obligation to 'properly implement' the laws in place. This may include the repression and punishment of breaches of a right entrenched in the ECHR. For instance, as we have seen, the ECtHR has maintained that states are under the duty to institute criminal proceedings in response to any intentional taking of human life. In other words, the mere presence of domestic criminal laws is not enough; to fully comply with the relevant positive obligations under the ECHR, states must also apply those laws in practice.

4.1.3.4 Formal aspects

Finally, in some cases the ECtHR has demanded the observance of formal criteria as well, such as the requirement of clarity.[365] As we have seen in *A., B. & C. v. Ireland*, this may serve the purpose of legal certainty for individuals who are entitled to the protection that is offered by the ECHR rights. In other cases, such as *Siliadin v. France,* the ECtHR has emphasised the necessity of clarity in order to maximise the deterrent effect of the implementing legislation. The interest of deterrence could also demand the adoption of legislation of a criminal legal nature, as opposed to civil or administrative legal provisions. Although the formal requirements (clarity and nature of the implementing legislation) that are applicable to implementing legislation might be viewed as separate criteria, it may be more convincing to consider these as accessory to the material requirement of effective protection. At the end of the day, the ECtHR will assess whether the state authorities have provided 'effective protection' to an individual in the case before it.

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360 A recent example is *De Tommaso v Italy* (App no 43395/09) ECHR 23 February 2017, par. 180.

361 B. Rainey, E. Wicks and C. Ovey, *The European Convention on Human Rights* (6th edn OUP, Oxford 2014) 133.

362 *Aydin v Turkey* (App no 23178/94) ECHR 25 September 1997, par. 103.

363 See for an extensive discussion of the applicable criteria Council of Europe, *Guide to good practice in respect of domestic remedies* (Council of Europe, Strasbourg 2013) < www.coe.int>.

364 *Wille v Liechtenstein* (App no 28396/95) ECHR 1999-VII 279, par. 75.

365 As will be discussed in section 11.3.3.1, this requirement bears a resemblance to the requirement of 'foreseeability'.

The clarity of the domestic law at hand may be an indication whether the standard of effective protection has been met. On the other hand, it could be argued on the basis of *A., B. & C. v. Ireland* that the lack of a clear legal norm may not be sufficient to find a violation of the ECHR when the domestic law, despite its obscurity, has not negatively affected the protection to which an individual is entitled.

4.1.4 Overview

As appears from the above, states party to the ECHR are under the duty not only to abstain from conduct that constitutes an infringement on the ECHR rights, but also to take effective measures to safeguard access to those rights by its citizens. These so-called positive obligations can be derived from article 1, read in conjunction with the various substantive rights embodied in the ECHR. Positive obligations may entail the adoption of all kinds of measures. In most cases the ECtHR has demonstrated a considerable level of indifference as to the nature of these measures, either legislative or non-legislative. In some cases, however, the ECtHR has made clear that a state's positive obligations can only be successfully complied with after the enactment of certain legislative measures that meet the legislative standards prescribed by the ECtHR. They demand that domestic implementing legislation meets the requirements of effectiveness and non-discrimination. Moreover, with regard to the articles 2 and 4, the adoption of criminal laws may be mandatory, as is the application of those laws in practice and the provision of an effective remedy under article 13 ECHR. Finally, the ECtHR has stated that the observance of formal criteria may also be imperative in specific circumstances.

4.2 Implementation of the International Covenant on Economic, Social and Cultural Rights

4.2.1 General

In addition to the protection of civil and political rights, as entrenched in the ECHR and the International Covenant on Civil and Political Rights (ICCPR), the international community has made efforts to codify economic, social and cultural rights. Examples include the right to health and the right to an adequate standard of living. Their most comprehensive codification is the International Covenant on Economic, Social and Cultural Rights (ICESCR), the origins of which can be found in the Universal Declaration of Human Rights (UDHR), a (non-binding) resolution adopted by the UNGA in 1948.[366] The UDHR enumerates various human rights, including both

366 UNGA res 217(III)A (10 December 1948).

civil and political rights and economic, social and cultural rights. After its adoption, efforts were made to codify both categories in binding instruments as well. Eventually, this resulted in two separate treaties: ICCPR and ICESCR.[367] They are, in combination with the UDHR, often referred to as the International Bill of Rights.[368]

The ICESCR was adopted in 1966 and entered into force on 3 January 1976. Currently 167 states are party to the ICESCR.[369] In 2008 it was supplemented by the Optional Protocol which established an individual complaints procedure. As yet, 23 states are party to the protocol.[370]

Scholars have written extensively on the differences between civil and political rights (often referred to as 'first generation human rights') on the one hand, and economic, social and cultural rights (usually categorised as 'second generation human rights') on the other hand. There is neither a need, nor space to revisit this debate in its entirety.[371] However, it may be useful to briefly address some perceived differences between the ICCPR and the ICESCR in order to fully understand the character of the obligations flowing from economic, social and cultural rights. A major difference between the ICCPR and the ICESCR lies in the nature of the state obligations entrenched in the respective treaty. Whereas the ICCPR provides for an obligation to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant', ICESCR contains a state duty to take steps towards the 'progressive realisation' of the rights embodied in ICESCR.[372] Due to the terms used in the ICESCR, it has been argued that economic, social and cultural rights, in contrast to civil and political rights, cannot be legally enforced as they do not contain 'rights' but obligations to take certain (policy) measures.[373] This certainly is an 'oversimplification'.[374] For instance, as we have seen in the previous section on the ECHR, civil and political rights may also encompass positive obligations to take certain specified measures; they may not be limited to the state obligation to refrain from certain conduct if that conduct constitutes an infringement on the protected interest of an individual. Furthermore, the CESCR has emphasised that the rights entrenched in the

367 M. Senyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing, Oxford 2009) 26-27; M. Craven, *The International Covenant on Economic, Social and Cultural Rights. A perspective on its development* (Clarendon Press, Oxford 1995) 6-7.

368 Craven, *The International Covenant on Economic, Social and Cultural Rights*' (n 367) 16-17.

369 http://indicators.ohchr.org/ (accessed 29 March 2018).

370 Ibid.

371 For an overview of this discussion, see Craven, *The International Covenant on Economic, Social and Cultural Rights*' (n 367) 7-16.

372 ICCPR art 2, first paragraph, and ICESCR art 2, first paragraph. Although this difference is correct in general, there may be exceptions. Th. van Boven, 'Categories of rights' in: D. Moeckli, S. Shah and S. Sivakumaran (eds) *International human rights law* (2nd edn OUP, Oxford 2014) 143-156, 144-145.

373 B. Saul, D. Kinley and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights. Commentary, cases, and materials* (1st edn OUP, Oxford 2014) 1.

374 Craven, *The International Covenant on Economic, Social and Cultural Rights*' (n 367) 11.

ICESCR contain 'significant justiciable dimensions'.[375] Perhaps for these reasons, Van Boven observes 'a significant evolution […] over the years towards the enhanced status of economic, social and cultural rights', which have been brought 'on a par' with civil and political rights.[376]

4.2.2 Content of the Convention

The ICESCR enumerates several economic, social and cultural rights. The most important rights are the right to work (article 6), the right to the enjoyment of just and favourable conditions of work (article 7), the right to form trade unions (article 8, first paragraph, sub a), the right to strike (article 8, first paragraph, sub d), the right to social security (article 9), the right to an adequate standard of living (article 11), the right to health (article 12), the right to education (article 13) and the right to take part in cultural life (article 15). Moreover, article 1 ICESCR stipulates that all peoples have the right of self-determination, a provision which is an exact copy of article 1 ICCPR.

The state obligations and, at the receiving end, the rights of individuals, entrenched in the ICESCR have three 'dimensions': an obligation to respect, protect and fulfil. They cannot be derived from the text of the ICESCR, but must be considered part and parcel of the substantive rights included in Part III.[377] Whereas the 'obligation to respect' imposes a duty on states to refrain from conduct in violation of the applicable rights, the 'obligation to protect' provides that states must take measures to prevent violations by third parties. In this regard, the 'obligation to protect' bears some resemblance to the positive obligations under the ECHR examined in section 4.1. The 'obligation to fulfil' requires states to take measures aimed at the full realisation of the rights embedded in the ICESCR.[378]

In order to promote compliance with the ICESCR, it provides for the establishment of a supervisory body. While this task was originally intended to be performed by the Economic and Social Council, one of the principal organs of the UN, in 1985 it was decided to put in place a committee of independent experts to take over this task: the Committee on Economic, Social and Cultural Rights.[379] Its main duty is to oversee state compliance with the ICESCR on the basis of reports submitted by state parties pursuant to article 16. Furthermore, the CESCR may receive and consider complaints

375 CESCR, 'General Comment no. 9: the domestic application of the Covenant' (3 December 1998) UN Doc E/C.12/1998/24, par. 10.

376 Van Boven, 'Categories of rights' (n 372) 149.

377 CESCR, 'General Comment no. 12: the right to adequate food (art. 11)' (12 May 1999) UN Doc E/C.12/1999/5, par 15.

378 Ch. Tomuschat, *Human rights. Between idealism and realism* (2nd edn OUP, Oxford 2008) 43.

379 ECOSOC, 'Review of the composition, organisation and administrative arrangements of the Sessional Working Group of Governmental Experts on the implementation of the International Covenant on Economic, Social and Cultural Rights' Res 1985/17 (28 May 1985) UN Doc E/RES/1985/17.

issued by aggrieved individuals in accordance with the Optional Protocol to the ICESCR.[380]

4.2.3 Legislative standards

4.2.3.1 Implementation and progressive realisation

States have a duty to adopt domestic measures required for the implementation of the ICESCR. This follows from article 2, first paragraph, which reads:

> 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

Whatever the means of implementation, they must be 'adequate to ensure fulfillment of the obligations under the ICESCR'.[381] The CESCR has expressed the view, in its General Comment on the above-cited provision, that 'in many instances legislation is highly desirable and in some cases […] even indispensable'.[382] For example, the CESCR has argued that it may be difficult to combat discrimination if a 'sound legislative foundation' for the necessary measures is absent.[383] In the same vein, as was noted by Saul, Kinley and Mowbray, the CESCR has 'subsequently made very clear the importance it attaches to states enacting legislation (and enforcing it) as effective means to realize the Covenant's rights'.[384]

The substance of the obligation to adopt domestic legislation in order to implement the above-cited provision is largely dependent upon the meaning attributed to the phrases 'to the maximum of [a state's] available resources' and 'achieving progressively the full realization of the rights'.

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380 On the condition that states that are believed to be in breach of their obligations have become a state party to the Optional Protocol.

381 CESCR, 'General Comment no. 9' (n 375) par. 7.

382 CESCR, 'General Comment no. 3: the nature of states parties' obligations (art. 2, para 1, of the Covenant)' (14 December 1990) UN Doc E/1991/3, par. 3.

383 Ibid. See also paragraph 17 and 18 of the Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights. The Limburg Principles were agreed upon in 1986 by 29 'distinguished experts in international law' convened under the auspices of the International Commission of Jurists, a non-governmental organisation dedicated to the protection of human rights. Although these principles do not have a legal basis in the Covenant, or in international law in general, they reflect the experts' view of the 'present state of international law' <https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural> (accessed 29 March 2018).

384 Saul, Kinley and Mowbray, *The International Covenant on Economic, Social and Cultural Rights* (n 373) 159.

The reference to the maximum of a state's available resources is 'unavoidably subjective', as it will be the state itself that assesses which resources are available and until what maximum.[385] On the other hand, it may be argued that a lack of resources may not be invoked as a justification for inertia on the part of the state. In this regard, the CESCR has stated that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party'.[386]

The reference to the 'progressive realisation' of the rights embedded in the ICESCR indicates, in the view of the CESCR, that:

> '[t]he concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. […] Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.'[387]

These statements expressed by the CESCR cannot conceal the fact that the precise scope of article 2, first paragraph, remains somewhat vague. For this reason, it seems very hard to infer from these general observations specific legislative standards. An exception may be found in the principle of non-discrimination, which has a separate legal basis in the ICESCR. Fortunately, the interpretation of the *specific* ICESCR rights by the CESCR may provide for additional guidance as to the standards that should be met in the relevant domestic legislation. These principles and standards, which can be found in the so-called 'General Comments' and recommendations ('Concluding Observations') issued by the CESCR, and, to a lesser extent, in the views adopted by CESCR in the context of the individual complaints procedure under the Optional Protocol, will be discussed in the remaining part of this section.[388]

4.2.3.2 Non-discrimination

Perhaps the most important legislative standard which may be derived from the text of the ICESCR is the prohibition of discrimination, i.e. differ-

385 Ibid, 143-144.
386 CESCR, 'General Comment no. 3' (n 382) par. 10.
387 Ibid, par. 9.
388 In cases where a particular legislative standard can be derived from several or even many sources, we have - for the sake of brevity- limited the references to the General comments or the most recent reports.

ential treatment which cannot be objectively and reasonably justified.[389] It has been codified in article 2, second paragraph, which stipulates:

> 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.[390]

The CESCR has recognised that 'non-discrimination and equality are fundamental components of international human rights law and essential to the exercise end enjoyment of economic, social and cultural rights'.[391] Therefore, the standard of non-discrimination has been termed an 'immediate and cross-cutting' obligation in the ICESCR.[392]

The importance of equal treatment has also been emphasised with regard to other specific rights entrenched in the ICESCR. For example, with regard to discrimination on the basis of gender, article 3 stipulates that state parties 'undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights' set forth in the ICESCR. Articles 2, second paragraph, and 3, have been described as 'integrally related and mutually reinforcing'.[393] They require that 'the principle of equality […] be respected by the legislature when adopting laws, by ensuring that those laws further equal enjoyment of economic, social and cultural rights by men and women'.[394] Identical arguments have been made with regard to *inter alia* a person's access to social security, which must be ensured without discrimination, and a person's right to participate in a particular cultural activity under the articles 9 and 15 respectively.[395] In practice, this means that the domestic legislation that was enacted in order to implement the requirements of the ICESCR may not discriminate on prohibited grounds.[396]

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389 CESCR, 'General Comment no. 20: non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (2 July 2009) UN Doc E/C.12/GC/20, par. 13.

390 Other provisions which entail a prohibition of discrimination of women can be found in articles 3 and 7, sub a, sub i.

391 CESCR, 'General Comment no. 20' (n 389) par. 2. Also J. Clifford, 'Equality' in: D. Shelton (ed), *The Oxford Handbook of International Human Rights Law* (1st edn OUP, Oxford 2013) 420-445, 434-435.

392 CESCR, 'General Comment no. 20' (n 389) par. 7.

393 CESCR, 'General Comment no. 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights (article 3 of the International Covenant on Economic, Social and Cultural Rights)' (11 August 2005) UN Doc E/C.12/2005/4, par. 3.

394 Ibid, par. 9.

395 CESCR, 'General Comment no. 19: the right to social security (art. 9)' (4 February 2008) UN Doc E/C.12/GC/19, par. 30; CESCR, 'General Comment no. 21: the right of everyone to take part in cultural life (art. 15, para. 1 (a) of the International Covenant on Economic, Social and Cultural Rights)' (21 December 2009) UN Doc E/C.12/GC/21, par. 22.

396 CESCR, 'General Comment no. 20' (n 389) par. 8.

4.2.3.3 *Consultation*

Furthermore the CESCR has underlined the importance of consultation in 'formulating, implementing, reviewing and monitoring laws and policies' related to the right to just and favourable conditions of work, which is entrenched in article 7 ICESCR. In the view of the CESCR, such consultation could be performed with various organisations. Among them are the traditional social partners, such as workers' and employers' organisations, and other interest groups. The latter category encompasses organisations that represent minority groups, such as persons with disabilities, younger and older persons, women, workers in the informal economy, migrants, lesbian, gay, bisexual, transgender and intersex persons, and persons that belong to ethnic groups and indigenous communities.[397] In the same vein, consultations should be held by state parties that consider the enactment of implementing legislation in order to perform their duty under the right of everyone to take part in cultural life. Indeed, the CESCR asserts that the applicable article 15, first paragraph, sub a:

> 'entails that the laws, policies, strategies, programmes and measures adopted by the State party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities involved'.[398]

Thus, as may be derived from this statement, the main reason for holding consultations with parties involved is to seek support for national implementing legislation.

Also beyond articles 7 and 15 ICESCR, the CESCR has emphasised the importance of '[carrying] out a broad process of consultation and participation in the drafting and adoption [of national legislation].[399]

4.2.3.4 *Observance of applicable international law*

In many cases the CESCR has also indicated that the domestic implementing legislation under the ICESCR must be consistent with other international legal obligations to which the state is bound. For instance, with regard to the right to just and favourable conditions of work, which emanates from article 7, the CESCR has stated:

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397 CESCR, 'General Comment no. 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)' (27 April 2016) UN Doc E/C.12/GC/23) par. 56 and 65, sub c. See also paragraphs 35 and 40 on exceptions to limitation on daily hours of work or weekly rest periods respectively.

398 CESCR, 'General Comment no. 21' (n 395) par. 16, sub c.

399 For example CESCR, Concluding observations on the sixth periodic report of Colombia (6 October 2017) UN Doc E/C.12/COL/CO/6, par. 18; CESCR, Concluding observations on the sixth periodic report of Canada (4 March 2016) UN Doc E/C.12/CAN/CO/6, par. 14.

> '[…] States parties should ensure that other international agreements do not negatively affect the right to just and favourable conditions of work, for example, by restricting the actions that other States parties could take to implement the right'.[400]

A similar point was made with regard to the right to social security, to which the CESCR added that '[a]greements concerning trade liberalization should not restrict the capacity of a State Party to ensure the full realization of the rights to social security'.[401] In other words, state parties to the ICESCR must observe and continue to observe its requirements when they contract other international legal obligations.

Whereas the aforementioned examples reflect the requirement that other international agreements which are concluded by a state party must be consonant with the obligations of that state under the ICESCR, the inverse situation has also been addressed by the CESCR. In order to perform their obligations under the right to sexual and reproductive health, which is considered part of article 12 ICESCR, states 'should be guided by contemporary human rights instruments and jurisprudence, as well as the most current international guidelines and protocols established by United Nations agencies, in particular WHO and the United Nations Population Fund (UNFPA)'. It then referred to several authoritative interpretations of the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination against Women.[402]

The CESCR has made similar statements with regard to, *inter alia,* the rights of indigenous peoples[403], the rights of persons with disabilities,[404], the rights of minors,[405] the rights of refugees, asylum seekers and stateless persons,[406] the right to join and form trade unions[407] and the right to housing[408].

The CESCR's references to other international norms must be seen as an attempt to ensure the consistent interpretation of the various applicable human rights instruments by states and, in particular, as a recognition that

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400 CESCR, 'General Comment no. 23' (n 397) par. 72 and 79.

401 CESCR, 'General Comment no. 19' (n 395) par. 57 and 65.

402 CESCR, 'General Comment no. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' (2 May 2016) UN Doc E/C.12/GC/22, par. 49. Also CESCR, Concluding observations on the initial report of Pakistan (23 June 2017) UN Doc E/C.12/PAK/CO/1, par. 48.

403 CESCR, Concluding observations on the sixth periodic report of Colombia (6 October 2017) UN Doc E/C.12/COL/CO/6, par. 18.

404 CESCR, Concluding observations on the initial report of Pakistan (n 402) par 24.

405 Ibid, par 56.

406 Ibid, par 26.

407 CESCR, Concluding observations on the sixth periodic report of Colombia (n 403) par 40; CESCR, Concluding observations on the fifth report of Australia (23 June 2017) UN Doc E/C.12/AUS/CO/5, par 30; CESCR, Concluding observations on the fourth periodic report of the Dominican Republic (7 October 2016) E/C.12/DOM/CO/4, par. 40.

408 CESCR, Concluding observations on the sixth periodic report of Canada (4 March 2016) UN Doc E/C.12/CAN/CO/6, par. 40; CESCR, Concluding observations on the second periodic report of the Sudan (9 October 2015) UN Doc E/C.12/SDN/CO/2, par. 48.

the interpretation of the ICESCR, and the domestic legislation which is adopted in order to give effect to its provisions, is subject to the meaning which is attributed under the other related, instruments, guidelines and protocols.

4.2.3.5 Monitoring of compliance and enforcement

The CESCR has indicated that the mere adoption of legislation by state parties in order to fulfil their obligations under the ICESCR is insufficient; states must also monitor compliance and ensure the adequate enforcement of the legislation in practice. Of course, these two elements go hand in hand; enforcement of legislation, in the sense of punishment of violations, presupposes the establishment of a breach of the law. In turn, a violation of the applicable legislation can only be determined if a system has been put in place to monitor compliance with that legislation.

Therefore, the obligation to establish a system to monitor compliance has been considered an integral part of the ICESCR rights. Under the right to water, the CESCR recommends that states adopt domestic legislation which provides, *inter alia*, for 'national mechanisms for its monitoring'.[409] In addition, as part of the right to just and favourable conditions of work, compliance by the private sector should be monitored 'through an effectively functioning labour inspectorate'.[410] Elsewhere, with regard to the right to social security, the CESCR has suggested that monitoring should be performed 'independently', although it did not clarify how this criterion must be understood.[411] In some case the CESCR has expressly mentioned the sectors which should be the object of compliance monitoring. For instance, under the right to sexual and reproductive health (article 12 ICESCR), the state parties should aim their monitoring efforts in particular on private health-care providers, health insurance companies, educational and childcare institutions, institutional care facilities, refugee camps, prisons and other detention centers and pharmaceutical companies operating abroad.[412]

409 CESCR, 'General Comment no. 15: the right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (20 January 2003) UN Doc E/C.12/2002/11, par 50.

410 CESCR, 'General Comment no. 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights (article 3 of the International Covenant on Economic, Social and Cultural Rights)' (11 August 2005) UN Doc E/C.12/2005/4, par. 24. Also CESCR, 'General Comment no. 23' (n 397) par. 47, sub f; Also CESCR, Concluding observations on the initial report of Burundi (9 October 2015) UN Doc E/C.12/BDI/CO/1, par. 26. With regard to labour conditions for domestic workers, CESCR, Concluding observations on the second periodic report of Greece (9 October 2015) UN Doc E/C.12/GRC/CO/2, par. 26.

411 CESCR, 'General Comment no. 19' (n 395) par. 46.

412 CESCR, 'General Comment no. 22' (n 402) par. 60.

As regards the requirement of enforcement, we could by way of example refer to the following statement of the CESCR, which particularly addresses the state obligations under article 7 on the right to just and favourable conditions of work:

> 'States should ensure that laws, policies and regulations governing the right to just and favourable conditions of work, such as a national occupational safety and health policy, or legislation on minimum wage and minimum standards for working conditions, are adequate and effectively enforced. States parties should impose sanctions and appropriate penalties on third parties, including adequate reparation, criminal penalties, pecuniary measures such as damages, and administrative measures, in the event of violation of any of the elements of the right.'[413]

However, the obligation to ensure the legislation's enforcement is by no means limited to the laws that have been enacted under article 7 ICESCR. It must also be considered integral part of *inter alia* the rights codified in articles 3[414], 6[415], 9[416], 10[417], 11[418], 12[419] and 15, first paragraph, sub a[420] and c[421].

In some cases the CESCR has argued that *criminal* enforcement constitutes the most appropriate form of enforcement. For example in the case of domestic violence, the CESCR has recommended:

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413 CESCR, 'General Comment no. 23' (n 397) par. 59. Also CESCR, Concluding observations on the initial report of Pakistan (n 402) par. 64; CESCR, Concluding observations on the sixth periodic report of Cyprus (7 October 2016) UN Doc E/C.12/CYP/CO/6, par. 22; CESCR, Concluding observations on the combined fifth and sixth periodic reports of the Philippines (7 October 2016) UN Doc E/C.12/PHL/CO/5-6, par. 38; CESCR, Concluding observations on the sixth periodic report of Poland (7 October 2016) UN Doc E/C.12/POL/CO/6, par. 17; CESCR, Concluding observations on the fourth periodic report of the Dominican Republic (n 407) par. 33.

414 CESCR, Concluding observations on the combined second and third periodic reports of Liechtenstein (23 June 2017) UN Doc E/C.12/LIE/CO/2-3, par. 16.

415 CESCR, Concluding observations on the sixth periodic report of Cyprus (n 413) par. 22.

416 CESCR, 'General Comment no. 19' (n 395) par. 46 and 65.

417 CESCR, Concluding observations on the initial report of Pakistan (n 402) par 54; CESCR, Concluding observations on the sixth periodic report of Cyprus (n 413) par. 22; CESCR, Concluding observations on the second periodic report of Lebanon (7 October 2016) UN Doc E/C.12/LBN/CO/2, par. 46; CESCR, Concluding observations on the fourth periodic report of the Dominican Republic (n 407) par. 40; CESCR, Concluding observations on the second periodic report of Honduras (24 June 2016) E/C.12/HND/CO/2, par 38; CESCR, Concluding observations on the combined second to fifth periodic reports of Kenya (4 March 2016) UN Doc E/C.12/KEN/CO/2-5, par. 40; CESCR, Concluding observations on the initial report of Burundi (n 410) par. 38.

418 CESCR, 'General Comment no. 15' (n 409) par. 43 and 44, sub b.

419 CESCR, 'General Comment no. 22' (n 402) par 49, sub d, 55 and 64; CESCR, 'General Comment no. 14: The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' (11 August 2000) UN Doc E/C.12/2000/4 par. 49 and 51.

420 CESCR, 'General Comment no. 21' (n 395) par. 50, sub d, and 63.

421 CESCR, 'General Comment no. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant)' (12 January 2006) UN Doc E/C.12/GC/17 par. 43 and 45.

> '[…] that the State party should speed up the process of drafting and adopting comprehensive legislation to eliminate all forms of domestic violence, under which all sorts and degrees of domestic and gender violence will be characterized as crimes and appropriate sanctions provided'.[422]

The CESCR has expressed a similar view with regard to the enforcement of for instance national legislation to combat sexual violence against women[423] and sexual harassment in the work place[424].

A final point that needs to be made here concerns the penalties to be imposed in response to violations of national implementing legislation. The CESCR has demonstrated a certain reluctance, also with regard to individual state parties, to prescribe in great detail the penalties it considers adequate. Instead, it has considered that sanctions should be 'proportionate'[425], 'deterrent'[426] or 'dissuasive'[427].

4.2.3.6 Remedies

Another legislative standard that can be inferred from the ICESCR consists of the availability of domestic remedies to persons whose rights have been (allegedly) infringed. This was also emphasised by the CESCR, which has stated:

> 'The Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place'.[428]

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422 CESCR, Concluding observations on the fourth periodic report of Chile (19 June 2015) UN Doc E/C.12/CHL/CO/4, par. 23. Also CESCR, Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China (23 May 2014) UN Doc E/C.12/CHN/CO/2, par. 27; CESCR, Concluding observations on the second periodic report of the Islamic Republic of Iran, adopted by the Committee at its fiftieth session (29 April-17 May 2013) (17 May 2013) UN Doc E/C.12/IRN/CO/2, par. 17; CESCR, Consideration of reports submitted by states parties under articles 16 and 17 of the Covenant (14 May 2004) UN Doc E/C.12/1/Add.97, par. 37.

423 CESCR, Concluding observations on the initial report of Indonesia (23 May 2014) UN Doc E/C.12/IDN/CO/1, p. 8-9.

424 CESCR, Concluding observations on the second periodic report of China (n 422) par. 55; CESCR, Concluding observations on the second periodic report of Kuwait (29 November 2013) UN Doc E/C.12/KWT/CO/2, par. 20; CESCR, Consideration of reports submitted by states parties under articles 16 and 17 of the Covenant (28 November 2003) UN Doc E/C.12/1/Add.94, par. 48.

425 CESCR, Concluding observations on the second periodic report of China (n 422) par. 55; CESCR, Concluding observations on the second periodic report of Kuwait (n 424) par. 20.

426 CESCR, Concluding observations on the initial report of Gabon (29 November 2013) UN Doc E/C.12/GAB/CO/1, par. 11.

427 CESCR, Consideration of reports submitted by states parties under articles 16 and 17 of the Covenant (20 May 2010) UN Doc E/C.12/KAZ/CO/1, par. 12.

428 CESCR, 'General Comment no. 9' (n 375) par. 2.

Also in the context of recommendations to states and the individual complaints procedure under the Optional Protocol, the CESCR has clearly stated that the requirement to adopt legislation to give effect to the ICERSC 'includes the adoption of measures that ensure access to effective judicial remedies for the protection of the rights recognized in the Covenant […]'.[429]

The availability of remedies as a legal obligation can be traced back to article 2, first paragraph, which was cited in section 4.2.3.1, read in conjunction with the other substantive provisions of the ICESCR. This view is supported by General Comment no. 3 on article 2, first paragraph, in which it was argued that 'among the measures which might be considered appropriate [under this article], in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable'.[430]

This requirement is, of course, closely related to the ICESCR's validity in the domestic legal order; it may only acquire practical relevance if persons whose rights have been (allegedly) infringed, have legal avenues to enforce their rights. Therefore, it must be clear to them to what extent they can legally rely on the ICESCR. In this respect the CESCR has stated that the specific means by which the ICESCR is to be given effect in the domestic legal order is for each state party to decide, even though it has expressed its preference for the incorporation of the text into domestic law.[431] In any case, the obligation to put in place domestic remedies which enable persons to enforce their rights must be considered to extend to domestic legislation through which the ICESCR is implemented on the national level. This was emphasised by the CESCR when it recommended to 'take the legislative measures necessary to give full effect to the Covenant rights in [the state party's] legal order and ensure that victims have access to effective remedies'.[432] Only then the values that are reflected in the ICESCR can be realised in practice.

The CESCR may share this view, as it has suggested that states 'may find it advantageous to adopt framework legislation to operationalize their right to water strategy'. Such legislation, the CESCR added, should include inter alia remedies and recourse procedures, since persons whose rights have been infringed 'should be entitled to adequate reparation, including

429 CESCR, Views of the Committee on Economic, Social and Cultural Rights under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (fifty-fifth session) concerning Communication No. 2/2014 (17 June 2015) par. 11.3 and 17. Also CESCR, Concluding observations on the third periodic report of the Republic of Moldova (6 October 2017) UN Doc E/C.12/MDA/CO/3, par 19; CESCR, Concluding observations on the initial report of Pakistan (n 402) par 20; CESCR, Concluding observations on the combined second and third periodic reports of Liechtenstein (n 414) par. 12; CESCR, Concluding observations on the second periodic report of Honduras (n 417) par 22.

430 CESCR, 'General Comment no. 3' (n 382) par. 5.

431 CESCR, 'General Comment no. 9' (n 375) par. 5 and 8.

432 CESCR, Concluding observations on the sixth periodic report of Canada (n 399) par. 40.

restitution, compensation, satisfaction or guarantees of non-repetition'.[433] Similar statements have been made with regard to the rights embodied in article 2, second paragraph[434], 3[435], 6[436], 7[437], 9[438], 11[439], 12[440], 15, first paragraph, sub a[441] and c[442].

Another interesting question concerns the required features of those remedies. Under article 15, first paragraph, sub c, these characteristics comprise the elements of availability, accessibility and quality.[443] Whereas the requirement of availability refers to the mere presence of domestic remedies, the accessibility-criterion demands that individuals have access to those remedies. According to the CESCR, accessibility has three dimensions: national courts must be physically accessible by both abled and disabled persons; the procedures must be economically affordable for all; and states must safeguard the accessibility of information in order to ensure that individuals can collect all the information that is necessary to institute proceedings. Finally, the element of quality demands that the remedial procedures are administered 'competently and expeditiously' by the authorities.[444] The CESCR has made a similar statement with regard to the right to sexual and reproductive health when it contended that 'effective exercise of the right to remedy requires funding access to justice and information about the existence of these remedies'.[445]

433 CESCR, 'General Comment no. 15' (n 409) par. 50 and 55.
434 CESCR, 'General Comment no. 20' (n 389) par. 40; CESCR, Concluding observations on the fifth periodic report of Costa Rica (7 October 2016) UN Doc E/C.12/CRI/CO/5, par. 17; CESCR, Concluding observations on the second periodic report of Honduras (n 417) par 22.
435 CESCR, 'General Comment no. 16' (n 410) par. 21. Also CESCR, Concluding observations on the sixth periodic report of Cyprus (n 413) par. 14.
436 CESCR, 'General Comment no. 18: article 6 of the International Covenant on Economic, Social and Cultural Rights' (6 February 2006) UN Doc E/C.12/GC/18, par 48. Also CESCR, Concluding observations on the sixth periodic report of Cyprus (n 413) par. 22.
437 CESCR, 'General Comment no. 23' (n 397) par. 50 and 57. Also CESCR, Concluding observations on the sixth periodic report of Cyprus (n 413) par. 22.
438 CESCR, 'General Comment no. 19' (n 395) par. 72 and 77.
439 CESCR, 'General Comment no. 12: the right to adequate food (art. 11)' (12 May 1999) UN Doc E/C.12/1999/5, par 32. Also with a view of providing protection to victims of forced evictions, the CESCR has recommended to 'adopt a legislative framework providing adequate legal protection against forced evictions and relocations for those without secure tenure to land and housing, and provide compensation and redress to those forcibly relocated'. CESCR, Concluding observations on the fifth periodic report of Sri Lanka (23 June 2017) UN Doc E/C.12/LKA/CO/5, section C.
440 CESCR, 'General Comment no. 14' (n 419) par. 59; CESCR, 'General Comment no. 22' (n 402) par. 49, sub h and 64.
441 CESCR, 'General Comment no. 21' (n 395) par. 63 and 72.
442 CESCR, 'General Comment no. 17' (n 421) par. 18, 34, 43, 44 and 51.
443 Ibid, par. 18.
444 Ibid, par. 18.
445 CESCR, 'General Comment no. 22' (n 402) par 64.

4.2.3.7 Evaluation of legislation

Once domestic implementing legislation has entered into force, it should be periodically reviewed in order to evaluate its consequences in practice. This obligation may be derived from article 3 on the equal treatment of men and women, which reads:

> 'States parties should periodically review existing legislation, policies, strategies and programmes in relation to economic, social and cultural rights, and adopt any necessary changes to ensure that they are consonant with their obligations under article 3 of the Covenant'.[446]

Similar obligations exist under articles 7 (the right to just and favourable conditions of work) and 9 (right to social security) ICESCR. They seem to serve the same purpose. While the evaluation of legislation under article 3 serves the purpose to ensure consonance with the ICESCR,[447] such review under articles 7 and 9 must be performed 'with a view to updating [labour] standards in the light of practice' and 'towards the realization of the right to social security' respectively.[448] To this end, the CESCR has contended that states should identify 'factors and difficulties affecting implementation of their obligations'.[449]

Also in the context of other rights the CESCR has recommended the performance of evaluation of domestic legislation in order to give effect to the ICESCR, such as the right to housing[450], the right to work[451], the rights to health[452] and the rights of indigenous people[453].

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446 CESCR, 'General Comment no. 16' (n 410) par. 34. Elsewhere, the Committee has stated that 'a failure to adopt, implement and monitor effects of laws, policies and programmes to eliminate de jure and de facto discrimination with respect to each of the rights enumerated in articles 6 to 15 of the Covenant constitutes a violation of those rights'. Ibidem, par. 41. Also CESCR, Concluding observations on the sixth periodic report of the Russian Federation (6 October 2017) UN Doc E/C.12/RUS/CO/6, par 25; CESCR, Concluding observations on the initial report of Pakistan (n 402) par 34; CESCR, Concluding observations on the sixth periodic report of Cyprus (n 413) par. 14; CESCR, Concluding observations on the combined fifth and sixth periodic reports of the Philippines (n 413) par. 38.

447 It may be added that in the view of the Committee, special attention must be given to 'adverse effects on disadvantaged or marginalised individuals or groups, particularly women and girls'. CESCR, 'General Comment no. 16' (n 410) par. 21.

448 CESCR, 'General Comment no. 19' (n 395) par. 74; CESCR, 'General Comment no. 23' (n 397) par. 62.

449 CESCR, 'General Comment no. 19' (n 395) par. 74.

450 CESCR, Concluding observations on the fifth report of Australia (n 407) par 42.

451 CESCR, Concluding observations on the sixth periodic report of Poland (n 413) par. 17.

452 CESCR, Concluding observations on the initial report of Burundi (n 410) par. 54.

453 CESCR, Concluding observations on the sixth periodic report of Sweden (24 June 2016) E/C.12/SWE/CO/6, par. 14.

4.2.3.8 Formal aspects

The CESCR has also made statements with regard to national legislation's form. In these, rather exceptional, cases it expresses its disapprovement of national legislation which it considers too vague. As a consequence, the CESCR contends, national legislation fails to provide protection as required under the ICESCR. An example can be found in national legislation on forced evictions in the context of development projects. The CESCR, fearful of the possibility that such evictions cause homelessness, has recommended to 'strictly define the circumstances and safeguards under which evictions can take place'.[454] Elsewhere the CESCR has criticised 'moral turpitude' as a justification for removal, dismissal or disqualification from employment in the civil service of Nepal on the ground that the term 'is not defined with sufficient precision and which can lead to arbitrary interpretations'.[455] Similarly, with regard to lèse-majesté, as criminalised under Thailand's national legislation, and its negative consequence for the enjoyment of the right to take part in cultural life, the CESCR has urged the state party to amend its legislation with a view to 'ensuring clarity and unambiguity regarding the prohibited acts'.[456] These examples demonstrate that the CESCR has on several occasions sought to persuade state parties to provide for national legislation which is clear and unambiguous, especially when the application of vague norms may constitute impediments to the enjoyment of economic, social and cultural rights embedded in the ICESCR.

4.2.3.9 Information to the public

On a few occasions, the CESCR has suggested that the provisions of the ICESCR may not only require the adoption of national implementing legislation, but may also demand that state parties undertake information campaigns. Sometimes the latter recommendations are expressly related to the adoption of national implementing legislation. Therefore, they amount to what we have called 'legislative standards' and deserve to be discussed here.

One example applies to domestic violence, about which the CESCR urged the state party to 'adopt without delay specific legislation on domestic violence […] and to undertake a major information campaign to raise aware-

454 CESCR, Concluding observations on the initial report of Indonesia (n 423) par. 30. Also CESCR, Consideration of reports submitted by States parties in accordance with articles 16 and 17 of the Covenant (18 November 2009) UN Doc E/C.12/TCD/CO/3, par. 28.

455 CESCR, Consideration of reports submitted by States parties in accordance with articles 16 and 17 of the Covenant (29 August 2001) UN Doc E/C.12/1/Add.66, par. 25.

456 CESCR, Concluding observations on the combined initial and second periodic reports of Thailand (19 June 2015) UN Doc E/C.12/THA/CO/1-2, par. 35. Similarly, with regard to the Irish criminalisation of abortion, see CESCR, Concluding observations on the third periodic report of Ireland (19 June 2015) UN Doc E/C.12/IRL/CO/3, par. 30.

ness about such legislation.'[457] It has made similar statements with regard to information campaigns about national anti-tobacco legislation and legislation aimed at the protection of persons infected with HIV with a view on 'raising awareness among the public'.[458]

In some cases the information should, in the view of the CESCR, not be directed to the public in general, but to the organisations and persons which are primarily affected by the legislation. In the context of its discussion on the need to adopt national legislation to combat corruption, it suggested to conduct 'awareness-raising campaigns among political leaders, judges, legislators and public officials on the need to strictly enforce anti-corruption legislation and to work towards the complete eradication of that phenomenon.'[459] With regard to national legislation aimed to ensure the protection of women on maternity leave, the CESCR has called upon the state party to 'circulate its legislation widely among employers'.[460]

4.2.4 Overview

From the above, it may be concluded that the text of the ICESCR establishes only the most rudimentary standard which must be respected by states which adopt domestic legislation in order to perform their obligations under the treaty. It consists of the principle of non-discrimination, which means that domestic implementing legislation may not distinguish between persons or groups on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, if such distinction cannot be objectively and reasonably justified. However, a closer look at the General Comments on the various ICESCR rights and the various recommendations to state parties reveals that the CESCR adheres to an interpretation of the ICESCR which encompasses several other legislative standards as well. They include, as we have seen in the previous sections, the elements of consultation, monitoring of compliance and enforcement, remedies, the evaluation of legislation, the provision of information to the public and legislative clarity.

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457 CESCR, Consideration of reports submitted by States parties in accordance with articles 16 and 17 of the Covenant (16 May 2007) UN Doc E/C.12/NPL/CO/2, par. 35.

458 CESCR, Concluding observations on the initial report of Togo (17 May 2013) UN Doc E/C.12/TGO/CO/1, par. 31; CESCR, Consideration of reports submitted by States parties in accordance with articles 16 and 17 of the Covenant (18 May 2012) UN Doc E/C.12/SVK/CO/2, par. 23.

459 CESCR, Concluding observations on the fourth periodic report of Morocco (8 October 2015) UN Doc E/C.12/MAR/CO/4, par. 12.

460 CESCR, Concluding observations concerning the fourth periodic report of Belgium (29 November 2013) UN Doc E/C.12/BEL/CO/4, par. 15.

5 Legislative standards as part of EU law

5.1 Implementation of directives of the European Union

5.1.1 General

In section 3.4.2 it was argued that the source of obligation to implement EU directives may be traced back to legislative instrument itself, the treaties and in the so-called principle of effectiveness. In addition to this general obligation of the European Union's member states to give effect to EU law in their respective legal orders, EU law more specifically prescribes *how* implementation by member states should be performed. The largest part of the normative framework that is applicable to the implementation of the EU's legislative instruments, can be derived from case law pertaining to the implementation of directives in the sense of article 288 TFEU. This may be explained by the nature of the instrument, which 'shall leave to the national authorities the choice of form and methods'.[461]

On various occasions, however, the CJEU has made clear this freedom of choice is not unlimited. Prechal suggests that the question of correct implementation comprises 'three closely related but nevertheless distinguishable issues': requirements regarding the content of the measures, requirements regarding the nature of the measures and requirements regarding their effective application and enforcement in practice.[462] This categorisation, which is still accurate more than a decade after the publication of the first edition of Prechal's monograph on directives adopted in the framework of the EU, will be followed below. It will be complemented, however, by the obligation to ensure the implementation in due time.

The legislative standards that will be discussed below are related to directives as *instruments,* irrespective of the *content of* the many directives that have been adopted in the framework of the European Union. Contrary to other legal regimes discussed in Part II, therefore, this chapter will not include a section on the 'content of the regime'. In section 5.2, we will continue our discussion of the EU's legislative instruments and focus on EU regulations in particular.[463]

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461 It may be recalled that regulations, on the contrary, have general application and are directly applicable in all member states.

462 S. Prechal, *Directives in EC law* (2nd edition; OUP 2005) 32.

463 Since the number of cases on the implementation of directives is larger than the number of cases on the implementation of regulations, we will start our discussion with that category of legislative instruments.

5.1.2 Legislative standards

5.1.2.1 Timely implementation

An obvious limitation can be found in the norm that implementation has to be accomplished in due time.[464] What amounts to 'in due time' in this respect, is determined by the EU's legislative instrument at hand, which prescribes a date on which the transposition period expires. This period is used by states to amend their national laws in order to bring them in conformity with the adopted EU legislation.[465] In order to meet the criterion of timely transposition, the piece of national implementing legislation should enter into force no later than the implementation deadline.[466]

This also means that, prior to the date on which the transposition period elapses, as prescribed in the relevant instrument, states are under no obligation to comply with the newly established EU regime.[467] Nevertheless, during the period of time between the entry into force of a directive and the implementation deadline, states are under the duty to refrain from acts that could seriously compromise a directive's objectives.[468] Given this limitation, the national authorities have to assess whether the adoption of measures prior to the implementing deadline is lawful. As the CJEU has explained in *Inter-Environnement Wallonie ASBL*:

> '[i]n making that assessment, the national court must consider, in particular, whether the provisions in issue purport to constitute full transposition of the directive, as well as the effects in practice of applying those incompatible provisions and of their duration in time.'[469]

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464 Prechal, *Directives in EC law* (n 462) 16-28 and case law cited.

465 CJEU, *Inter-Environnement Wallonie,* case C-129/96, judgment of 18 December 1997, ECLI:EU:C:1997:628, par. 44.

466 CJEU, *SETAR,* case C-551/13, judgment of 18 December 2014, ECLI:EU:C:2014:2467, par. 40 and 51.

467 CJEU, *Commission v Belgium*, case C-422/05, judgment of 14 June 2007, ECLI:EU:C:2007:342, par. 62.

468 D. Chalmers, G. Davies and G. Monti, *European Union law. Text and materials* (3rd edition; CUP 2014) 214. See also CJEU, *Inter-Environnement Wallonie* (n 465) par. 45; CJEU, *Stichting Zuid-Hollandse Milieufederatie,* case C-316/04, judgment of 10 November 2005, ECLI:EU:C:2005:678, par. 42; CJEU, *Adeneler and others* (n 297) par. 91; CJEU, *Commission v Belgium* (n 467) par. 59; CJEU, *Azienda Agro-Zootecnica Franchini Sarl and Eolica di Altamura Srl,* case C-2/10, judgment of 21 July 2011, ECLI:EU:C:2011:502, par. 71 and case law cited; CJEU, *Jetair,* case C-599/12, judgment of 13 March 2014, ECLI:EU:C:2014:144, par. 35; CJEU, *Federconsorzi,* case C-104/14, judgment of 26 February 2015, ECLI:EU:C:2015:125, par. 32.

469 The Court continues by stating that '[f]or example, if the provisions in issue are intended to constitute full and definitive transposition of the directive, their incompatibility with the directive might give rise to the presumption that the result prescribed by the directive will not be achieved within the period prescribed if it is impossible to amend them in time. Conversely, the national court could take into account the right of a Member State to adopt transitional measures or to implement the directive in stages. In such cases, the incompatibility of the transitional national measures with the directive, or the non-transposition of certain of its provisions, would not necessarily compromise the result prescribed'. CJEU, *Inter-Environnement Wallonie* (n 465) par. 47-49. Also Prechal, *Directives in EC law* (n 462) 20.

In *Jetair* the CJEU was requested to render judgment on the question whether a Belgian tax measure could pass the test that it had formulated in *Inter-Environnement Wallonie ASBL.* Jetair is a Belgian travel agent which organises holiday journeys outside the European Union, for which it had paid value added tax to the Belgian tax authorities. While the said journeys organised by Jetair had been exempted from taxation, this exemption was withdrawn by the Belgian legislature with effect from 1 December 1977, when the amended national tax code entered into force. This was only one month before the transposition period, prescribed by the applicable directive, expired. This directive provided for an exemption for the taxation of the journeys outside the EU, including those organised by Jetair. Nevertheless, the relevant rules also expressly authorised member states to continue to tax the relevant transactions, if they had already taxed those services on 1 January 1978. Did the contested measure that had been imposed upon Jetair by the Belgian tax authorities constitute a violation of EU law? The CJEU answered this question in the negative, and held that:

> 'if Member States taxed the transactions at issue on 1 January 1978, they could continue to do so after that date. As the [directive] expressly set the date of 1 January 1978 as the starting point for the possible retention of a tax measure, it cannot be considered that a law providing for taxation of such transactions adopted before that date, during the period for transposition of that directive, was liable seriously to compromise the attainment of the result prescribed by that directive'.[470]

Apparently, in this case, the fact that the relevant directive itself had expressly and deliberately provided for a transitional regime pertaining to the taxation of the claimant's business activities, had persuaded the CJEU that the 'result prescribed by the directive' included the measures that were enacted by the Belgian legislature.

The CJEU came to the opposite conclusion in *Commission v. Belgium*, in which the Commission had challenged the adoption by Belgium of measures aimed at the reduction of noise produced at European airports. The measures comprised night-time operating restrictions at all Belgian airports for certain types of civil subsonic jet aeroplanes and entered into force on 1 July 2003. This date had fallen within the transposition period prescribed by directive 2002/30/EEC, which introduced operating restrictions at airport level in order to diminish the production of noise by airplanes to the detriment of the environment and of people living in the vicinity of airports. This directive also repealed a regulation which contained similar rules for certain types of civil subsonic jet aeroplanes, to which the new Belgian national law had expressly referred. The European Commission (EC) complained that, in particular, the Belgian law contained an approach that had also appeared in the regulation, even though when the national law was adopted that regulation had already been repealed

470 CJEU, *Jetair* (n 468) par. 34-38.

and that approach had not been retained in the directive. Did the Belgian law seriously compromise the result prescribed by directive 2002/30/EC? In the view of the CJEU, the Belgian law:

> 'gave rise to unduly unfavourable treatment for certain categories of aeroplanes and had a lasting impact on the conditions of transposition and implementation of the directive in the Community. By reason of the ban on the operation of various aeroplanes resulting from the application of that [law], the assessment of the noise impact provided for in the directive cannot take into account the noise produced by all aeroplanes in accordance with the [prescribed rules] and, therefore, the optimum improvement in noise management cannot be achieved in accordance with the provisions set out in the directive.'[471]

Therefore, Belgium had failed to observe its obligations during the transposition period.

These examples demonstrate that member states enjoy a certain measure of freedom during the transposition period. Only after the transposition deadline states have to comply fully with the adopted EU legislation.

5.1.2.2 The nature of the implementing measures

In addition to the requirement that the implementation of EU directives has to be completed in due time, EU law prescribes the method of transposition. According to established case law of the CJEU, 'provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty'.[472] This statement by the court contains several elements which all serve the purpose of legal certainty. The first one, the 'unquestionable binding force' will be discussed in the present section, while the remaining requirements will be explored in section 5.1.2.3.

The national implementing measures should have binding force and, in other words, should be laid down in law. This means that in the view of CJEU:

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471 CJEU, *Commission v Belgium* (n 467) par. 62-69.

472 CJEU, *Commission v Germany,* case C-59/89, judgment 30 May 1991, ECLI:EU:C:1991:225, par. 24; CJEU, *Commission v France,* case C-225/97, judgment of 19 May 1999, ECLI:EU:C:1999:252, par. 37; CJEU, *Commission v Italy,* case C-159/99, judgment of 17 May 2001, ECLI:EU:C:2001:278, par. 32; CJEU, *Commission v France*, case C-296/01, judgment of 20 November 2003, ECLI:EU:C:2003:626, par. 54; CJEU, *Commission v Germany*, case C-441/02, judgment of 27 April 2006, ECLI:EU:C:2006:253, par. 73; CJEU, *Commission v Portugal,* case C-61/05, judgment of 13 July 2006, ECLI:EU:C:2006:467, par. 37; CJEU, *Commission v Ireland*, case C-427/07, judgment of 16 July 2009, ECLI:EU:C:2009:457, par. 55; CJEU, *Commission v Ireland*, case C-50/09, judgment of 3 March 2011, ECLI:EU:C:2011:109, par. 46; CJEU, *Commission v Spain,* case C-151/12, judgment of 24 October 2013, ECLI:EU:C:2013:690, par. 26; CJEU, *Commission v Poland,* case C-281/11, judgment of 19 December 2013, ECLI:EU:C:2013:855, par. 101; CJEU, *Commission v Portugal,* case C-277/13, judgment of 11 September 2014, ECLI:EU:C:2014:2208, par. 43; CJEU, *Commission v Poland,* case C-29/14, judgment of 11 June 2015, ECLI:EU:C:2015:379, par. 37.

> '[m]ere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty.'[473]

In the same vein, implementing measures that consist of 'guidelines' or 'recommendations' will not be considered adequate implementation, as they lack binding character.[474] In *Commission v. Greece*, the issue was raised whether statements expressed by member states in court could compensate for the failure to transpose a directive. In this case it was claimed that Greece had failed to fulfil several of its obligations under directive 98/48/EEC on the recognition of higher-education diplomas. One specific claim related to the alleged failure by the Greek authorities to recognise diplomas of persons recruited in the public sector, as a result of which some persons had been recruited at a level lower than that to which they would have been entitled if their diplomas had been recognised by the competent authority in accordance with the directive.[475] At the hearing the representative of Greece, probably aware of its omissions, stated that Greece was prepared to 'regularise with retroactive effect the situation of the persons' who had suffered from the belated transposition of the directive.[476] The CJEU referred to the applicable domestic Civil Service Code, which contained the provisions that contravened the norms laid down in the directive, and dryly noted:

> '[i]n this respect, mere statements, such as those made by the Hellenic Republic at the hearing, which, in the continued existence of express provisions of the Civil Service Code, maintain, for the persons concerned, a state of uncertainty as regards the extent of their rights in an area governed by Community law are not sufficient.'[477]

The requirement that directives should be transposed with 'unquestionable binding force' is particularly relevant for provisions that intend to create rights for individuals, because it enables the beneficiaries of those rights to

473 CJEU, *Commission v Italy*, case C-168/85, judgment of 15 October 1986, ECLI:EU:C:1986:381, par. 13; CJEU, *Commission v Ireland*, case C-236/91, judgment of 17 November 1992, ECLI:EU:C:1992:444, par. 6; CJEU, *Commission v Ireland*, case C-381/92, judgment of 26 January 1994, ECLI:EU:C:1994:22, par. 7; CJEU, *Commission v Spain*, case C-242/94, judgment of 12 October 1995, ECLI:EU:C:1995:317, par. 6; CJEU, *Commission v Greece*, case C-311/95, judgment of 2 May 1996, ECLI:EU:C:1996:189, par. 7; CJEU, *Commission v Italy*, case C-316/96, judgment of 16 December 1997, ECLI:EU:C:1997:614, par. 16; CJEU, *Commission v Italy*, case C-315/98, judgment of 11 November 1999, ECLI:EU:C:1999:551, par. 10; CJEU, *Commission v Italy* (n 472) par. 32; CJEU, *Commission v Ireland*, case C-455/08, judgment of 23 December 2009, ECLI:EU:C:2009:809, par. 38.

474 CJEU, *Commission v Poland* (n 472) par. 46.

475 CJEU, *Commission v Greece*, case C-274/05, judgment of 23 October 2008, ECLI:EU:C:2008:585, par. 50-59.

476 Ibid, par. 57.

477 Ibid, par. 58.

ascertain their full extent.[478] To this end, states are also obliged to promulgate the adopted national implementing measures in order to ensure the existence of 'appropriate publicity' for those measures.[479]

5.1.2.3 The content of the implementing measures

Furthermore, as was already stated above, implementation has to be performed with 'specificity, precision and clarity'. Again, these demands must be seen as an elaboration of the principle of legal certainty, to which the CJEU has consistently referred.[480] In its case law, these three criteria do not seem to possess an autonomous substance; as a *trias*, however, they constitute the standards that the content of the implementing measures should meet. Similar to the purpose served by the binding character of the implementing measures, the application of the elements of specificity, precision and clarity should ensure that 'individuals can ascertain the full extent of their rights and obligations and, where appropriate, rely on those rights before the national courts.'[481] It may be added that the fact that an activity referred to in a directive does not yet exist in a member state cannot release that state from its obligation to adopt laws or regulations in order to ensure that all the provisions of the directive are properly transposed.[482]

In accordance with this case law, the principle of legal certainty does not demand the express implementation of a directive's provision if that provision concerns only the relations between member states and the EC.[483] A typical provision of this kind is an obligation imposed upon member states to provide information to the EC, such as the presentation of a report. Generally, such a provision does not affect an individuals' rights and obligations, as a result of which the rationale for implementation may be considered to have disappeared.

Moreover, the criteria of specificity, precision and clarity do not necessarily entail the obligation to reproduce a directive verbatim in a specific, express law or regulation, since a 'general legal context' may be sufficient,

478 CJEU, *Commission v Ireland,* case C-455/08 (n 473) par. 23. Also CJEU, *Commission v Italy*, case C-207/96, judgment of 4 December 1997, ECLI:EU:C:1997:583, par. 26.

479 CJEU, *Commission v Belgium,* case C-415/01, judgment of 27 February 2003, ECLI:EU:C:2003:118, par. 21; CJEU, *Commission v Poland* (n 472) par. 37.

480 CJEU, *Commission v Poland* (n 472) par. 37; Also CJEU, *Commission v France*, case C-296/01 (n 472) par. 54; CJEU, *Commission v Italy,* case C-82/06, judgment of 14 June 2007, ECLI:EU:C:2007:349, par. 19; CJEU, *Commission v Greece*, case C-81/07, judgment of 13 March 2008, ECLI:EU:C:2008:172, par. 19.

481 CJEU, *Commission v France,* case C-177/04, judgment of 14 March 2006, ECLI:EU:C:2006:173, par. 48.

482 CJEU, *Commission v Belgium* (n 467) par. 59.

483 CJEU, *Commission v Portugal,* case C-72/02, judgment of 24 June 2003, ECLI:EU:C:2003:369, par. 19-20; CJEU, *Commission v France*, case C-296/01 (n 472) par. 92; CJEU, *Commission v Luxembourg*, case C-32/05, judgment of 30 November 2006, ECLI:EU:C:2006:749, par. 35.

depending on its content.[484] As the CJEU has explained on several occasions,

> '[i]n particular, the existence of general principles of constitutional or administrative law may render superfluous transposition by specific legislative or regulatory measures, provided, however, that those principles actually ensure the full application of the directive by the national administrative authorities and that, where the relevant provision of the directive seeks to create rights for individuals, the legal situation arising from those principles is sufficiently precise and clear and that the persons concerned are placed in a position to know the full extent of their rights and obligations and, where appropriate, to be able to invoke them before the national courts'.[485]

When may the general legal context that consists of national principles of constitutional or administrative law be sufficient for the correct implementation of a directive's provisions? A scarce example can be found in *Commission v. France,* in which the transposition of article 3, third paragraph, of directive 90/313/EEC on the freedom of access to information on the environment, was discussed. Pursuant to this provision, '[a] request for information [submitted by any natural person or legal person] may be refused where it would involve the supply of unfinished documents or data or internal communications, or where the request is manifestly unreasonable or formulated in too general a manner'.[486] The EC had maintained that France was under the obligation to transpose the mentioned ground for refusal, as embodied in article 3, third paragraph, of the directive, into French national law. 'In the absence of express transposition', the EC held, 'individuals are not able to know with the requisite clarity the extent of their rights under the directive in that regard'.[487] The French government, however, referred to domestic legislation that was currently in place and argued that the aforementioned provision of the directive had already been implemented in a certain law in the way it was applied by the Conseil d'État. In other words, '[the said provision] simply confers on public authorities

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484 CJEU, *Commission v Germany*, case C-29/84, judgment of 23 May 1985, ECLI:EU:C:1985:229, par. 23; CJEU, *Commission v Italy*, case C-363/85, judgment of 9 April 1987, ECLI:EU:C:1987:196, par. 7; CJEU, *Commission v Germany,* case C-131/88, judgment 28 February 1991, ECLI:EU:C:1991:87, par. 6; CJEU, *Commission v Germany* (n 472) par. 18; CJEU, *Commission v Portugal,* case C-392/99, judgment of 10 April 2003, ECLI:EU:C:2003:216, par. 80; CJEU, *Commission v Ireland*, case C-50/09 (n 472) par. 46; CJEU, *Commission v Poland* (n 472) par. 38.

485 CJEU, *Commission v Poland* (n 472) par. 38. Also CJEU, *Commission v Spain* (n 472) par. 28; CJEU, *Commission v Belgium*, case C-475/08, judgment of 3 December 2009, ECLI:EU:C:2009:751, par. 41; CJEU, *Commission v Luxembourg* (n 483) par. 34; CJEU, *Commission v Italy,* case C-456/03, judgment of 16 June 2005, ECLI:EU:C:2005:388, par. 51; CJEU, *Commission v France*, case C-296/01 (n 472) par. 55; CJEU, *Commission v Austria,* case C-194/01, judgment of 29 April 2004, ECLI:EU:C:2004:248, par. 39; CJEU, *Commission v France,* case C-233/00, judgment of 26 June 2003, ECLI:EU:C:2003:371, par. 76.

486 Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ 1990, L 158) art 3, third paragraph.

487 CJEU, *Commission v France,* case C-233/00 (n 485) par. 71.

an option which has already been acknowledged by the Conseil d'État, and the mere codification of that option cannot protect any right of individuals'.[488] The CJEU agreed and stated:

> '[T]he requirement for specific transposition would be of very little practical use since that provision is drafted in very general terms and sets out rules which are in the nature of general principles common to the legal systems of the Member States. […] Compliance with a provision of a directive which exhibits those characteristics must thus be essentially ensured when it is applied in practice to a specific situation, regardless of whether it is transposed into national law in precisely the same words. […] In those circumstances, a general legal context, which finds expression in the present case in the existence of concepts whose content is clear and precise and which are applied in the framework of settled case law of the Conseil d'État, must be held to be sufficient for the purpose of properly transposing Article 3(3) of Directive 90/313.'[489]

On another occasion, the CJEU reached the opposite conclusion. In *Commission v. Poland*, the EC challenged the implementation by the Polish authorities of directive 2004/23/EC on standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, and related (implementing) directives. According to the EC, Poland had failed to respect its obligations by excluding reproductive cells and foetal and embryonic tissue from the scope of the national implementing instruments. This alleged failure was contested by Poland, which referred to approximately twenty domestic laws in order to substantiate the claim that, despite its exclusion from the national implementing act, the implementation of the directives was sufficiently provided for by the 'legislation in force in the [Polish] internal legal order'.[490] The CJEU investigated whether this general legal context could, as Poland had argued, be considered to constitute an implementation in conformity with Poland's obligations under the directives. Here, it emphasised the fact that the directive imposed specific obligations on persons and establishments which use human tissues and cells, and concluded:

> 'It is apparent from the pleadings lodged by the Republic of Poland before the Court that the acts relied upon by that Member State in order to claim that it duly transposed the directives at issue vary in their legal nature and include both non-binding acts and provisions of general application in the fields of criminal and civil law. In the light of the specific scope of the obligations imposed by the directives at issue and the objective of protecting public health which they pursue, the transposition of those directives by a multitude of acts combined with the exclusion of certain types of tissues and cells from the scope of the principal transposing act, even though those tissues and cells are covered by those directives, fails to satisfy the requirements of specificity, precision and clarity […] In those circumstances, the individuals concerned by the unified framework provided for by the directives at issue are not in a position, on the basis of those acts alone, to know the full extent of their rights and obligations with the legal certainty required by the Court's case law.'[491]

488 Ibid, par. 73.
489 Ibid, par. 80-83.
490 CJEU, *Commission v Poland* (n 472) par. 24.
491 Ibid, par. 47.

From these examples it seems impossible to draw general conclusions about when a 'general legal context' existent in a EU member state will be viewed as a sufficient implementation of the relevant legislative instrument. Instead, it will depend on the objectives and level of specificity of that instrument and, of course, the legislation in place in the member state. In most cases by far, however, the general legal context already in place in a member state will be insufficient for a correct implementation of a given directive, or any other instrument for that matter. Therefore, in those cases an additional implementing act will be necessary in order to meet the standards of specificity, precision and clarity as required by the principle of legal certainty.

5.1.2.4 Effective application and enforcement in practice

Once the national implementing legislation has entered into force, the member states have taken a significant step towards 'full application' of the applicable EU legislation. Nevertheless, an additional task has to be completed: the domestic implementing legislation should be effectively applied and enforced in practice. This obligation is binding upon all state authorities, including those bodies under the control of the state that have been given responsibility for a public-interest service and, to that end, have been entrusted with special powers.[492]

The task to effectively apply and enforce in practice includes the imposition of penalties in those instances where the provisions of the EU directive, or, more accurately, its national implementing instrument, have been transgressed. Again, states enjoy considerable discretion in shaping the application and enforcement in their domestic jurisdictions. However, this freedom is not unlimited. In the view of the CJEU,

> '[…] in the absence of harmonisation of European Union legislation in the field of penalties applicable in cases where conditions laid down by arrangements under that legislation are not complied with, Member States are empowered to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with European Union law and its general principles, and consequently with the principle of proportionality.'[493]

The regime to which is referred here ('European Union law and its general principles'), encompasses several elements. Member states are under the duty to provide for sanctions that are 'effective, proportionate and dissuasive'. These sanctions should not only be available to the authorities, but

492 CJEU, *Portgás*, case C-425/12, judgment of 12 December 2013, ECLI:EU:C:2013:829, par. 34.

493 CJEU, *Chmielewski*, case C-255/14, judgment of 16 July 2015, ECLI:EU:C:2015:475, par. 21; CJEU, *Rēdlihs*, case C-263/11, judgment of 19 July 2012, ECLI:EU:C:2012:497, par. 44; CJEU, *Ntionik and Pikoulas*, case C-430/05, judgment of 5 July 2007, ECLI:EU:C:2007:410, par. 53.

also be imposed in practice in cases where transgressions of EU legislation, or domestic implementing acts thereof, occur. Furthermore, the punishment of violations of EU law should be equal to the sanctioning of similar provisions of purely national origin.[494]

How should the terms 'effective, proportionate and dissuasive' be interpreted? In *Asociația Accept,* the CJEU was requested to decide whether a penalty that was imposed in response to a violation of implementing legislation in the field of equal treatment in employment satisfied these requirements.[495] Directive 2000/78/EC contained the obligation to provide for 'sanctions, which may comprise the payment of compensation to the victim, [that are] effective, proportionate and dissuasive'.[496] A Romanian non-governmental organisation whose aim is to promote and protect lesbian, gay, bi-sexual and transsexual rights, lodged a complaint for an alleged breach of the national legislation that implemented the aforementioned directive. According to the non-governmental organisation, a soccer club had discriminated against a professional football-player who was homosexual, because the club's representative had made public statements to the effect that the football-player was not offered a contract because of his sexual orientation. The National Council for Combatting Discrimination, before which proceedings had been brought, had decided that the statements that were expressed indeed constituted discrimination and issued a warning. The warning was the only available penalty, since the 'limitation period' of six months for the imposition of a fine had already expired. In reply to the request submitted to the CJEU, it established that although the imposition of a fine under Romanian law was not impossible, it had to be considered very difficult at the least, due to the brief limitation period. The CJEU expressed the view that 'a purely symbolic sanction cannot be regarded as being compatible with the correct and effective implementation of Directive 2000/78'. It added, however, that:

494 These criteria may be derived from *Commission v Greece,* in which the Court held: 'For that purpose, whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive'. CJEU, *Commission v Greece*, case C-68/88, judgment of 21 September 1989, ECLI:EU:C:1989:339, par. 24. See also CJEU, *Åkerberg Fransson*, case C-617/10, judgment of 26 February 2013, ECLI:EU:C:2013:105, par. 36; CJEU, *Paquay,* case C-460/06, judgment of 11 October 2007, ECLI:EU:C:2007:601, par. 52; CJEU, *Mulliez,* joined cases C-23/03, C-52/03, C-133/03, C-337/03 and C-473/03, order of the Court of 4 May 2006, ECLI:EU:C:2006:285, par. 27; CJEU, *Berlusconi,* joined cases C-387/02, C-391/02 and C-403/02, judgment of 3 May 2005, ECLI:EU:C:2005:270, par. 36; CJEU, *Adeneler and others* (n 297) par. 94; CJEU, *Boehringer Ingelheim* (n 297) par. 59; CJEU, *Gallotti* (n 297) par. 14.

495 CJEU, *Asociația Accept,* case C-81/12, judgment of 25 April 2013, ECLI:EU:C:2013:275.

496 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000, L 303) art 17.

> 'the mere fact that a specific sanction is not pecuniary in nature does not necessarily mean that it is purely symbolic, particularly if it is accompanied by a sufficient degree of publicity and if it assists in establishing discrimination within the meaning of that directive in a possible action for damages'.

In the present case, nonetheless, the CJEU concluded that the short limitation period, as a result of which the imposition of a warning would, in most cases, be the only possible penalty to address violations of the Romanian implementing legislation, could not be considered an effective, proportionate and dissuasive punishment.[497]

Moreover, the CJEU has held that the criterion of dissuasiveness means that the imposed penalties should have a 'genuinely dissuasive effect', although this clarification is hardly more revealing.[498] It was put to the test in *Le Crédit Lyonnais.* Pursuant to article 23 of directive 2008/48/EC, which laid down rules on credit agreements for consumers, the member states were under the obligation to provide for effective, proportionate and dissuasive penalties to ensure compliance with the directive's provisions. These provisions included the norm that 'before the conclusion of a credit agreement the creditor must assess the consumer's creditworthiness, where necessary on the basis of a consultation of the relevant database'.[499] The dispute which had given rise to the request for this preliminary ruling centered around a contract between Mr. Kalhan and LCL for a personal loan to be obtained by Mr. Kalhan from LCL. The next year, the monthly repayments ceased. Subsequently, LCL requested the French court order Mr Kalhan to pay to it the remaining sum with interest. LCL, however, in contravention of French law, had failed to consult the national register to assess Mr. Kalhan's creditworthiness. Under the French Consumer Code, this failure was punished by the forfeiture of the entitlement to interest. However, this only applied to contractual interest; in accordance with the French Civil Code, the interest remained payable at a statutory rate. Moreover, French case law had established that the statutory rate had to be increased by five percentage points if the borrower would not repay his debt in full within a period of two months after the decision of the court would have become enforceable. As the statutory interest rate, increased by five percentage points, was higher than the contractual interest, the application of the French legal provisions on the forfeiture of entitlement to interest seemed to be advantageous to the creditor who would disregard, as in the present case, his obligation to establish the consumer's creditworthiness by consulting the national register.[500] Thus, the question was whether article 23

497 CJEU, *Asociația Accept* (n 495) par. 62-73.

498 CJEU, *Chmielewski* (n 493) par. 23; CJEU, *LCL Le Crédit Lyonnais,* case C-565/12, judgment of 27 March 2014, ECLI:EU:C:2014:190, par. 45; CJEU, *Asociația Accept* (n 495) par. 63.

499 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008, L 133) artt 23 and 8, first paragraph.

500 CJEU, *LCL Le Crédit Lyonnais* (n 498) par. 14-24.

of the directive precluded the existence of the punitive regime for a creditor's failure to ascertain the creditworthiness of the consumer, prescribed by French law.[501]

In the view of the CJEU, in order to investigate the genuinely dissuasive nature of the penalty, the referring French judge should make a comparison between the amounts which the creditor would have received by way of repayment of the loan if it had complied with its obligation to assess, the consumer's creditworthiness, and the amounts which it would receive if the penalty for the breach were applied. In making this comparison, the CJEU should take into consideration all the circumstances and all the consequences that flow from the breach.[502] It held:

> 'If, after carrying out the abovementioned comparison, the referring court were to conclude that, in the dispute before it, the application of the penalty of forfeiture of entitlement to contractual interest is liable to confer an advantage on the creditor, since the amounts which it forfeits are less than those resulting from the application of interest at the increased statutory rate, it would follow that, clearly, the system of penalties at issue in the main proceedings does not ensure that the penalty incurred is genuinely dissuasive. Moreover, the penalty of forfeiture of entitlement to contractual interest cannot be regarded, more generally, as being genuinely deterrent if the referring court were to find that the amounts which the creditor is likely to receive following the application of that penalty are not significantly less than those which that creditor could have received had it complied with that obligation. If the penalty of forfeiture of entitlement to interest is weakened, or even entirely undermined, by reason of the fact that the application of interest at the increased statutory rate is liable to offset the effects of such a penalty, it necessarily follows that that penalty is not genuinely dissuasive.'[503]

As may be derived from the CJEU's decision, the assessment of the genuinely dissuasive character of a penalty will consist of two steps. First, a comparison has to be made between the benefits that the breaching party would enjoy, had it complied with its obligation, and the benefits for the breaching party that arise out of the established violation. Second, the outcome of this comparison has to be evaluated. If it appears that the breaching party suffers only a minor disadvantage from its actions, or, as in *Le Crédit Lyonnais*, if the violation is even beneficial to the violating party, the imposed penalty does not meet the criterion of dissuasiveness. In other words, for a penalty to be considered genuinely dissuasive, it must inflict significant harm to the non-compliant party.

The requirement of proportionality of sanctions demands that penalties do not go further than is necessary for the attainment of the legislation's pursued objective.[504] In order to determine whether the available sanctions

501 Ibid, par. 30.
502 Ibid, par. 50.
503 Ibid, par. 51-53.
504 CJEU, *Ecotrade*, joined cases C-95/07 and C-96/07, judgment of 8 May 2008, ECLI:EU:C:2008:267, par. 65-67; CJEU, *EMS-Bulgaria Transport*, case C-284/11, judgment of 12 July 2012, ECLI:EU:C:2012:458, par. 67; CJEU, *Rēdlihs* (n 493) par. 45-47.

meet the standard of proportionality, the nature and the degree of seriousness of the infringement which that penalty seeks to sanction, have to be taken into account.[505] Moreover, when there is a choice between several appropriate measures recourse must be had to the least onerous.[506]

In the case law of the CJEU, the reference to the principle of proportionality seems to be closely connected to the protection of the free movement of goods, services and persons with the common European market, as it has held that:

> '[a]dministrative or punitive measures must not go beyond what is necessary for the objectives pursued and a penalty must not be so disproportionate to the gravity of the infringement that it becomes an obstacle to the freedoms enshrined in the [treaties]'.[507]

While this reference may serve as a reminder that the effective enforcement of national implementing legislation may not pose threat to the legitimate free movement of goods, services and persons, the CJEU has until now not engaged in a separate application of this test. Thus, it seems to hold the view that enforcement of a disproportionate nature will automatically create an 'obstacle to the freedoms enshrined in the treaties'.

The power to impose penalties in response to infringements of the implementing legislation should also, as appears from the above-cited statement of the CJEU, be exercised in accordance with European Union law and its general principles. What does this, in addition to the applicability of the principle of proportionality, entail?

It is evident under current EU law that the applicable human rights norms, as embodied in the Charter of Fundamental Rights of the EU (CFR) and the ECHR, should be observed by the EU member states.[508] Pursuant to article 51, first paragraph, CFR, its provisions are addressed to the […] member states only when they are implementing Union law. In *Åkerberg Fransson*, it became clear how the CFR's provisions could affect implementing measures adopted by member states.[509] Article 22 of directive 77/388/EEC on taxes provided that 'Member States may impose other obli-

505 Ibid.

506 CJEU, *Fedesa*, case C-331/88, judgment of 13 November 1990, ECLI:EU:C:1990:391, par. 13; CJEU, *Crispoltoni*, joined cases C-133/93, C-300/93 and C-362/93, judgment of 5 October 1990, ECLI:EU:C:1994:364, par. 41; CJEU, *Azienda Agro-Zootecnica Franchini Sarl and Eolica di Altamura Srl* (n 468) par. 73.

507 CJEU, *Ntionik and Pikoulas* (n 493) par. 54; CJEU, *Commission v Greece*, case C-210/91, judgment of 16 December 1992, ECLI:EU:C:1992:525, par. 20; CJEU, *Casati*, case C-203/80, judgment of 11 November 1981, ECLI:EU:C:1981:261, par. 27.

508 Article 6, first paragraph, TEU, provides that '[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union […] which shall have the same legal value as the Treaties'. Moreover, pursuant to article 6, third paragraph, '[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms shall constitute general principles of the Union's law'.

509 CJEU, *Åkerberg Fransson* (n 494).

gations which they deem necessary for the correct collection of the tax and for the prevention of evasion', which had been implemented in Swedish law on tax evasion and tax assessment.[510] Mr. Åkerberg Fransson, a Swedish national, was accused of providing false information to the Swedish tax authority, which resulted in a loss of revenue linked to the levying of income tax and value added tax. He was also prosecuted for failing to declare employers' contributions, which exposed the social security bodies to a loss of revenue.[511] In response to these alleged violations of national law, the Swedish tax authority ordered Mr. Åkerberg Fransson to pay a surcharge, including interest, in addition to the tax sums that he, illegitimately, had withheld from the tax authority and the social security bodies. Two years later, criminal proceedings were instituted against Mr. Åkerberg Fransson as well. The Swedish judge, before whom the case was brought, was confronted with the question as to whether the charges brought against Mr. Åkerberg Fransson must be dismissed on the ground that a tax penalty has already been imposed upon him for the same acts of providing false information: the principle of *ne bis in idem*, as codified in article 50 CFR.[512] The application of this principle would indeed preclude the possibility of a criminal conviction for the acts committed by Mr. Åkerberg Fransson, the CJEU held, if the penalties imposed by the Swedish tax authority were of a criminal nature.[513] In the present case, this was a matter of the national authorities to decide. However, what is important here, is that national implementing legislation, including domestic laws that provide for penalties, should be applied in accordance with human rights and fundamental freedoms, included in the CFR and the ECHR.[514]

Furthermore, the 'principle of equivalence' has to be taken into account by member states during the enforcement of national implementing legislation. This principle prescribes that the domestic norms pertaining to the

510 Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977, L 145) art 22.

511 CJEU, *Åkerberg Fransson* (n 494) par. 12.

512 Article 50 of the Charter provides: 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.'

513 In the view of the Court, the penalties chosen by the member states may 'take the form of administrative penalties, criminal penalties or a combination of the two. It is only if the tax penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that that provision precludes criminal proceedings in respect of the same acts from being brought against the same person.' CJEU, *Åkerberg Fransson* (n 494) par. 34.

514 In other words, in *Åkerberg Fransson* the Court seemed to place human rights that flow from the Charter and the European Convention on Human Rights on an equal footing with 'other' general principles of European law, such as the proportionality principle. See B. van Bockel and P. Wattel, 'New wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after Akerberg Fransson' 38 *European law review* 6 (2013) 866-833, 881-882.

enforcement of a directive, where the adoption of those norms falls within the member states' freedom to choose the appropriate form and method of achieving the aims set out in a directive, must not be less favourable than those governing similar domestic situations.[515] In order to make an assessment of this similarity, it has to be ascertained whether the actions (based on EU law and on national law respectively) are 'similar as regards their purpose, cause of action and essential characteristics'.[516] Moreover, the determination as to whether a national procedural provision is less favourable, entails that the national court must take account of 'the role of that provision in the procedure, viewed as a whole, of the conduct of that procedure and of its special features'.[517]

In this way, the implementation of a directive may not only achieve the aim of harmonisation within Europe, but could also result in harmonisation of enforcement procedures within each member state. Of course, whether this internal harmonisation will indeed occur, depends on the willingness of the member state; it cannot be derived from the principle of equivalence itself as the principle cannot be applied in a situation which does not fall within the scope of EU law.[518]

An illustration of the application of the principle of equivalence in practice can be found in *VALE Építési.* VALE Costruzioni was an Italian construction firm which had moved its seat and business activities to Hungary, where it established VALE Építési and submitted a request for registration in the commercial register in accordance with Hungarian law. In the application, the representative stated that VALE Costruzioni was the predecessor in law to VALE Építési. The application was rejected on the basis of the argument that a company which was not Hungarian could not be listed as a predecessor in law. Neither could VALE Építési's intentions be regarded as a conversion under Hungarian law, as a result of which the firm would be considered Hungarian for the purpose of registration in the commercial register, since national law on conversions applied only to domestic situations.[519] In its decision on the legitimacy of the Hungarian authorities' decline of the request, the CJEU expressly referred to the principle of equivalence, and stated:

515 CJEU, *Adeneler and others* (n 297) par. 95; CJEU, *Peterbroeck,* case C-312/93, judgment of 14 December 1995, ECLI:EU:C:1995:437, par. 12; CJEU, *Rewe*, case C-33/76, judgment of 16 December 1976, ECLI:EU:C:1976:188, par. 5-6.

516 CJEU, *Érsekcsanádi Mezőgazdasági*, case C-56/13, judgment of 22 May 2014, ECLI:EU:C:2014:352, par. 67; CJEU, *Agrokonsulting-04,* case C-93/12, judgment of 27 June 2013, ECLI:EU:C:2013:432, par. 39.

517 CJEU, *Rosado Santana* (n 297) par. 90.

518 CJEU, *Érsekcsanádi Mezőgazdasági* (n 516) par. 63.

519 CJEU, *VALE Építési,* case C-378/10, judgment of 12 July 2012, ECLI:EU:C:2012:440, par. 9-15.

> '[i]n the context of a domestic conversion, if the legislation of a Member State requires strict legal and economic continuity between the predecessor company which applied to be converted and the converted successor company, such a requirement may also be imposed in the context of a cross-border conversion. However, the refusal by the authorities of a Member State, in relation to a cross-border conversion, to record in the commercial register the company of the Member State of origin as the 'predecessor in law' to the converted company is not compatible with the principle of equivalence if, in relation to the registration of domestic conversions, such a record is made of the predecessor company. […] Consequently, the refusal to record VALE Costruzioni in the Hungarian commercial register as the 'predecessor in law' is incompatible with the principle of equivalence'.[520]

Finally, we could refer to the 'principle of effectiveness' in the way it has been recognised in the CJEU's case law.[521] It is both a (complementary) source of the obligation of member states to adopt all measures necessary to ensure the full application of EU legislation, as we have seen in section 3.4.2, and a limitation on the fulfilment of that obligation. This limitation flows from the requirement that national implementing legislation should not 'render impossible in practice or excessively difficult the exercise of rights conferred by Community law'.[522] It must be emphasised that this principle concerns the effectiveness of *other* EU rights and obligations than the provisions flowing from the directive that is to be implemented. Therefore, the applicability of the principle of effectiveness may be viewed as a tool to ensure the internal coherence and the full application of EU law and of national law by which it has become part of the legal orders of the member states.

In order to determine whether a national procedural provision makes the application of EU law impossible or excessively difficult, it should be analysed:

> 'by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings'.[523]

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520 Ibid, par. 55-57.

521 The principles of equivalence and effectiveness are often referred to simultaneously, to emphasise the rights of defence to which an individual is entitled under European law. See, for example, CJEU, *Kamino International Logistics BV and Datema Hellmann Worldwide Logistics,* joined cases C-129/13 and C-130/13, judgment of 3 July 2014, ECLI:EU:C:2014:2041, par. 82; CJEU, *Kušionová,* case C-34/13, judgment of 10 September 2014, ECLI:EU:C:2014:2189, par. 50; CJEU, *Boudjlida*, case C-249/13, judgment of 11 December 2014, ECLI:EU:C:2014:2431, par. 42; CJEU, *Mukarubega,* case C-166/13, judgment of 5 November 2014, ECLI:EU:C:2014:2336, par. 52.

522 CJEU, *Adeneler and others* (n 297) par. 95.

523 CJEU, *Pohotovosť,* case C-470/12, judgment of 27 February 2014, ECLI:EU:C:2014:101, par. 51; CJEU, *Sánchez Morcillo and Abril García,* case C-169/14, judgment of 17 July 2014, ECLI:EU:C:2014:2099, par. 34; CJEU, *Surgicare,* case C-662/13, judgment of 12 February 2015, ECLI:EU:C:2015:89, par. 28; CJEU, *Agrokonsulting-04* (n 516) par. 48; CJEU, *Rosado Santana* (n 297) par. 92.

The application of this test has led the CJEU to conclude that, for instance, domestic legislation which lays down reasonable time-limits for bringing proceedings does not constitute a violation of the principle of effectiveness.[524]

5.1.3 Overview

The preceding sections provide a broad overview of the existing normative framework, derived from EU law, that is applicable to national legislation that implement EU directives. It has been argued that, although member states possess the freedom to choose 'form and methods' of implementation, this freedom is restricted in numerous ways. These restrictions, which relate to both the implementing legislation and its enforcement and application in practice, could be summarised as follows.

With regard to the transposition of the directive, states are under the obligation to perform this act in due time, i.e. before the expiration of the transposition period. Furthermore, to serve the purpose of legal certainty, domestic implementing legislation should not only have 'unquestionable binding force', but should also meet the criteria of 'specificity, precision and clarity'. From the moment on which the adopted implementing legislation enters into force, member states have the duty to 'effectively apply and enforce in practice' the domestic implementing legislation. This entails the imposition of 'effective, proportionate and dissuasive' penalties in case of breaches of the national implementing legislation. Finally, member states should respect 'European Union law and its general principles', which comprises principles pertaining to human rights and fundamental freedoms, and the principles of equivalence and effectiveness. In order to respect these standards set out by the CJEU, member states will have to take measures in their domestic legal orders. These measures will often include the adoption of legislation. Thus, this section has demonstrated that, in most cases, not only will the act of transposition itself require the adoption of domestic legislation, but also the application and enforcement of that legislation in practice.

524 CJEU, *Deutsche Telekom*, case C-262/06, judgment of 22 November 2007, ECLI:EU:C:2007:703, par. 56; CJEU, *Starjakob*, case C-417/13, judgment of 28 January 2015, ECLI:EU:C:2015:38, par. 62; CJEU, *Specht*, joined cases C-501/12 to C-506/12, C-540/12 and C-541/12, judgment of 19 June 2014, ECLI:EU:C:2014:2005, par. 114; CJEU, *Pohl*, case C-429/12, judgment of 16 January 2014, ECLI:EU:C:2014:12, par. 29.

5.2 Implementation of regulations of the European Union

The legislative acts of the EU include another important instrument: regulations. Regulations and directives have a fundamentally different nature. Article 288, second paragraph, TFEU, provides that '[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States'. Thus in general regulations, in contrast to directives, do not require the adoption of domestic implementing legislation;[525] they can be applied from the moment they enter into force.[526] This raises the question why they should be discussed in a study on implementing legislation at all. The answer is that the CJEU has advanced some guidance as to how EU regulations and domestic legislation relate to each other and how they should be reconciled whenever they concur. The relevant case law contains some hints about the legislative standards that should be met by the EU member states. Therefore, EU regulations should be part of our analysis.

First of all, it must be emphasised that the norms that circumscribe the implementation of EU directives by member states to a certain extent also apply to EU regulations. For example, member states are under the duty to ensure a regulation's 'effective application and enforcement in practice', similar to the identical obligation in relation to directives, as was discussed in section 5.1.2.4. Although the CJEU has so far not made express statements to this effect, there seems to be no reason to assume that it will justifiably deviate from the case law it has produced on the implementation of directives.

There is, however, one additional standard that applies exclusively to regulations. This exclusivity can be explained by the direct applicability of the instrument, as we have seen above. According to the CJEU, the adoption of a regulation by the EU 'precludes in principle the Member States from adopting or maintaining national provisions in parallel'.[527] Similarly, the CJEU has stated that member states must not 'impede the direct effect of regulations'[528] or '[take] steps which are intended to alter the scope of

525 P. Craig and G. De Búrca, *EU Law. Text, cases, and materials* (6th edn OUP, Oxford 2015) 107.

526 There are exceptions to this general rule, as regulations often impose obligations upon member states to take action, which may include the adoption of legislative measures. For example, article 94, first paragraph, first sentence, of Regulation 536/2014/EU of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC (Official Journal of the European Union 2014, L 158) provides: 'Member States shall lay down rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented'.

527 CJEU, *Stichting Al-Aqsa,* joined cases C-539/10 P and C-550/10, judgment of 15 November 2012, ECLI:EU:C:2012:711, par. 85.

528 CJEU, *Zerbone,* case C-94/77, judgment of 31 January 1978, ECLI:EU:C:1978:17, par. 24.

the regulation itself'[529]. This means that the adoption of national legislative measures is only permitted where such measures are expressly allowed or required under the applicable regulation, interpreted in the light of its objectives.[530]

In other words, situations in which domestic law and EU law concur or contradict each other should be avoided; where EU law advances, applicable domestic laws should be repealed. This is a direct consequence of the transfer of powers from the national level to the EU level, or, as the CJEU put it in *Bollmann* and *Waren-Import-Gesellschaft Krohn*: 'to the extent to which Member States have transferred legislative powers [to the EU] […] they no longer have the powers to adopt legislative provisions in this field'.[531]

Why should the parallel existence of domestic legislation be avoided? Since *Costa v. Enel*, as we have seen above, EU law has intrinsic priority over the domestic laws of the member states. In relation to EU regulations, this point was emphasised in *Variola,* in which the Court stated that:

> 'the direct application of a regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law'.[532]

Arguably, the parallel existence of an EU regulation and domestic legislation is not problematic at all; due to the prevalence of EU law over domestic law, it is clear that any legal question that falls within the scope of the regulation, should be answered on the basis of that regulation. In such cases any relevant domestic law should remain without application. It is not relevant whether the domestic law at hand expressly reproduces, or deviates from the EU regulation, even though in the latter case an additional problem will often be found in the fact that member states are no longer competent to legislate on the subject matter at hand. Although in cases of concurrence of EU regulations and domestic legislation there may thus not be a problem in the sense that the application of the regulation will be jeopardised, the CJEU

529 CJEU, *Hauptzollamt Hamburg v Bollmann*, case C-40/69, judgment of 18 February 1970, ECLI:EU:C:1970:12, par. 4; CJEU, *Stichting Al-Aqsa* (n 527) par. 85.

530 For instance CJEU, *Danske Svineproducenter,* case C-316/10, judgment of 21 December 2011, ECLI:EU:C:2011:863, par. 43.

531 CJEU, *Hauptzollamt Hamburg v Bollmann* (n 529) par. 4; CJEU, *Hauptzollambt Bremen,* case C-74/69, judgment of 18 June 1970, ECLI:EU:C:1970:58, par. 4.

532 CJEU, *Variola,* case C-34/73, judgment of 10 October 1973, ECLI:EU:C:1973:101, par. 10. Similarly, the Court has stated that '[b]y virtue of the very nature of regulations and of their function in the sources of Community law, the provisions of those regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application.' CJEU, *Handlbauer*, case C-278/02, judgment of 24 June 2004, ECLI:EU:C:2004:388, par. 25; CJEU, *Danske Svineproducenter* (n 530) par. 39. See also CJEU, *Leonesio,* case C-93/71, judgment of 17 May 1972, ECLI:EU:C:1972:39, par. 5.

expressly prohibits the existence of parallel domestic legislation. This prohibition must, therefore, be based on other considerations than considerations of a strictly legal nature. On several occasions the CJEU has indicated what these considerations might be. As a further specification of the prohibition the enact parallel domestic legislation, which was discussed above, the CJEU has maintained the view that:

> '[…] Member States must not adopt or allow national institutions with legislative power to adopt a measure by which the Community nature of a legal rule and the consequences which arise from it are concealed from the persons concerned.'[533]

This statement suggests that the CJEU considers it important that the persons concerned are aware of the origin, either EU or domestic, of the applicable norm. The relevance of the norm's origin was referred to by Advocate General Tizzano, who was confronted with the question whether member states in the particular case at hand were at liberty to assume international obligations with regard to subjects that fell within the scope of the EU's competences, even if those obligations were perfectly in accordance with the applicable EU legislation. Advocate General Tizzano answered this question in the negative and added that member states may not conclude international agreements, in matters covered by EU legislation, 'even if the texts of the agreements reproduce the common rules verbatim or incorporate them by reference'.[534] This view was based on the assessment that such incorporation of EU rules into international agreements which member states conclude with third countries would prejudice the uniform application of EU law, as it:

> 'would have the effect of distorting the nature and legal regime of the common rules, and entail a real and serious risk that they would be removed from review by the Court under the Treaty'.[535]

Of course, the incorporation of EU rules into international agreements with third countries on the one hand, and the adoption of domestic legislation in concurrence with an EU regulation on the other hand, are distinct situations. Nonetheless, Advocate General Tizzano identifies an element which is relevant in both situations: the jurisdiction of the CJEU. This point had been made by the CJEU itself in *Variola*, when it was recalled that 'the jurisdiction of the Court is unaffected by any provisions of national legislation which purport to convert a rule of Community law into national law'.[536]

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533 CJEU, *Zerbone* (n 528) par. 26; CJEU, *Variola* (n 532) par. 11; CJEU, *Stichting Al-Aqsa* (n 527) par. 87.

534 CJEU, *Commission v United Kingdom*, case C-466/98, Opinion of Advocate General Tizzano of 31 January 2002, ECLI:EU:C:2002:63, par. 72.

535 Ibid.

536 CJEU, *Variola* (n 532) par. 11.

It is thus suggested that the existence of domestic legislation parallel to a regulation may conceal the origin, either EU or domestic, of the applicable norm. This contains the risk that the subjects to which the norm is addressed, will not be aware of the mechanisms that are in place to enforce the rights to which they are entitled under EU law. These mechanisms primarily entail the possibility to institute proceedings against a member state before national courts.[537] As part of the proceedings, national courts may request the CJEU to give a preliminary ruling on the interpretation of EU law pursuant to article 267 TFEU.

If we return to the CJEU's statement in *Zerbone*, cited above, it seems plausible to maintain that the simultaneous application of domestic legislation and an EU regulation should be avoided, since it may obfuscate the fact that ultimately any legal question that falls within the scope of the regulation is subject to the CJEU's review. Such ambiguity, in turn, may jeopardise the uniform application of EU law.

537 In addition to the enforcement through national courts, article 263, fourth paragraph, TFEU, provides that '[a]ny natural or legal person may […] institute proceedings against […] a regulatory act which is of direct concern to them and does not entail implementing measures'. However, the Court has ruled that the term 'regulatory act' does not encompass legislative acts such as regulations. CJEU, *Inuit Tapiriit Kanatami,* case C-583/11, judgment of 3 October 2013, ECLI:EU:C:2013:625, par. 61.

6 Legislative standards as part of international criminal law

6.1 Implementation of the United Nations Convention against Transnational Organised Crime

6.1.1 General

In contrast to the international legal regimes discussed above, which are mostly of European origin, the United Nations Convention against Transnational Organised Crime (CTOC) has truly global aspirations. It has been negotiated in response to growing concerns about the effects of transnational organised crime, which urged the UNGA to adopt a resolution which in 1998 called for the establishment of an intergovernmental *ad hoc* committee for the purpose of elaborating a comprehensive international convention in order to combat transnational organised crime.[538] Over the course of almost two years, the *ad hoc* committee had drafted a Convention against Transnational Organised Crime and two supplementary Protocols, which were adopted by the UNGA in late 2000.[539] The protocols included the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air.[540] The instruments were opened for signature in December 2000.[541] Today 189 states are party to the CTOC, which entered into force on 29 September 2003.[542] It has been complemented with another protocol: the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.[543]

538 UNGA res 53/111 (9 December 1998) UN Doc A/RES/53/111, par. 10.

539 UNGA res 55/25 (15 November 2000) UN Doc A/RES/55/25, par 2.

540 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319; Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 207.

541 UNGA res 55/25 (n 539) par 2.

542 In accordance with article 38 of the Convention, which prescribes the entry into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, approval or accession. The protocols entered into force on 25 December 2003 and 28 January 2004, respectively.

543 The protocol was adopted by the General Assembly in 2001 and entered into force in 2005. UNGA res 55/25 (n 539) par. 2.

6.1.2 Content of the Convention

The purpose of the CTOC is 'to promote cooperation to prevent and combat transnational organized crime more effectively'.[544] It is applicable to certain specified crimes, if they have been committed by an organised criminal group and if they are 'transnational' in nature, i.e. which affect more than one state.[545] They include conduct that constitutes an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty, the participation in an organised criminal group, the laundering of the proceeds of crime, corruption and the obstruction of justice.[546] One of the central obligations of the CTOC is to adopt such legislative and other measures as may be necessary to establish these and related acts as criminal offences, when committed intentionally.[547] Furthermore, states must establish jurisdiction over these crimes, and perpetrators must be liable to proportionate sanctions.[548] Also, article 12 CTOC imposes the duty to adopt measures as may be necessary to enable confiscation of proceeds of crime derived from offences covered by the CTOC and of property, equipment or other instrumentalities used in or destined for use in those offences.[549] Other provisions relate to, among other subjects, international cooperation, including extradition and the transfer of sentenced persons or of criminal proceedings, to the protection of witnesses and to the prevention of transnational organised crime.[550]

In addition to these obligations, which are broad in nature as they apply to several crimes enumerated in the CTOC, state parties have the duty to take certain measures in response to certain specified crimes in particular. One of them is money laundering. The applicable duties encompass the obligation to 'institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions […] in order to deter and detect all forms of money-laundering, which regime shall emphasise requirements for customer identification, record-keeping and the reporting of suspicious transactions' and the obligation to ensure that 'administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering […] have the ability to cooperate and exchange information at the national and international levels […]'.[551] As a means to fight corruption, states that are bound by the CTOC shall 'to the

544 Art 1.
545 Art 3. Pursuant to the second paragraph, the 'transnational' character of the crimes can refer to the place where the crime is committed, prepared, planned, directed or controlled, the place where its effects materialise and the place where the involved organised criminal group is active.
546 Artt 2, sub b, 5, 6, 8 and 23.
547 Artt 2, sub b, 5, 6, 8 and 23.
548 Artt 15 and 11, first paragraph.
549 Art 12, first paragraph.
550 Artt 16, 17, 21, 24 and 31.
551 Art 7, first paragraph, sub a and b.

extent appropriate and consistent with [their] legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials' and to 'take measures to ensure effective action by [their] authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions'.[552]

Finally, the CTOC contains what may be considered the core obligation, laid down in article 34, first paragraph, to take 'the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention'.[553]

This brief overview of the content of the CTOC makes clear that the adoption of national measures, including legislation, is indispensable for states that wish to comply with its provisions. In order to attain the objectives of Part II of the present study, it is necessary to examine the legislative standards that should be taken into account by the states party to the CTOC. Two types of sources may provide insight into these standards: the CTOC itself and the *Legislative Guide*, which was compiled by experts, international institutions and government representatives in order to assist states seeking to ratify or implement the CTOC.[554] These standards will be discussed in the following section.

6.1.3 Legislative standards

6.1.3.1 Implementation, effectiveness and harmonisation

It is evident from the convention's provisions that states have a duty to adopt all domestic measures, including legislation, that are required for the implementation of the CTOC. This follows from the 'core obligation' entrenched in article 34, first paragraph, cited above. Compliance with this obligation must be understood as a necessary precondition for the attainment of the CTOC's aim: to promote cooperation to prevent and combat transnational organised crime more effectively.[555] Thus, the duty to ensure the implementation of the CTOC is closely related to the treaty's effectiveness. Whereas article 34, first paragraph, applies to the CTOC as a whole, various other CTOC norms impose a similar obligation to adopt domestic measures in relation to the attainment of a *specified* policy aim. Examples of the policy aims include the detection and deterrence of all forms of money-laundering, the prevention,

552 Art 9, first and second paragraph.
553 Art 34, first paragraph.
554 UN Office on Drugs and Crime, *Legislative Guide for the implementation of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto* (United Nations, New York 2004).
555 Art 1.

detection and punishment of the corruption of public officials, the maximisation of the effectiveness of law enforcement measures, and the identification, tracing, freezing or seizure of proceeds of crime.[556] From this it may be derived that the effectiveness of domestic implementing measures is a prerequisite for state compliance with the treaty.[557]

A notion which is closely related to the CTOC's implementation and effectiveness is the objective of harmonisation, which is considered an 'indispensable component of a concerted, global strategy against serious crime'.[558] The central role attributed to this concept comes to the surface in several parts of the CTOC. Pursuant to article 34, third paragraph, CTOC, '[e]ach State Party may adopt more strict or severe measures than those provided for by this Convention […]'. It thus imposes minimum standards of implementation, which ensure the harmonisation of domestic measures along the lines laid down in the CTOC. In addition to the imperative obligations included in the CTOC, it encourages harmonisation of domestic policies through the inclusion of optional measures. An example can be found in article 17, which stipulates that:

> 'States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by this Convention, in order that they may complete their sentences there'.

Even where the CTOC prescribes compulsory minimum standards for the prevention and combating of transnational organised crime, it is noted that domestic authorities may be responsible for the formulation of the particulars of the envisaged measures. Article 7, first paragraph, sub a, for instance, provides that states are required to establish a domestic regulatory and supervisory regime within their competence in order to deter and detect money-laundering activities. In the *Legislative Guide* it is submitted that:

> '[t]his regime must be comprehensive, but the precise nature and particular elements of the regime are left to States, provided that they require at a minimum banks and non-bank financial institutions to ensure: (a) Effective customer identification; (b) Accurate record-keeping; (c) A mechanism for the reporting of suspicious transactions.'[559]

Another feature of the notion of harmonisation applies to the language used in domestic implementing measures. There is some ambivalence in

556 Artt 7, first paragraph, sub a, 9, first paragraph, 11, second paragraph, and 12, second paragraph.

557 In the *Legislative Guide* (p. 9) it is noted that '[t]hese general provisions and requirements must be clearly understood by legislative drafters and policy makers and care must be taken to incorporate them when preparing legislation to implement the specific articles concerned. Otherwise, the implementing measure could be out of compliance with the requirements of the Convention'.

558 UNODC, *Legislative Guides* (n 554) 130.

559 Ibid, 51.

the approach taken by the CTOC's drafters in this regard. On the one hand, it is noted that 'close conformity [to the CTOC's terminology] is desirable, for example to simplify extradition proceedings'.[560] On the other hand, it is

> '[…] recommended that drafters check for consistency with other offences, definitions and legislative uses before relying on formulations or terminology contained in the Convention. The Convention was drafted for general purposes and is addressed to national Governments. Thus, the level of abstraction is higher than that necessary for domestic legislation. Drafters should therefore be careful not to incorporate parts of the text verbatim, but are encouraged to adopt the spirit and meaning of the various articles.'[561]

In other words, state parties to the CTOC are expressly invited to ensure that their domestic implementing legislation corresponds to their domestic legal tradition, even if this tradition deviates from the language used in the CTOC. 'This', it is argued, 'avoids the risk of conflicts and uncertainty about the interpretation of the new provisions by courts and judges'.[562]

In sum, the implementation and effectiveness of the CTOC, and the harmonisation which it pursues, are closely related. The harmonisation of domestic implementing measures leads to a certain complementarity between the CTOC on the one hand, and domestic legislation enacted by state parties on the other hand, in several respects. First, the CTOC contains minimum standards which encompass both imperative and optional provisions, as a result of which states may go beyond the CTOC requirements in their efforts to prevent and combat transnational organised crime. Second, domestic (legislative) authorities may be responsible for the elaboration on the domestic level of CTOC obligations which are formulated in broad terms. Third, the CTOC relies to a significant extent on legal terms and concepts that are in use in the jurisdictions of the state parties; it does not require the verbatim transposition of the terms and concepts used in the CTOC.

6.1.3.2 Observance of applicable international and national law

Furthermore, states must ensure that the national measures, including legislation, which they undertake to implement the CTOC, do not contravene other norms to which the state authorities are bound. These norms may encompass both norms of national and of international legal origin.

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560 Ibid, 10. The importance of the domestic legal context may not only be inferred from the *Legislative Guide*, but is also codified in the Convention itself. Article 11, sixth paragraph, provides: 'Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law'.

561 UNODC, *Legislative Guides* (n 554) 7.

562 Ibid, 18.

The former category comprises what has been termed 'fundamental principles of domestic law', which states must take into account when they adopt national implementing measures.[563] It emphasises that the harmonisation anticipated by the CTOC has legal limits. The phrase 'fundamental principles of domestic law' was proposed in the early stages of the negotiation process and its incorporation has remained largely uncontroversial until the adoption of the final text.[564] The justification for its inclusion in the treaty may be found in the desire to prevent domestic implementing legislation from 'becoming a dead letter, or challenged as unconstitutional'.[565]

In the context of the general treaty obligation to ensure the CTOC's effective implementation, entrenched in article 34, first paragraph, it is difficult to identify the specific domestic legal principles which the drafters had in mind. However, other articles may provide some clarification. An example may be found in article 26, third paragraph, which provides that:

> '[e]ach State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention'.

In this particular context, the reference to national legal principles was perceived necessary to accommodate the diversity in national policies applicable to the granting of immunity to alleged offenders who cooperate with national authorities. For this reason, it is noted in the *Legislative Guide* that 'the specific steps to be taken are left to the discretion of States, which are asked, but not obliged, to adopt immunity or leniency provisions'.[566]

While other provisions have a more compulsory character, they may similarly refer to boundaries laid down by domestic law. Article 16, first paragraph, as an example, which provides for norms on extradition, demands that 'the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party'. Furthermore, article 16, seventh paragraph, stipulates that '[e]xtradition shall be subject to the conditions provided for by the domestic law of the requested State Party […] including, inter alia, conditions in rela-

563 Art 34, first paragraph.

564 It was included in the early draft of the Convention, although this early proposal referred to 'fundamental provisions of […] domestic legislative systems'. Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, 'Draft United Nations Convention against Transnational Organised Crime' (1st session, Vienna, 19-29 January 1999) (15 December 1998) UN Doc A/AC.254/4, 1.

565 UNODC, *Legislative Guides* (n 554) 10.

566 Ibid, 165. Similar argumentation may be applicable to, among other provisions, article 6, first paragraph, sub b, sub i, and article 10, second paragraph, which refer to the 'basic concepts of [a state's national] legal system' and to the 'legal principles of a state party' respectively.

tion to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition'.[567]

Thus, it seems that the reference to fundamental principles of domestic law, as included in several provisions of the CTOC, is a double-edged sword. On the one hand, its objective is to ensure the effectiveness of the CTOC itself as it dissuades state parties from adopting national implementing legislation that, as a result of contravention of domestic laws or principles of higher rank, will remain without legal force. On the other hand, it serves to protect the sovereignty of states, since it ensures that the relevant domestic laws prevail over the applicable treaty provisions to the extent that a treaty obligation must be performed 'in accordance with fundamental principles of domestic law'.

As regards the latter category, states 'shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States'. Moreover, the Convention provides for the protection of jurisdiction of the state vis-à-vis other states.[568] Arguably, the references to the principles of non-intervention and exclusive exercise of jurisdiction are redundant, since the obligation to abide by these principles already follows from general (customary) international law.[569] They emerged for the first time in a proposal made by Germany[570], which was subsequently incorporated in a draft text of the treaty that was prepared by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime at its first session and seem to have been included in the final text of the treaty with only minor revisions.[571] Their substance and the motivation for their inclusion in the text have not been subject of debate at all, which may very well be explained by their

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567 Also article 12, ninth paragraph, of the Convention.

568 Art 4, first and second paragraph.

569 Only a few references may suffice. Pursuant to article 2, first paragraph, ChUN, 'the [UN] is based on the principle of the sovereign equality of all its Members'. Furthermore, the ICJ has found that '[b]etween independent states, respect for territorial sovereignty is an essential foundation of international relations' and, on another occasion, that 'the principle of non-intervention […] is part and parcel of customary international law'. *Corfu Channel Case* (Merits) [1949] ICJ Rep 4, p. 35, and *Case concerning Military and Paramilitary Activities in and against Nicaragua* (n 198) par. 202, respectively.

570 Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, 'Proposals and contributions received from governments' (1st session, Vienna, 19-29 January 1999) (19 December 1998) UN Doc A/AC.254/5, 10.

571 Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (n 564) 4. The revisions concerned the question whether the formulation should follow the language used in the International Convention for the Suppression of Terrorist Bombings ('Nothing in this Convention entitles a State Party to […]') or the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ('A State Party shall not […]'). Whereas the provisions on the principles non-intervention and exclusive exercise of jurisdiction had originally been envisaged as part of the Convention article on the scope of application, it was decided to place them in a separate article. UNODC, *Travaux préparatoires* (n 189) 27, 29 and 37.

redundancy, as noted above. This view is supported by the *Legislative Guide*.[572] Its commentary on the motivation for the inclusion of article 4 on the protection of national sovereignty is limited to the observation that 'its provisions are self-explanatory'.[573]

In addition to article 4, first and second paragraph, which applies to the CTOC as a whole, several other, specific provisions refer to other norms of international law that should be observed in the implementation of the treaty.[574] These provisions indicate that the CTOC and the domestic implementing measures to which it gives rise, should be adequately embedded in the international regulatory environment. This also applies to article 7, third paragraph, CTOC. Pursuant to this provision, 'States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organisations against money-laundering'. Although this provision is not compulsory in the sense that it contains a binding obligation for state parties to use the said initiatives as guidelines, it demonstrates a preference for international harmonisation in this regard. For this reason, it is stated that

> '[u]ltimately, States are free to determine the best way to implement this article. However, the development of a relationship with one of the organisations working to combat money-laundering would be important for effective implementation'.[575]

6.1.3.3 Criminalisation and enforcement

As was noted above, the CTOC requires state to establish as criminal offences the acts that fall under its scope.[576] Thus, CTOC's implementation must be performed through the enactment of criminal laws, instead of civil or administrative laws.[577] The choice for implementing measures of a criminal legal nature is based on the premise that it not only enables state authorities to resort to criminal powers for the investigation, prosecution and punishment of offenders. It also facilitates international cooperation among national authorities.[578]

Once the conduct referred to in the CTOC has been criminalised under domestic laws, the question arises what sanctions should be imposed on offenders. Here, the CTOC prescribes that sanctions should 'take into account the gravity of the offence', which may be viewed as a proportionality

572 UNODC, *Legislative Guides* (n 554) xv.
573 Ibid, 16.
574 Artt 13, fourth paragraph, 15, sixth paragraph, and 18, sixth paragraph.
575 UNODC, *Legislative Guides* (n 554) 51.
576 Artt 2, sub b, 5, 6, 8 and 23.
577 UNODC, *Legislative Guides* (n 554) 18. There is one exception to this rule, which pertains to the liability of legal persons. This exception can be found in article 10, second paragraph, of the Convention.
578 UNODC, *Legislative Guides* (n 554) 40.

requirement.[579] This proportionality of sanctions is inspired by the desire to provide for a minimum level of deterrence in order to ensure that sanctions 'clearly outweigh the benefits of the crime'.[580] This, however, cannot conceal the fact that the punishment of offenders is primarily a responsibility and prerogative of the state parties, which is emphasised in article 11, sixth paragraph. Pursuant to this provision, '[n]othing contained in this Convention shall affect the principle that […] offences shall be prosecuted and punished in accordance with [the domestic law of a state party]'.[581]

A special regime is applicable to legal persons involved in the commission of serious crimes that fall within the scope of the CTOC. Contrary to other obligations that are part of the CTOC, which, as we have seen, require criminalisation, the liability of such legal persons may be accomplished on the basis of civil or administrative law as well. This is stated in article 10, second paragraph. Whatever the nature of the sanctions imposed on the perpetrating legal person, however, states must ensure that it is subject to 'effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions'.[582] Apparently this special regime for legal persons was contained in the CTOC as a result of the diversity in domestic laws on the subject, which include, among other sanctions, criminal and non-criminal fines, forfeiture, confiscation, restitution, the withdrawal of certain advantages and the suspension of certain rights.[583]

6.1.4 Overview

The CTOC contains a large number of obligations that will require the adoption of domestic legislation by the state parties.[584] However, the legislative standards that should be respected, as stipulated by the CTOC and the *Legislative Guide*, which was compiled by experts, international institutions and government representatives in order to assist states seeking to ratify or implement the CTOC, are scarce; the CTOC seems to grant considerable space for domestic policies. This may be explained by the premise that states consider the adoption of criminal legislation as a matter reserved for the domestic, instead of the international, policy makers. The standards that have to be taken into account by the national legislature may be summarised as follows. First and foremost, states should ensure that the CTOC is effective, which requires adequate implementation on the domestic level. In addition, states should take into account applicable national and

579 Art 11, first paragraph.
580 UNODC, *Legislative Guides* (n 554) 130.
581 Ibid, 20.
582 Art 10, fourth paragraph.
583 UNODC, *Legislative Guides* (n 554) 120-121.
584 'The process by which the requirements of the Convention can be fulfilled will vary from State to State. Monist systems could ratify the Convention and incorporate its provisions into domestic law by official publication, while dualist systems would require implementing legislation.' Ibid, 6.

international law when they adopt implementing measures. References to national law not only serve as a protection of state sovereignty, but also as a safeguard to ensure the CTOC's effectiveness. With respect to the international legal obligations, this may not only be interpreted as a rather superfluous statement that states should act in accordance with other international legal obligations to which they are bound, but also serves as a reminder that the CTOC's policy aims will be accomplished successfully if domestic implementing measures fit in with the regulatory environment which is already in place. In relation to the norms pertaining to the punishment of offenders, the CTOC is largely limited to the requirement of proportionality, which imposes the obligation on state authorities which establish the sanctions on offenders to take into account the gravity of the offence.

6.2 Implementation of the International Convention for the Suppression of the Financing of Terrorism

6.2.1 General

The origins of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) can be found in the concern about the 'worldwide escalation of acts of terrorism in all its forms and manifestations'.[585] It may be traced back to the UNGA resolution 51/210 of December 1996 on 'Measures to eliminate international terrorism', which called upon states, *inter alia*, to 'take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organisations, whether such financing is direct or indirect […]'[586] A draft convention on the financing of terrorism was prepared by France, which was, after elaboration by the *ad hoc* committee established by the aforementioned resolution,[587] adopted by the UNGA's Sixth Committee.[588] On 9 December 1999 the text was adopted by resolution 54/109 of the UNGA.[589] The ICSFT was open for signature between 10 January 2000 and 31 December 2001. As of today, 188 states are party to the treaty, which entered into force on 10 April 2002.

585 Preamble.
586 UNGA res 51/210 (17 December 1996) UN Doc A/RES/51/210, par. 3.
587 UNGA res 53/108 (26 January 1999) UN Doc A/RES/53/108, par. 11.
588 UNGA, 'Measures to eliminate international terrorism. Report of the Working Group' (26 October 1999) UN doc A/C.6/54/L.2. Also UNGA, 'Measures to eliminate international terrorism. Report of the Sixth Committee' (10 December 1999) UN Doc A/54/615, par. 13.
589 UNGA res 54/109 (25 February 2000) UN Doc A/Res/54/109.

6.2.2 Content of the Convention

The approach taken by the ICSFT differs from previous treaties pertaining to terrorism, since it 'seeks to cripple the phenomenon as a whole' instead of addressing specific types or areas of terrorism.[590] Although the body of the ICSFT does not contain an express provision on the purpose of the ICSFT, the purpose can be derived from the treaty's preamble, which recalls the 'urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators'.[591] The provision on the ICSFT's scope is embodied in article 2, first paragraph, which establishes as an offence under the ICSFT the financing of conduct with the intention that they should be used or in the knowledge that they are to be used for what may be loosely defined as 'terrorist acts'.[592] In order to determine what conduct constitutes an act of terrorism, the ICSFT refers to several international anti-terrorism treaties enumerated in the annex to the treaty.[593] It also encompasses 'any other act intended to cause death or serious bodily injury to a civilian […] when the purpose of such act, by its nature and context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act'.[594] The ICSFT, with the exception of the articles pertaining to international cooperation, including on matters of extradition or mutual legal assistance, does not apply where the commission of an offence merely affects the interests of a single state.[595]

State parties are under the obligation to establish as criminal offences under their domestic law the offences set forth in article 2 and to make those offences 'punishable by appropriate penalties which take into account the grave nature of the offences'.[596] Lavalle convincingly argues that it is difficult to imagine that the terrorist acts included in the anti-terrorism trea-

590 R. Lavalle, 'The International Convention for the Suppression of the Financing of Terrorism' 60 *Heidelberg Journal of International Law* 1 (2000) 491-510, 492. Also A.C. Culley, 'The International Convention for the Suppression of the Financing of Terrorism. A legal tour de force?' 29 *Dublin University Law Journal* (2007) 397-413, 397-398.

591 For an extensive discussion of the Convention's content, see Lavalle, 'The International Convention for the Suppression of the Financing of Terrorism' (n 590).

592 In the context of the Convention, 'financing' means the provision or collection by any means, directly or indirectly, unlawfully and wilfully, of funds.

593 Art 2, first paragraph, sub a. These treaties include *inter alia* the Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105; the International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205; and the Convention on the Physical Protection of Nuclear Material (adopted 3 March 1980, entered into force 8 February 1987) 1456 UNTS 101. The annex may be amended in accordance with the procedure laid down in article 23.

594 Art 2, first paragraph, sub b.

595 Art 3.

596 Art 4.

ties to which the ICSFT refers for its scope of application, given their grave nature, are not punishable under the existing domestic criminal laws of any state. In practice, therefore, the obligation to criminalise such conduct will often not require any additional specific legislative action.[597] Furthermore, a state party has a duty to take such measures as may be necessary to establish jurisdiction over the offences if they are committed in its territory or by one of its nationals.[598]

In addition to the obligations to criminalise and penalise the financing of terrorism and to establish jurisdiction over offences referred to in article 2, the ICSFT imposes several duties which are closely related. They include the adoption of measures for the identification, detection, freezing or seizure, and subsequently forfeiture of any funds used for those offences, as well as the proceeds derived from such offences.[599] Once a person is suspected to have a financed terrorist activities, a state which has jurisdiction may choose to either prosecute or extradite the alleged offender.[600] Moreover, state parties should afford one another the 'greatest measure of assistance' in connection with criminal investigations or criminal or extradition proceedings.[601] Finally, in order to prevent the financing of terrorist acts, states must, *inter alia,* exchange information and adopt measures that require financial institutions to ensure that their customers can be identified and to pay special attention to unusual or suspicious transactions.[602]

6.2.3 Legislative standards

6.2.3.1 Implementation, effectiveness and harmonisation

In contrast to the CTOC, which was discussed in the previous chapter, the ICSFT does not contain one core provision of a general nature to the effect that states are required to adopt implementing legislation in order to comply with the obligations set forth in the treaty; such requirement must be derived from the various specific articles that were explored in section 6.2.2. Neither does the body of the ICSFT impose a general obligation to ensure the effectiveness of domestic implementing measures. Aside from the preambular statement, referred to above, on the 'urgent need to enhance international cooperation among States in […] devising and adopting effective measures for the prevention of the financing of terrorism', such obligation must be looked for in the specific articles of the ICSFT. The notion of effectiveness arises only in article 5, third paragraph, which imposes the

597 Lavalle, 'The International Convention for the Suppression of the Financing of Terrorism' (n 590) 505.
598 Art 7, first paragraph.
599 Art 8, first and second paragraph.
600 Art 10, first paragraph.
601 Art 12, first paragraph.
602 Art 18, first paragraph, sub b, and third paragraph.

obligation to ensure that legal entities that commit crimes as set out in the ICSFT, are subject to 'effective' sanctions. This, of course, must not lead to the conclusion that the notion of effectiveness is not relevant to the states that are required to adopt implementing measures; effectiveness must again be considered inherent to the specific treaty obligations.[603]

With regard to the subject of harmonisation, the ICSFT contains several categories of norms, most notably of a compulsory nature. An example can be found in article 4, sub a, which provides that '[e]ach State Party shall adopt such measures as may be necessary […] to establish as criminal offences under its domestic law the offences set forth in article 2'. Other, less numerous, provisions leave a certain measure of discretion to state parties, such as the norms entrenched in article 12, fourth paragraph, which stipulates that '[e]ach State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence […]'.

6.2.3.2 Observance of applicable international and national law

The ICSFT partly relies on domestic law. This can be derived, for example, from article 8, first paragraph, ICSFT, which reads:

> 'Each State Party shall take appropriate measures, *in accordance with its domestic legal principles*, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture'.

Similar references to domestic law can be found in the provisions pertaining to the forfeiture of funds that are used for the commission of terrorist offences and of the proceeds derived from such offences; the institution of criminal proceedings; extraditable offences; and the provision of mutual legal assistance in the absence of an applicable treaty between two or more state parties.[604] Arguably, as was noted in the context of the CTOC, references to national law serve both as a protection of state sovereignty, and as a safeguard to ensure the effectiveness of the convention. As regards the former, such references emphasise that the ICSFT provides for a framework which is to *respect*, instead of *replace* applicable domestic law. Indeed, as was noted during the negotiations of the draft text of article 5, first paragraph, the insertion of the phrase 'in accordance with its domestic legal system' was proposed in order to 'take into consideration the diversity of national legal systems'.[605] At the same time, the observance of applicable national law ensures that the ICSFT is not rendered ineffective for reasons of incompatibility with domestic law of higher rank.

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603 For instance art 6.

604 Artt 8, second paragraph, 10, first paragraph, 11, third paragraph, and 12, fifth paragraph.

605 UNGA, 'Measures to eliminate international terrorism. Report of the Working Group' (n 588) par. 128. The phrase 'domestic legal system' would eventually be replaced by the term 'domestic legal principles'. Ibid, par. 175.

Several other provisions require state parties to ensure that the obligations entrenched in the ICSFT are performed in accordance with existing international legal norms. Examples can be found in article 7, sixth paragraph, which reads: 'Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law'. During the negotiations of this particular provision it was noted 'that the exercise of national terms of reference should be applied in conformity with international law. If not, the provision could lead to actions considered unacceptable under international law'.[606] And such a situation, the negotiators might have added, is to be avoided. Similarly, article 20 stipulates that states 'shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of states and that of non-intervention in the domestic affairs of other states'.[607] Pursuant to article 21, '[n]othing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the UN Charter, international humanitarian law and other relevant provisions'.[608] The issue of concurrence of international humanitarian law and the ICSFT was raised during the negotiations of the text because of expected 'difficulties with the application of humanitarian law' which feared to lead to 'the situation where certain acts would be classed as terrorism when they would be acceptable under humanitarian law'.[609] For this reason it was suggested that 'the draft convention makes reference to the hierarchy of norms of international law, whereby in the context of armed conflict the application of humanitarian law would take precedence over that of the draft convention'.[610] In short, the provisions emphasise the requirement that the ICSFT obligations, including those which necessitate the adoption of domestic legislation, must be honored in a way which is consistent with other international legal rights and obligations.

606 UNGA, 'Measures to eliminate international terrorism. Report of the Working Group' (n 588) par. 202.

607 Closely related is article 22, which provides: 'Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction or performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law.' Also artt 7, sixth paragraph, 8, fifth paragraph, and 9, fifth paragraph.

608 Similarly, article 17 provides that '[a]ny person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law'.

609 UNGA, 'Measures to eliminate international terrorism. Report of the Working Group' (n 588) par. 102.

610 Ibid, par. 85.

6.2.3.3 *Criminalisation and enforcement*

As we have seen above, two of the most principal obligations embodied in the ICSFT concern the criminalisation of the financing of terrorism and related conduct and the penalisation of those crimes. As regards the latter, the ICSFT not only prescribes the obligation to provide for penalties on the domestic level, but also that the established penalties must be 'appropriate' and 'take into account the grave nature of the offences'.[611] If such offence is attributed to a legal entity, as opposed to a natural person, the state parties must ensure that those entities are subject to 'effective, proportionate and dissuasive criminal, civil or administrative sanctions' which include monetary sanctions.[612] In other words, the ICSFT does not express a preference regarding the legal nature of the prescribed sanctions (either criminal, civil or administrative, including monetary); they must, however, be sufficiently deterrent.

6.2.4 Overview

From the foregoing it may be concluded that the ICSFT does not provide for elaborate standards applicable to implementing legislation which must be observed by state parties. In addition, its drafters, contrary to the drafters of the *Legislative Guide* for the implementation of the CTOC, have not arranged for guidance regarding the implementation of the ICSFT provisions. As a result, legislative standards can only be derived from the ICSFT itself. The ICSFT imposes obligations to, *inter alia*, criminalise the offences covered by the convention, to provide for penalties under domestic law, and to establish jurisdiction over those crimes. The choice of sanctions, either criminal, civil or administrative, including monetary, is left to the discretion of states. The ICSFT only prescribes that the available sanctions are sufficiently deterrent. Furthermore, it requires that its obligations, including the obligations the require the adoption of domestic legislation, are performed in consistency with other norms to which the state is bound, either national or international.

611 Art 4, sub b.
612 Art 5, third paragraph.

7 Legislative standards as part of international health law

7.1 Implementation of the International Health Regulations

7.1.1 General

The international spread of disease has been a concern for the international community since 1851, as was discussed in Part I. The International Health Regulations (IHR), which are central to the present section, reflect only the most recent version of international cooperation on the subject. They were adopted in 2005 to replace their predecessor, the 1969 International Health Regulations, which had been amended in 1973 (to add provisions for cholera) and in 1981 (to exclude smallpox from the regulations' scope).[613] In 1995 a process of revision was set in motion, which has resulted in a new set of rules that entered into force in 2007.[614] One important innovation was that, contrary to their predecessors, the new regulations are not limited to certain specified diseases, such as yellow fever or plague; instead, they apply to any 'illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans'.[615]

7.1.2 Content of the Regulations

The new regulations' aim is 'to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade'.[616] In order to achieve that aim, the IHR contain various obligations concerning national and international surveillance, public health response, health measures applied to international travelers, aircraft, ships, motor vehicles and goods, and public health at international ports, airports and ground crossings.[617]

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613 WHO, 'Revision of the International Health Regulations. Report by the Secretariat' (24 March 2003) A 56/25, 1.

614 WHA res 58.3 (n 278).

615 Art 1, first paragraph.

616 Art 2 IHR.

617 WHO, 'International Health Regulations (2005). A brief introduction to implementation in national legislation' (World Health Organisation, Geneva 2009) WHO/HSE/IHR/2009.2, 2 <http://www.who.int/ihr/Intro_legislative_implementation.pdf> (accessed 29 March 2018).

The main obligations can be summarised as follows. Pursuant to article 4, first paragraph, IHR, states shall designate or establish 'National IHR Focal Points' and the authorities responsible for the implementation of health measures under the regulations. They have a central role in communicating with the WHO and with other domestic authorities.[618] For example, they serve as a channel of communications in case of an event unfolding on a state's territory which may constitute a 'public health emergency of international concern'. States are under an obligation to report such an event to the WHO within 24 hours and to provide all relevant public health information. Subsequently the collected information will be forwarded by the WHO in order to enable other states to respond to the established public health risk.[619] In addition, states have a duty to develop, strengthen and maintain the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern.[620] In the event of such an emergency, the Director-General of the WHO temporarily has the power to issue recommendations, which may include health measures regarding persons, baggage, cargo, containers, conveyances, goods and parcels in order to prevent or reduce the international spread of disease.[621]

Furthermore, the IHR impose several obligations regarding the so-called 'points of entry', a term that encompasses airports, ports and ground crossings. The requirements include the duty to identify the competent authorities and the duty to ensure the development of various 'capacities' at designated points of entry, such as the availability of medical staff in order to assess ill travelers and facilities to treat contaminated baggage and cargo etc.[622]

The IHR also stipulate that state authorities may on arrival and departure impose requirements for public health purposes with regard to travelers, such as information on the person's itinerary or a medical examination, and inspection of baggage, cargo etc.[623] Similarly, states shall take all practicable measures to ensure that conveyance operators comply with the health measures recommended by the WHO and may take action if a conveyance is suspected to contain sources of infection or contamination.[624] Under certain conditions, a state may require invasive medical examination or vaccination, for instance when it is necessary to determine whether a public health risk exists or as a condition for travelers seeking temporary or permanent residence.[625]

While the aforementioned measures primarily seek to combat established or suspected public health risks, the aim of the IHR is also to diminish unnecessary impediments to international traffic and trade. This follows

618 Art 4, first and second paragraph.
619 Artt 6, first paragraph, 7 and 11.
620 Art 13, first paragraph, and Annex I.
621 Art 15, first and second paragraph.
622 Artt 19, sub a and b, 20 and 21, and Annex I, sub B.
623 Art 23, first paragraph.
624 Art 24, first paragraph, sub a, and 27, first paragraph.
625 Art 31, first and second paragraph.

from various provisions, such as the prohibition of the application of health measures to conveyances in transit not coming from affected areas, and the prohibition to require other health documents than those provided for in the IHR.[626]

7.1.3 Legislative standards

7.1.3.1 Implementation and harmonisation

The 'Toolkit for implementation in national legislation' acknowledges that implementation of the IHR on the domestic level can be performed in various ways. It reveals, however, a preference for implementation through legislation since, it is submitted, 'there needs to be an adequate legal framework to support and enable all these activities [required by the IHR] within all States Parties'.[627] Implementation through legislation is desirable, it is stated, not only since it 'facilitate[s] performance of IHR activities in a more efficient, effective or otherwise beneficial manner', but also because legislation may serve to 'institutionalize and strengthen the role of IHR capacities within the State Party'. An additional potential benefit may be found in enhanced 'coordination among different governmental and non-governmental entities involved in implementation […]'.[628] This preference for implementation through legislative means can be satisfied in two ways, it is argued: legislation that gives effect to the various requirements in each relevant area; or legislation which incorporates the IHR as a whole in the domestic legal system, either by attaching the text of the IHR as an annex or by reference.[629]

The IHR harmonise national attitudes towards public health responses to the international spread of disease. However, states are expressly permitted to adopt 'additional health measures' in response to specific public health risks or public health emergencies of international concern (both terms are defined in article 1, first paragraph, IHR) which achieve the same or greater level of health protection than recommendations issued by the WHO, or which are otherwise prohibited under several provisions of the IHR. Such additional measures should be otherwise consistent with the IHR and should not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives.[630] Put simply, states are allowed to restrict international traffic further if it is

626 Artt 25, 26 and 35. Also artt 33, 40 and 41.

627 WHO, 'International Health Regulations (2005). Toolkit for implementation in national legislation. Questions and answers, legislative reference and assessment tool and examples of national legislation' (World Health Organisation, Geneva 2009) WHO/HSE/IHR/2009.3, 9 <http://www.who.int/ihr/Toolkit_Legislative_Implementation.pdf?ua=1> (accessed 29 March 2018).

628 Ibid.

629 Ibid, 11. The second way is usually called ad hoc statutory incorporation. See section 2.4.

630 Art 43, first paragraph.

necessary in order to respond to an imminent and serious threat to public health. In the same vein, states are free to conclude additional treaties with other states in order to 'facilitate the application of the IHR'.[631] This means that the IHR does not impose one uniform framework to be applied by states in the context of the international spread of disease; it leaves some discretion to states, although the manner in which states could use this discretion is governed by the IHR.

7.1.3.2 Observance of human rights, including non-discrimination

One of the legislative standards that may be derived from the IHR can be found in the provision which calls upon Member states to implement fully the IHR in accordance with the principles embodied in article 3.[632] These include the principle that the implementation of the IHR shall be 'with full respect for the dignity, human rights and fundamental freedoms of persons'. Closely related to the implementation of the IHR themselves is the adoption of health measures pursuant to the IHR. They must be initiated and completed without delay, and applied in a transparent and non-discriminatory manner.[633] Pursuant to article 32, health measures pertaining to travelers must be performed 'with respect [for travelers'] dignity, human rights and fundamental freedoms', while minimizing 'discomfort and distress associated with such measures'. To this end, states have a duty to treat all travelers with courtesy and respect, to take into consideration their gender and their sociocultural, ethnic or religious concerns, and to provide those who are quarantined, isolated or subjected to medical examination with adequate food, water, accommodation etc.[634]

7.1.3.3 Observance of applicable international and national law

The drafters of the IHR have intended to ensure that the IHR do not contravene other international legal obligations to which the state parties are bound. On a general level, it is stated that implementation shall 'be guided by the Charter of the United Nations and the Constitution of the World Health Organisation' and 'by the goal of their universal application for the protection of all people of the world from the international spread of disease'.[635] Nevertheless, acknowledging the possibility that tension arises between these internationalist objectives and the reality within the jurisdiction of states, the IHR also stipulate that 'states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to legislate and to implement legislation in pursuance of

631 Art 57, second paragraph.
632 WHA res 58.3 (n 278).
633 Art 42.
634 Art 32, sub a, b and c.
635 Art 3, first, second, and third paragraph, IHR.

their health policies. In doing so they should uphold the purpose of these Regulations'.[636]

Other references to international law can be found in article 57, first paragraph, which stipulates that 'the [IHR] and other relevant international agreements should be interpreted so as to be compatible' and that the rights and obligations derived from those agreements shall not be affected by the IHR. This is not to say that other state obligations than those included in the IHR, will always prevail; it merely states that they should be reconciled, *by means of interpretation*, to the largest possible extent. Whenever a state party is bound by a legal obligation that clearly contravenes the duties set forth in the IHR, interpretation in accordance with article 57, first paragraph, will prove to be insufficient to solve the contradiction. Moreover, in article 46 express reference is made to 'international guidelines' that should be taken into account by states to facilitate the performance various activities with biological substances, diagnostic specimens, reagents and other diagnostic materials for verification and public health response purposes.

In several places the IHR refer to national law as well. First of all, the terms 'temporary residence' and 'permanent residence' have the meaning given to them in domestic law.[637] Article 45, first and second paragraphs, governs the treatment of personal data that have been collected or received in accordance with the IHR. Such data should be kept confidential and be anonymously processed 'as required by national law'. Thus, the drafters of the IHR have decided to rely on national law for the specification of the cited terms and for norms pertaining to the processing of personal data, instead of integrating the said terms and norms in the IHR.

7.1.4 Overview

From the overview presented in the previous sections, it must be concluded that the legislative standards pertaining to the implementation of the IHR are scarce. The IHR impose various obligations on states that require implementing measures, and, as we have seen, preferably implementing *legislation,* but they do not elaborate on the means and methods of implementing legislation. For instance, the IHR are silent on monitoring and enforcement measures. Nevertheless, on a few occasions they refer to human rights, including non-discrimination, international law and domestic law. These references are not only relevant for the interpretation of the IHR themselves, but also for the interpretation of domestic implementing legislation that is adopted to give effect to the IHR.

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636 Art 3, fourth paragraph, IHR. Similarly, it is stated: 'How the IHR requirements are to be implemented is up to each State Party in light of its own domestic legal and governance systems, socio-political contexts and policies. Each State Party should therefore determine the extent to which the different aspects of this guidance may be relevant or appropriate to their particular circumstances. WHO, 'A brief introduction to implementation' (n 617) 7.

637 Art 1, first paragraph.

7.2 Implementation of the Framework Convention on Tobacco Control

7.2.1 General

Together with the IHR, probably the best known instrument of international health law may be found in the Framework Convention on Tobacco Control (FCTC). Similar to the IHR, the FCTC was negotiated and adopted under the auspices of the WHO. The FCTC was adopted in 2003 by the World Health Assembly in accordance with article 19 of the Constitution of the WHO, which bestows it with the power to adopt international conventions.[638] It is the product of a process that commenced in 1970 with the adoption of a resolution on the serious health effects of smoking.[639] In May 1995 this process resulted in the adoption by the Health Assembly of a resolution in which the Director-General was requested to investigate the feasibility to develop an international instrument on tobacco control.[640] In 1999 it was decided that an intergovernmental negotiating body should formulate a draft text of the treaty.[641] After the adoption of the text of the treaty in May 2003, it was opened for signature in June 2003 and entered into force in February 2005. The FCTC is a 'framework convention' and may be complemented by protocols in accordance with article 33. This has resulted in the adoption of the Protocol to Eliminate Illicit Trade in Tobacco Products in November 2012.[642] Today 181 states are bound by the FCTC; 31 states are party to the Protocol.[643]

638 WHO (Resolution of the World Health Assembly), 'WHO Framework Convention on Tobacco Control' (21 May 2003) WHA56.1. Article 19 of the Constitution of the WHO, stipulates: 'The Health Assembly shall have authority to adopt conventions or agreements with respect to any matter within the competence of the Organisation. A two-thirds vote of the Health Assembly shall be required for the adoption of such conventions or agreements, which shall come into force for each Member when accepted by it in accordance with its constitutional processes'.

639 WHO (Resolution of the World Health Assembly), 'Health consequences of smoking' (19 May 1970) WHA 23.32.

640 WHO (Resolution of the World Health Assembly), 'An international strategy for tobacco control' (12 May 1995) WHA 48.11.

641 WHO (Resolution of the World Health Assembly), 'Towards a WHO framework convention on tobacco control' (24 May 1999) WHA 52.18.

642 Conference of the Parties to the WHO Framework Convention on Tobacco Control, 'Protocol to Eliminate Illicit Traffic in Tobacco Products' Decision FCTC/COP5(1) (12 November 2012) <http://apps.who.int/gb/fctc/PDF/cop5/FCTC_COP5(1)-en.pdf> (accessed 29 March 2018).

643 See the FCTC website: http://www.who.int/fctc/signatories_parties/en/ and http://www.who.int/fctc/protocol/en/ (accessed 29 March 2018).

7.2.2 Content of the Convention

The objective of the FCTC is to 'protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures […]'.[644] In order to achieve this objective, the FCTC prescribes various measures. The FCTC distinguishes between general obligations, which are entrenched in article 5 FCTC, and other obligations.

The general obligations include the duty to 'adopt and implement effective legislative, executive, administrative and/or other measures and cooperate, as appropriate, with other Parties in developing appropriate policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke'.[645] Furthermore, states have a duty to protect their public health policies with respect to tobacco control from undue influence of the tobacco industry and to cooperate with each other and with other competent international bodies.[646] In addition to article 5, the FCTC prescribes the adoption of measures aimed at the reduction of demand for tobacco, the protection from exposure to tobacco smoke, the reduction of the supply of tobacco, the protection of the environment, liability, and scientific and technical cooperation.[647] Examples include the consideration of price and tax measures in order to discourage the use of tobacco products, the adoption and implementation of effective measures providing for protection from exposure to tobacco smoke in indoor workplaces and public places, the adoption and implementation of measures to ensure that tobacco packages and labels contain health warnings describing the harmful effects of tobacco use, the adoption and implementation of measures aimed at strengthening public awareness on the health effects of tobacco use, the adoption and implementation of measures that prohibit the sale of tobacco products to minors, and the development and promotion of national research programmes relating to tobacco control.[648]

Furthermore, the FCTC provides for the establishment of a Conference of the Parties, which 'shall keep under regular review the implementation of the Convention and take the decisions necessary to promote its effective implementation'.[649]

644 Art 3.
645 Art 5, second paragraph, sub b.
646 Art 5, third, fourth and fifth, paragraph.
647 Parts III, IV, V, and VI.
648 Artt 6, 8, second paragraph, 11, first paragraph, 12, 16, first paragraph, and 20, first paragraph.
649 Art 23, first and fifth paragraph.

7.2.3 Legislative standards

7.2.3.1 Implementation, 'guiding principles' and harmonisation

The central obligation of the FCTC can be found in article 3, which states that the treaty provides for a framework for tobacco control measures 'to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke'.

When states adopt the national measures required by the FCTC, they should take into account, it is stipulated, *inter alia,* the 'guiding principles' set out in article 4. These principles stress the need for information to the public on the health effects which result from the use of tobacco products, the need for 'strong political commitment' and international cooperation, the importance of 'comprehensive multisectoral measures and responses to prevent health damage', of issues of liability, and of 'technical and financial assistance to aid the economic transition of tobacco growers and workers', and the essential role of civil society in the attainment of the FCTC's objectives. These principles may be viewed as a brief summary of the FCTC and may contribute to the understanding, for the purposes of interpretation, of the treaty text in accordance with article 31, first paragraph, VCLT. This provision stipulates that the interpretation of treaties should not only be conducted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context, but also 'in the light of its object and purpose'.[650]

Notwithstanding their importance as a means of interpretation, the guiding principles laid down in article 4 probably do not constitute autonomous legal obligations to be performed by the state parties, as their legal substance can only be established in connection with the other FCTC provisions.

In this context it is worth referring to the *Guidelines for implementation*, which have been drafted and elaborated over the years in order to promote the implementation of the FCTC.[651] These guidelines reflect 'the consolidated views of parties on different aspects of implementation, their experiences and achievements, and the challenges faced'.[652] Instead of focusing on the implementation of the FCTC in its entirety, it elaborates on the implementation of specified articles such as article 8 on the protection from the exposure to tobacco smoke.[653] The Guidelines should probably be character-

650 VCLT art 31, first paragraph.

651 WHO, *Guidelines for implementation* (n 177). As an additional tool to enhance compliance with the Convention, the Convention Secretariat annually publishes 'Global Progress Reports' on the implementation of the Convention <http://www.who.int/fctc/reporting/summary_analysis/en/> (accessed 29 March 2018).

652 WHO, *Guidelines for implementation* (n 177) v.

653 Other provisions to which the Guidelines apply, are articles 5, third paragraph, 9, 10, 11, 12, 13 and 14.

ised as a soft law instrument, which may be derived from the statement that 'Parties are encouraged to use these guidelines not only to fulfill their legal duties under the Convention, but also to follow best practices in protecting public health'.[654] To this end, the Guidelines on article 8 FCTC provide for seven 'principles' that should guide the implementation of article 8, and clarify various aspects of the implementation, such its scope, enforcement, monitoring and evaluation.[655]

Finally, the FCTC contains minimum standards. This may be derived from article 2, first paragraph, which encourages state parties to 'implement measures beyond those required by this Convention [..]', adding that 'nothing in these instruments shall prevent a Party from imposing stricter requirements'.[656]

7.2.3.2 Observance of applicable international and national law

Several provisions of the FCTC refer to international and national law, which indicates that implementation should be performed in a manner that is consistent with other legal norms to which the state is bound. As was noted above, the state parties to the FCTC may adopt stricter requirements than the requirements prescribed by the FCTC in order to better protect human health. However, there are two conditions that have to be met: those additional measures must be consistent with the provisions of the FCTC and with international law in general.[657] Similarly, the FCTC expressly stipulates that state parties have the right to conclude bilateral and multilateral agreements, provided that those agreements are compatible with the obligations under the FCTC. In short, the FCTC requires what may be termed consistency with other international legal provisions. This requirement may seem, at first sight, unnecessary, since it is nothing more than an affirmation of the obvious principle that states should act in accordance with the obligations to which they are bound: *pacta sunt servanda.* However, it may be understood to point to a certain hierarchy, which ensures the prevalence of the FCTC over other applicable international agreements or domestic laws. Which international legal norms the drafters had in mind remains unclear, unfortunately, since the FCTC and the *Guidelines for Implementation* are silent on this topic.

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654 WHO, *Guidelines for implementation* (n 177) 19.

655 Principle 4, for example, provides that '[g]ood planning and adequate resources are essential for successful implementation and enforcement of smoke free legislation'. WHO, *Guidelines for implementation* (n 177) 21-29.

656 Art 2, first paragraph. See also article 13, fifth paragraph.

657 Art 2, first paragraph.

In addition to the references to international law, the FCTC on several occasions points to national law.[658] In these cases, the FCTC does not impose one single, harmonised norm to be followed by all state parties; instead, it allows some level of discretion to national authorities that are responsible for the implementation of the relevant provision. An example may clarify this point. Article 13, fourth paragraph, sub a, provides:

> '[…] *in accordance with its constitution or constitutional principles*, each Party shall: (a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions';

In the *Guidelines for Implementation*, relating to this particular provision, it is accepted that domestic law may provide for limitations on the imposition of a ban on tobacco advertising. Given these limitations, it is submitted, the state in question should apply restrictions on tobacco advertising which are 'as comprehensive as possible in the light of those [limitations]'.[659] In this particular aspect, thus, the FCTC provision may not be interpreted as to prevail over domestic (constitutional) laws applicable to tobacco advertising.

In other FCTC articles, references to domestic laws ensure the complementary, instead of restrictive, character of those laws. This is the case in article 16, first paragraph, which stipulates:

> 'Each Party shall adopt and implement effective legislative, executive, administrative or other measures at the appropriate government level to prohibit the sales of tobacco products to persons under the age set by domestic law, national law or eighteen'.

Here, the legal regime pertaining to the sale of tobacco products to minors that is entrenched in the FCTC relies on domestic law for the purpose of setting an age limit; only if such domestic laws are absent, the FCTC sets the age limit on eighteen years. Admittedly, the characterisation of references to national law in the text of the FCTC as 'restrictive' or 'complementary' is in essence a matter of perspective; in principle, any such reference may be viewed as both restrictive and complementary at the same time. Whereas a preference for a qualification as restrictive may reveal support for the protection of state sovereignty, the labeling as 'complementary' points to an internationalist approach in which states take common action to solve common problems. In the end, the key issue is that the references to national law which are part of the FCTC, indicate that the FCTC on the one hand and the domestic laws of a state party on the other, are *connected*. In those cases, as a consequence, it is imperative to take into account both sides in order to identify the applicable law.

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658 For instance, articles 5, third paragraph, 6, second paragraph, 10, 11, first paragraph, 13, 14, first paragraph, 16, first paragraph, 19, third paragraph, 20, fourth paragraph.

659 WHO, *Guidelines for implementation* (n 177) 103.

7.2.3.3 Compliance and enforcement

Moreover, the implementation of the FCTC entails the obligation to put in place a compliance and enforcement mechanism in order to ensure compliance with the specified FCTC articles. It must be emphasised that the FCTC does not contain any obligation to this effect that is applicable to the treaty as a whole. Rather, it must be derived from specified treaty articles or, in the absence thereof, from the *Guidelines for Implementation*. Pursuant to the *Guidelines for Implementation* compliance with article 8 should be monitored, which requires the establishment of inspection procedures. These procedures may, it is added, be integrated into existing health and sanitation inspections, inspections for workplace health and safety or fire safety inspections.[660] As regards articles 9 and 10 FCTC on the regulation of the content of tobacco products, including the publication of information about their content, the *Guidelines for Implementation* stipulate that domestic implementing measures 'should identify the authority or authorities responsible for enforcement, and should include a system both for monitoring compliance and for prosecuting violators'.[661] The *Guidelines for Implementation* proceed to describe in detail the features of this compliance mechanism, such as the availability of a budget, information to stakeholders and the recommendation to use inspectors and enforcement agents to conduct regular visits to manufacturing facilities to verify whether any prohibited ingredient is being used.[662] State authorities should have the authority to seize, forfeit and destroy any tobacco products that do not meet the requirements of the articles 9 and 10.[663]

Other enforcement measures may be required under on article 5, third paragraph, FCTC, which codifies the duty of states to protect their public health policies from the commercial interests of the tobacco industry.[664] The obligation to provide for an enforcement mechanism includes the possibility for the imposition of penalties for violations of the FCTC. Again, the FCTC does not contain a general obligation to this effect. Therefore, it must be partly derived from two specified articles, which provide for the obligations to '[…] enact or strengthen legislation, *with appropriate penalties and remedies*, against illicit trade in tobacco products, including counterfeit and contraband cigarettes' and to '[…] adopt and implement effective legislative, executive, administrative or other measures, *including penalties* against sellers and distributors, in order to ensure compliance with the obligations contained in [article 16, paragraphs 1 to 5]'.[665]

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660 Ibid, 26.
661 Ibid, 45. The Guidelines contain an identical statement with regard to article 8 of the Convention. Ibid, 26.
662 Ibid, 45-46.
663 Ibid, 47.
664 Ibid, 12.
665 Artt 15, fourth paragraph, sub b, and 16, sixth paragraph. Italics added.

Although the 2013 edition of the *Guidelines for Implementation* do not elaborate on the requirement of penalisation as referred to in articles 15 and 16, it does imply the need for, and the duty to impose, penalties for transgressions of *other* provisions of the FCTC. This is remarkable, because the latter FCTC provisions do not contain an obligation to this effect. Here the *Guidelines for Implementation* clearly go beyond what could derived from the text of the treaty itself. According to the *Guidelines for Implementation* regarding article 11, '[p]arties should specify a range of fines or other penalties commensurate with the severity of the violation […]'.[666] Similarly, states should 'introduce and apply effective, proportionate and dissuasive penalties' in response to violations of the prohibition of, or restrictions applicable to, tobacco advertising, as embodied in article 13.[667] The penalties may encompass fines, corrective advertising remedies and licence suspension or cancellation.[668] With respect to the aforementioned articles 9 and 10, the *Guidelines for Implementation* prescribe that '[p]arties should specify appropriate sanctions, such as criminal sanctions, monetary amounts, corrective actions, and the suspension, limitation or cancellation of business and import licences'.[669]

7.2.3.4 Participation of stakeholders

In addition, the FCTC and its supporting documents envisage the involvement of stakeholders in the implementation of measures to attain the formulated policy aims. The most important stakeholders include a wide range of organisations or groups, businesses, restaurant and hospitality associations, employer groups, trade unions, the media, health professionals, organisations representing children and young people, institutions of learning or faith, the research community and the general public.[670]

The involvement of stakeholders which are part of civil society may be based partly on the guiding principle entrenched in article 4, seventh paragraph, already discussed above, which emphasises the participation of civil society in order to achieve the objective of the FCTC. To this end, it is recommended that states 'work with civil society to create a climate of attitude that […] identifies legislative priorities and helps develop and enforce

666 Ibid, 66.

667 The emphasis on deterrence also becomes visible in relation to article 8. In the *Guidelines for Implementation*, it is noted that 'penalties should be sufficiently large to deter violations or else they may be ignored by violators or treated as mere costs of doing business'. Ibid, 25.

668 Ibid, 110-111.

669 Ibid, 46.

670 Ibid, 24. A distinction must be made between the tobacco industry and other stakeholders. As regard the former, states should take into account in article 5, third paragraph, which provides that national public health policies regarding the use of tobacco product should be protected from commercial or other interests of the tobacco industry.

legislative measures'.[671] Elsewhere it is noted that 'broad consultation with stakeholders is also essential to educate and mobilize the community and to facilitate support for legislation after its enactment'.[672]

Also after its entry into force, contacts with stakeholders are believed to enhance compliance with domestic implementing measures. In the context of article 8 FCTC on protective measures against the harmful effects of tobacco smoke, the *Guidelines for Implementation* provide that:

> '[o]nce legislation is adopted, there should be an education campaign leading up to implementation of the law, the provision of information for business owners and building managers outlining the law and their responsibilities and the production of resources, such as signage. These measures will increase the likelihood of smooth implementation and high levels of voluntary compliance. Messages to empower non-smokers and to thank smokers for complying with the law will promote public involvement in enforcement and smooth implementation.'[673]

7.2.3.5 Monitoring and evaluation of measures

After domestic implementing measures have been adopted, the question arises whether those measures should be monitored and, if yes, how. Under several FCTC obligations, the need for monitoring and evaluation of measures is emphasised. Their exact purpose, as formulated in the *Guidelines for Implementation*, varies from article to article. In relation to article 8, for instance, it is noted that the monitoring and evaluation of measures to reduce tobacco smoke serve multiple aims, such as the increase of public and political support for strengthening and extending legislative provisions and to shed light on efforts made by the tobacco industry to undermine implementation measures.[674] Under article 11, on packaging and labeling of tobacco products, the objective of monitoring and evaluation seems to be broader, namely to assess the impact and possible improvement of the adopted measures.[675] Similarly, the monitoring and evaluation of the laws adopted under article 12 on education, communication, training and public awareness regarding tobacco control issues, allows states to 'measure progress' and to 'identify best practices'.[676] A purpose that is connected to monitoring and evaluation and which is common to all of the aforementioned provisions, is the assistance of states, that will benefit from the experiences of other states.[677]

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671 Ibid, 83.
672 Ibid, 24.
673 Ibid.
674 Ibid, 28.
675 Ibid, 67.
676 Ibid, 86.
677 Ibid, 28, 67 and 86.

7.2.4 Overview

In view of the above, several conclusions may be drawn in relation to the implementation regime that has been established under the FCTC. In order promote the implementation of the FCTC, the Conference of the Parties have drafted *Guidelines for Implementation* which clarify and elaborate the obligations to which states are bound under the treaty. Their legal status is such that they probably do not constitute binding obligations supplementary to the FCTC text. Nevertheless, the fact remains that the guidelines go beyond what is required under the text of the treaty. They refer to the need for inspection and enforcement procedures under several FCTC provisions, whereas those provisions do not stipulate such obligation. The formulation of standards on the consultation with stakeholders and on the evaluation of domestic implementing measures is quite rare in international legal practice. In addition to these standards for legislation, it is clear that the drafters have intended to embed the FCTC, and the required domestic implementing laws, within the existing international and national legal framework.

8 Legislative standards as part of international environmental law

8.1 Implementation of the Convention on International Trade in Endangered Species

8.1.1 General

During the 1960's and 1970's the international trade in wildlife has increased dramatically.[678] In 2005 the value of legitimate global trade in wildlife and plants, excluding timber, was estimated at 21 billion US dollars.[679] The illegitimate trade in international trade in wildlife, on the other hand, is valued at between 5 billion and 20 billion US dollars.[680] High demand for wildlife has had detrimental effects on the survival of species, which, apart from the species' intrinsic value, has several negative consequences. For instance, animals and plants may be indispensable for the development of new drugs and other forms of medical treatment. Similarly, plants are a source of information which may prove important to increase the world's food production. If species become extinct, their value is lost.[681] In an attempt to address the disadvantages of the international trade in wildlife, the international community deemed it necessary to provide for an international approach, which has resulted in the Convention on International Trade in Endangered Species, known by its abbreviation CITES. It can be traced back to the United Nations Stockholm Conference on the Human Environment in 1972, during which a recommendation was adopted which called for an international convention on the export, import and transit of certain species of wild animals or plants.[682] The treaty was adopted in March 1973 and entered into

678 D. Kueck, 'Using international political agreements to protect endangered species: a proposed model' 2 *University of Chicago Law School Round Table* (1995) 345-354, 345. This estimate dates back to 1987.

679 G.E. Rosen and K.F. Smith, 'Summarizing the evidence on the international trade in illegal wildlife' 7 *EcoHealth* 1 (2010) 24-32, 24. Also J.E. Scanlon 'The international dimension of illegal wildlife trade' (Presentation on the occasion of the 1st session of the United Nations Environment Assembly (UNEA) in Nairobi, Kenya, on 24 June 2014) <https://cites.org/eng/international_dimension_of_illegal_wildlife_trade> (accessed 29 March 2018). Scanlon adheres to an estimation of 20 billion US dollars.

680 Rosen and Smith, 'Summarizing the evidence on the international trade in illegal wildlife' (n 679) 24.

681 D. Mahony, 'The Convention on International Trade in Endangered Species of Flora and Fauna. Addressing problems in global wildlife trade enforcement' 3 *New England International and Comparative Law Annual* (1997) 1-23, 2-3.

682 Recommendation 99, third paragraph, of the Stockholm Action Plan. 'Report of the United Nations Conference on the Human Environment' (Stockholm 5-16 June 1972) UN Doc A/CONF.48/14/Rev.1.

force in July 1975 pursuant article XXII CITES. As yet, 183 states are party to the treaty, which has been described as perhaps the most successful of all international treaties concerned with the conservation of wildlife.[683]

8.1.2 Content of the Convention

The purpose of the CITES is the 'protection of certain species of wild fauna and flora against over-exploitation through international trade'.[684] To this end, it regulates international trade in endangered species, encompassing both plants and animals, thus balancing the interests of lucrative trade and the protection of wild life.[685]

The CITES distinguishes between three categories of species, each of which is included in appendices I, II or III. Appendix I contains species which are threatened with extinction. In order not to endanger further their survival, it is stipulated, trade in specimens of these species may only be authorised in exceptional circumstances.[686] The species included in appendices II and III are subject to less strict regulations, as they do not (yet) face the threat of extinction.[687] The core provision of the CITES is laid down in article II, fourth paragraph, which provides that trade in specimens and species included in the appendices I, II and II to the CITES, is prohibited. From this prohibition is exempted trade in accordance with the provisions of the CITES, which essentially consists of a permit system.[688]

The articles III, IV and V prescribe for the species included in each appendix the applicable trade restrictions.[689] They include the presentation of permits for the import or export of a specimen to which appendix I applies; re-export or introduction from the sea of a specimen of this category is allowed only with a certificate.[690] States must designate one or more authorities which are authorised to issue permits and certificates

683 M. Bowman, P. Davies and C. Redgwell, *Lyster's international wildlife law* (2nd edn CUP, Cambridge 2010) 484. For the number of state parties visit http://www.cites.org (accessed 29 March 2018).

684 Preamble.

685 S. Patel, 'The Convention on International Trade in Endangered Species: enforcement and the last unicorn' 18 *Houston Journal of International Law* 2 (1995) 157-213, 161. Similarly, K. Hill, 'The Convention on International Trade in Endangered Species. Fifteen years later' 13 *Loyola of Los Angeles International and Comparative Law Journal* 2 (1990) 231-278, 232.

686 Art II, first paragraph. 'Specimens' are defined as 'any animal or plant, whether alive or dead [or] any readily recognizable part or derivative thereof' (Art I, sub b).

687 Art II, second and third paragraph.

688 Bowman, Davies and Redgwell, *Lyster's international wildlife law* (n 683) 485.

689 For a more extensive discussion of the applicable trade restrictions, see Bowman, Davies and Redgwell, *Lyster's international wildlife law* (n 683) 499-509.

690 'Re-export' means export of any specimen that has previously been imported (article I, sub d). 'Introduction from the sea' means transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State (art I, sub e).

and give advice on behalf of that state.[691] Furthermore, the CITES provides which conditions must be fulfilled before the required document can be issued. For instance, for this species an export permit may only be granted if a (scientific) state authority of the exporting state has advised that such export will not be 'detrimental to the survival of that species' and if a state authority is satisfied that a living specimen will be 'so prepared and shipped as to minimise the risk of injury, damage to health or cruel treatment'.[692] A separate permit is required for the import of the specimen, which may only be granted if the specimen is not to be used for primarily commercial purposes.[693] In sum, the international trade of such species may only be authorised in 'exceptional circumstances'.[694]

The CITES imposes similar, but less stringent, requirements on permits and certificates for trade in species included in appendices II and III.

The CITES also provides for exemptions to the permit system. Permits are not required for the 'transit or transshipment of specimens through or in the territory of a Party while the specimens remain in Customs control'.[695] Neither do the limitations prescribe by the CITES apply to specimens that can be considered 'personal or household effects'.[696]

In addition, the CITES imposes some related requirements on state parties, such as the obligation to minimise the delay caused by the formalities which are part of the trade in specimens under the CITES and the obligation to keep records of trade in specimens which fall within the scope of the CITES. Such records must include the names and addresses of importers and exporters, the official documents that were issued, the types of specimens etc.[697]

8.1.3 Legislative standards

8.1.3.1 Implementation and harmonisation

The CITES does not contain an obligation of a *general* nature which requires the adoption of domestic measures in order to give effect to its norms. However, in March 1992 the Conference of the Parties adopted a resolution, which 'urges all Parties that have not adopted appropriate measures for effective implementation of the Convention to do so […]'.[698] In 2013,

691 Art IX, first paragraph.
692 Art III, second paragraph, sub a and c.
693 Art III, third paragraph, sub c.
694 Art II, first paragraph.
695 Art VII, first paragraph.
696 Art VII, third paragraph.
697 Art VIII, third and sixth paragraph.
698 Conference of the Parties to the Convention on the International Trade in Endangered Species, 'National laws for implementation of the Convention' Resolution Conf. 8.4 (March 1992) <https://www.cites.org/eng/res/index.php> (accessed 29 March 2018).

ensuring compliance with and implementation and enforcement of the treaty was identified as one out of three 'strategic goals' as part of CITES Strategic Vision.[699]

Leaving aside these documents, any binding obligation to adopt implementing legislation must be derived from the CITES provisions of a *special* character, such as the aforementioned duty to prohibit trade of endangered species which is not in accordance with the CITES.[700] Pursuant to article XIV, first paragraph, states are permitted to apply stricter domestic measures to the trade, possession or transport of specimens of species included in the appendices to the CITES, including the complete prohibition thereof. The CITES thus prescribes minimum norms.[701]

8.1.3.2 Information to the public

Another obligation that may be considered a legislative standard consists of the requirement to make available to the public the periodic reports on the implementation of the CITES. These reports must encompass a summary of the records of trade in specimens, as was discussed above, and a report on the legislative, regulatory and administrative measures that were taken to enforce the provisions of the CITES.[702] Under the condition that will be discussed in section 8.1.3.3, these reports must be made public.

8.1.3.3 Observance of applicable international and national law

There are few examples of CITES provisions that refer to domestic laws. One of them can be found in the obligation to prepare periodic reports on the implementation of the treaty, which was discussed in the previous section, and to make these reports available to the public, if such publication 'is not inconsistent with the law of the Party concerned'.[703]

Furthermore the CITES contains an express provision on its 'effects on domestic legislation and international conventions'.[704] In addition to the right of state parties to impose domestic restrictions on trade of endangered species that go beyond the minimum requirements of the CITES, state

699 Conference of the Parties to the Convention on the International Trade in Endangered Species, 'CITES Strategic Vision 2008-2020', Resolution Conf. 16.3 (March 2013) <https://www.cites.org/eng/res/index.php> (accessed 29 March 2018).

700 See also art VIII, first paragraph, which provides that states 'shall take appropriate measures […] to prohibit trade in specimens in violation [of the Convention]'.

701 In the same vein, state parties may impose restrictions on the trade in specimens of species which are not included in the appendices to the Convention (art XIV, first paragraph, sub b).

702 Art VIII, seventh and eighth paragraph.

703 Art VIII, seventh and eighth paragraph.

704 Art XIV.

parties have the right to maintain domestic laws pertaining to other aspects of trade, taking, possession or transport of specimens such as customs, public health, veterinary or plant quarantine.[705]

The same applies to similar norms which derive from international treaties; they are not affected by the CITES.[706] Domestic implementing legislation must also be consistent with the obligations that flow from international treaties establishing transnational trade areas or customs unions.[707] Moreover, if a state party is also bound by an international treaty that provides protection to marine species which are included in appendix II and which are taken by ships that are registered in that state, that treaty prevails over the CITES.[708]

8.1.3.4 Enforcement

Pursuant to article VIII, first paragraph, state parties are obliged to take measures required for the enforcement of the treaty.[709] These must include, as a minimum, measures to provide for the penalisation of unlawful trade in, or possession of, specimens, and measures to provide for the confiscation or return to the state of export of such specimens.[710] State parties may choose to provide for internal reimbursement for expenses incurred as a result of such confiscation.[711]

These elementary legislative standards do not further provide for criteria applicable to penalisation, such as the severity of sanctions.[712] Resolution 11.3 of the Conference of Parties on compliance and enforcement of the CITES offers some additional guidance, albeit in a non-binding manner. In this resolution it is recommended that state parties advocate sanctions for infringements that are 'appropriate to their nature and gravity'.[713] In the view of several scholars, the enforcement of the CITES has been a major weakness. Hill, for instance, asserts that '[w]ithout a central administrative body, any compliance and enforcement takes on a ragged, almost anarchic

705 Art XIV, second paragraph.
706 Art XIV, second paragraph.
707 Art XIV, third paragraph.
708 Art XIV, fourth paragraph.
709 Also E. McOmber, 'Problems in enforcement of the Convention on International Trade in Endangered Species' 27 *Brooklyn Journal of International Law* 2 (2002) 673-701, 678.
710 See also art VIII, fourth paragraph.
711 Art VIII, second paragraph.
712 Also W. Burns, 'CITES and the regulation of international trade in endangered species of flora. A critical appraisal' 8 *Dickinson Journal of International Law* 2 (1990) 203-223, 221.
713 Conference of the Parties to the Convention on the International Trade in Endangered Species, 'Compliance and Enforcement', Resolution Conf. 11.3 (April 2000) <https://www.cites.org/eng/res/index.php> (accessed 29 March 2018).

quality'.[714] Mahony describes the general enforcement provision, embedded in article VIII, as 'relatively innocuous'.[715] Similarly, Wijnstekers argues that in many states party to the Convention penalties are 'insufficiently high and not much of a deterrent for illegal traders'.[716] A slightly less pessimistic argument is made by Patel, who adds that:

> '[h]eavier sanctions will not necessarily eliminate the incentives to smuggle, but they might reduce the trade involving small wildlife dealers who cannot afford to take the risk of being apprehended.'[717]

8.1.4 Overview

In the view of the above, the international legal regime embodied in CITES hardly provides for legislative standards that must be observed in the adoption of domestic implementing legislation by state parties. The drafters of the CITES have, however, considered it important to ensure that treaty implementation would not jeopardise the observance of certain national laws and international conventions. In addition to this requirement of consistency with existing law, the CITES imposes an obligation on state parties to provide for enforcement measures. In particular, domestic laws must provide for penalties to be imposed for infringements of the CITES' provisions and for measures to enable authorities to confiscate and return specimens which have been traded in contravention of the treaty. As a result, it seems justified to conclude that domestic legislators are largely free to choose the most suitable means and methods for its implementation.

714 K. Hill, 'The Convention on International Trade in Endangered Species' (n 685) 273. Also McOmber, 'Problems in enforcement' (n 709) 696-698; Patel, 'The Convention on International Trade in Endangered Species' (n 685) 184-188; T. Hewitt, 'Implementation and enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora in the South Pacific Region. Management and scientific authorities' 6 *Queensland University of Technology Law and Justice Journal* 2 (2002) 98-130, 115.

715 Mahony, 'The Convention on International Trade in Endangered Species of Flora and Fauna' (n 681) 11.

716 W. Wijnstekers, *The evolution of CITES. A reference to the Convention on International Trade in Endangered Species of Wild Fauna and Flora* (9th edn International Council for Game and Wildlife Conservation, Budakeszi 2011) 238.

717 Patel, 'The Convention on International Trade in Endangered Species' (n 685) 206.

8.2 Implementation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

8.2.1 General

The desire to improve the international regulation of toxic waste may be traced back to the 1970's and 1980's.[718] Typically, at least in the view of the public,[719] such waste had originated from the developed countries and was moved to developing countries for disposal. The main incentive for this transport was economic: due to a lack of environmental regulation, toxic wastes could be dumped at lower costs in the developing world. This led to a situation in which the countries responsible for the production of the lion's share of toxic waste placed the burden of disposal on other, often developing, countries. Of course, the 'waste colonialism'[720] posed severe risks to the environment and public health in those regions, as was demonstrated in several disasters.[721] Against this backdrop, it may not come as a surprise that the elaboration of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (CCTMW) was hampered by opposing interests between the developed world and the developing world: whereas many developing countries, supported by environmental organisations, demanded a complete ban on the transboundary movement of hazardous wastes, industrialised states were reluctant to accept such a ban and proposed regulation instead.[722] To substantiate their claim, the latter maintained that a complete ban would result in the flourishing of illegal markets.[723] The negotiations culminated in a compromise solution: a limited ban on the international movement of hazardous waste. Under this limited ban, importing states have a right to refuse the import of hazardous waste.

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718 W. Schneider, 'The Basel Convention ban on hazardous waste exports: paradigm of efficacy or exercise in futility' 20 *Suffolk Transnational Law Review* (1996) 247-288, 250.

719 Kummer, writing in 1992, notes that 'the focus of public opinion during the negotiation process on the Basel Convention was almost exclusively on the "North-South" aspect of the problem […]. The fact that the vast majority of international waste transport takes place between industrialized nations was widely ignored'. K. Kummer, 'The international regulation of transboundary traffic in hazardous wastes: the 1989 Basel Convention' 41 *International and Comparative Law Quarterly* 3 (1992) 530-562, 535.

720 V. O. Okaru, 'The Basel Convention: Controlling the movement of hazardous wastes to developing countries' 4 *Fordham Environmental Law Report* 2 (1992) 137-165, 152.

721 For an extensive discussion of the development which sparked the drafting of the Basel Convention, see Okaru, 'The Basel Convention' (n 720) and Schneider, 'The Basel Convention' (n 718).

722 Kummer, 'The international regulation of transboundary traffic in hazardous wastes' (n 719) 535-536.

723 Okaru, 'The Basel Convention' (n 720) 152.

The drafting of the CCTMW started in 1987 and was completed in March 1989, when it was adopted in the Swiss city that has given the treaty its name. The CCTMW entered into force on 5 May 1990 in accordance with article 25, first paragraph. As yet, there are 186 state parties to the treaty.[724]

Whereas the original treaty text (which is currently in force) imposed a limited ban on the movement of hazardous waste, as mentioned above, debate has continued on the scope of the ban. The main driving force behind the discussion was the developing world, which had felt that their interests had been taken into account insufficiently. A renewed negotiation process unfolded and led to the 'ban amendment', which was adopted in 1995 and constitutes a complete prohibition on the transfer of hazardous wastes from developed countries (OECD-countries, the member states of the EU and Liechtenstein) to developing countries for disposal.[725] Furthermore, in 1999 states adopted a supplementary protocol on liability and compensation for damage resulting from the transboundary movement of hazardous waste and their disposal, in accordance with article 12 CCTMW.[726] Both the ban amendment and the protocol, however, have not yet entered into force due to a lack of ratifications.[727]

8.2.2 Content of the Convention

The purpose of the CCTMW may, in the absence of an express statement in the articles of the treaty, be inferred from the preamble. It refers to the determination to 'protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes'.[728] This policy aim is pursued in three ways: to reduce to a minimum the amount of transboundary shipments of hazardous waste, to encourage the treatment and disposal of hazardous wastes as close to their points of origin as possible and to reduce the amount of hazardous waste in total.[729]

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724 The number of state parties is available at <http://www.basel.int> (accessed 29 March 2018).

725 United Nations Environmental Programme, 'Amendment to the Basel Convention' (Decision III/1 of the Conference of the Parties to the Basel Convention, 3rd Meeting, 18-22 September 1995) (28 november 1995) UN Doc UNEP/CHW.3/35. See also K. Kummer, 'The Basel Convention. Ten years on', 7 *Review of European Community and International Environmental Law* 3 (1998) 227-236, 229.

726 Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and their Disposal (adopted 10 December 1999, not yet in force) UN Doc UNEP/CHW.1/WG.1/9/2. For a discussion of the protocol, see M. Tsimplis, 'Liability and compensation in the international transport of hazardous wastes by sea: the 1999 Protocol to the Basel Convention' 16 *International Journal of Marine and Coastal Law* 2 (2001) 295-346.

727 Status of ratifications of both instruments is available through <http://www.basel.int> (accessed 29 March 2018).

728 Final preambular section.

729 M.L. Buckingham, 'The Basel Convention' 10 *Colorado Journal of International Environmental Law and Policy* (1999) 291-298, 291. Also Schneider, 'The Basel Convention' (n 718) 268.

Similar to the CITES, the scope of the CCTMW is limited to 'hazardous' or 'other' wastes which are included in annexes to the treaty, or which have been designated as 'hazardous' under domestic law.[730] Schneider correctly notes that the CCTMW fails to define 'hazardous' precisely. As a consequence, the CCTMW's exact scope remains unclear. This problem, however, cannot be easily resolved, as it must be considered impractical to exhaustively and specifically enumerate wastes that must be viewed as 'hazardous'.[731] Under the CCTMW, the term 'waste' must be understood as substances or objects which are disposed of.[732] The meaning of the term 'disposal' is clarified in a separate annex to the treaty (IV).[733]

The main obligations of the CCTMW are the following. First of all, states must prohibit the export of hazardous or other wastes if importing states have indicated their objection to it. This objection may result from a state's right to prohibit the import of the waste, or from the state's refusal to consent in writing to the anticipated transport.[734] These restrictions constitute what has been called the 'limited ban', as opposed to a 'complete ban'. States thus have a right to prohibit the import of hazardous wastes, which may be based on another international treaty: the Bamako Convention.[735] This treaty, which was adopted in the framework of the Organisation of African Unity and entered into force in 1998, prohibits the import of hazardous wastes into Africa.[736]

In addition, under the CCTMW states are under a duty to take appropriate measures in order to reduce the generation and transboundary movement of hazardous wastes to a minimum, to ensure the availability of adequate disposal facilities and to prevent pollution due to hazardous and other wastes.[737] Furthermore, states must not allow the export of hazardous wastes to countries which have prohibited by their legislation all imports, or if they have 'reason to believe that the wastes in question will not be managed in an environmentally sound manner'.[738] The meaning of the latter phrase is hardly clarified by the definition included in article 2, sub 8, which refers to environmentally sound management as 'taking all practi-

730 Artt 1, first and second paragraph, and 3.
731 Schneider, 'The Basel Convention' (n 718) 271.
732 Or, as article 2, first paragraph, provides: *intended* or *legally required* to be disposed of.
733 Operations that amount to 'disposal' are, for instance: deposition into or onto land, release into a water body, incineration on land etc.
734 Art 4, first paragraph, sub a-c.
735 United Nations Environmental Programme (Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention), 'Manual for the implementation of the Basel Convention' (24 June 2015) UN Doc UNEP/CHW.12/9/Add.4/Rev.1, 12.
736 Bamako Convention on the ban of the import into Africa and control of transboundary movement and management of hazardous wastes within Africa (adopted 30 January 1991, entered into force 22 April 1998) 2101 UNTS 177, art 4, first pragraph.
737 Art 4, second paragraph, sub a-d.
738 Art 4, second paragraph, sub e.

cable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes'.

States have to prohibit all persons under their jurisdiction from transporting or disposing of hazardous wastes, with the exception of persons which are expressly authorised to perform these tasks.[739] Article 4, ninth paragraph, imposes additional restrictions which *inter alia* consist of the requirement that hazardous and other wastes are only exported for recycling purposes or if the exporting state does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in an environmentally sound and efficient manner.[740]

In order to facilitate the implementation of the CCTMW, states are under the duty to designate one or more competent authorities and one 'focal point'.[741] These national bodies serve as a channel of communication between the exporting state and the importing state or states whenever hazardous or other wastes are proposed to be transported across the border. The applicable procedure, which is prescribed by article 6 CCTMW and referred to as 'prior informed consent procedure', is initiated when the competent authorities of the anticipated importing state or states are informed by the exporting state of a planned transboundary movement of hazardous or other waste. The authorities that have received the notification shall respond with a written consent to the planned transport, either with or without conditions, with a refusal or with a request of additional information.[742] The transport may only commence after the written consent of the importing state and on the condition of the existence of a contract between the exporter and the disposer.[743]

Other obligations embodied in the treaty concern international co-operation with regard to, *inter alia,* the development of new waste-related technologies and systems for waste-management and the exchange of information between state parties engaged in the transboundary movement of hazardous or other wastes.[744] Such information may relate to the occurrence of accidents during the transport of waste and to decisions made by state authorities to limit or ban the export of hazardous or other wastes. States must also annually submit a report on various aspects covered by the CCTMW.[745]

739 Art 4, seventh paragraph, sub a.
740 Art 4, ninth paragraph, sub a and b.
741 Art 5. It is not necessary that such designation is performed through the adoption of implementing legislation. See UNEP, 'Manual for the implementation of the Basel Convention' (n 735) 14.
742 Art 6, first and second paragraph.
743 Art 6, third paragraph.
744 Artt 10 and 13.
745 Art 13, third paragraph.

8.2.3 Legislative standards

8.2.3.1 Implementation and minimum requirements

Under article 4, fourth paragraph, CCTMW, state parties are under the obligation to take 'appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention'.[746] Aside from this *general* obligation to ensure the realisation of the CCTMW on the domestic level, norms of a more *special* character, as was discussed in the previous section, will often require the adoption of domestic legislation. For instance, article 4, seventh paragraph, sub a, can only be complied with if the state puts in place some domestic regulatory framework which provides for a legal prohibition complemented with certain exceptions.[747] Similarly, the designation of national competent authorities in accordance with article 5 may also require a legal act of the state.

States retain the right to impose additional requirements for the protection of human health and the environment, under the condition that those domestic laws are consistent with the provisions of the CCTMW and with international law in general.[748] In other words, the CCTMW contains minimum requirements.

8.2.3.2 Observance of applicable international and national law

As may be derived from several CCTMW provisions, domestic implementing legislation must be consistent with other applicable legal instruments, both international and national. For instance, hazardous wastes and other wastes that are intended to be the subject of transboundary movement, must be packaged and labeled in conformity with 'generally accepted and recognized international rules and standards'.[749] Similarly, radioactive wastes and garbage which result from normal shipping operations, are excluded from the treaty's scope, as they are subject to other international regimes.[750] Apparently, the contracting parties have intended to avert a situation in which the aforementioned subject matter is covered by more than one international legal regime.[751] Furthermore, whenever a state party

746 Art 4, fourth paragraph.
747 Art 4, seventh paragraph, sub a, stipulates: '[Each Party shall] prohibit all persons under its national jurisdiction from transporting or disposing of hazardous wastes or other wastes unless such persons are authorized or allowed to perform such types of operations'.
748 Art 4, eleventh paragraph.
749 Art 4, seventh paragraph, sub b.
750 Art 1, third and fourth paragraph.
751 Okaru, 'The Basel Convention' (n 720) 143-144.

chooses to adopt stricter requirements for the protection of the environment and of public health, those additional domestic laws must respect 'rules of international law'.[752] More generally, it is stipulated that the CCTMW shall not:

> 'affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for by international law and as reflected in relevant international instruments'.[753]

Article 11 governs legal relations among state parties beyond from the CCTMW and relations between a state party and a third state. It provides that state parties may enter into bilateral, multilateral or regional agreements regarding the transboundary movement of hazardous or other wastes, under the condition that those agreements are not less 'environmentally sound' than the CCTMW.[754] The CCTMW thus imposes limitations on the conclusion of *other* treaties on hazardous waste. In this way, the treaty aims to avoid waste exports to regions where applicable standards are less stringent.[755] For the same reason, export to or import from third states is prohibited if no agreements, referred to in article 11, apply.[756]

Similarly, several of its provisions refer to national law. Most notably, in accordance with article 1, first paragraph, sub b, state parties may designate certain wastes not included in the annexes to the CCTMW as 'hazardous' under domestic law. In other words, the scope of the CCTMW may be broadened through the adoption of a national legal act.[757]

Put briefly, the aforementioned provisions indicate that under several specific CCTMW provisions, states that adopt domestic implementing measures have to pay heed to other relevant international law and national law.

752 Art 7, eleventh paragraph.
753 Art 4, twelfth paragraph.
754 Art 11, first paragraph. Also Kummer, 'The international regulation of transboundary traffic in hazardous wastes' (n 719) 546.
755 Ibid, 532.
756 Art 4, fifth paragraph.
757 Pursuant to article 3, first paragraph, a state party shall, within six months after it has become a party to the Convention, notify the Secretariat of the Convention of wastes which are labelled as 'hazardous' under its domestic law. Amendments to the applicable domestic laws must be brought to the attention of the Secretariat in accordance with article 13 second paragraph, sub b.

8.2.3.3 *Enforcement*

Above we argued that parties to the CCTMW are not only under the duty to take appropriate measures to implement the treaty, but also to 'enforce [its provisions], including measures to prevent and punish conduct in contravention of the Convention'.[758] Thus, the mere adoption of domestic implementing legislation does not suffice; it must also be enforced.

In particular, the CCTMW imposes the obligation to 'consider that illegal traffic in hazardous wastes or other wastes is criminal' and to enact appropriate domestic legislation to prevent and punish illegal traffic.[759] Kummer notes that the labeling of illegal traffic as 'criminal' must be viewed as a 'fairly rhetorical statement'.[760] This statement, however, seems to differ from the approach taken in the relevant excerpt of the (non-binding) 'Manual for implemention', which reads: '[i]n deciding what penalties to impose, parties should also take into account article 4(3), which states that illegal traffic in hazardous wastes or other wastes is criminal'.[761]

Conduct that amounts to 'illegal traffic' is specified in article 9, first paragraph, and encompasses, in short, the transboundary movement of hazardous waste without the (valid) consent of concerned states or otherwise in contravention of the CCTMW. With regard to the obligation to prevent and punish illegal traffic, the Manual for implementation emphasises that state parties 'have no discretion to implement administrative or other measures towards that end'; the enactment of domestic legislation is required.[762]

Whenever the occurrence of the illegal traffic on the part of the exporter or generator is established, the exporting state must ensure that the hazardous or other wastes are taken back by the exporter or generator, or to ensure the disposal of those wastes in accordance with the CCTMW.[763] If, on the other hand, illegal traffic is the result of conduct on the part of the importer or disposer, the importing state have to ensure that the wastes are disposed of in an environmentally sound manner by the importer or disposer or, if necessary, by itself.[764]

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758 Art 4, fourth paragraph.
759 Artt 4, third paragraph, and 9, fifth paragraph.
760 Kummer, 'The international regulation of transboundary traffic in hazardous wastes' (n 719) 551.
761 UNEP, 'Manual for the implementation of the Basel Convention' (n 735) 19.
762 Ibid.
763 Art 9, second paragraph.
764 Art 9, third paragraph.

8.2.4 Overview

The analysis of the CCTMW, conducted in the previous sections, justifies the conclusion that the treaty imposes only a few legislative standards that must be observed in its implementation. First of all, applicable international law must be respected, for instance norms with regard to labelling and packaging of hazardous wastes or other wastes. Domestic law may be relevant for the implementation as well, as categories of waste that are deemed 'hazardous' may be brought under the the scope of the CCTMW through a national legal act. These references to international and national law may indicate that the drafters of the CCTMW have made efforts to fit the treaty itself, and the national implementing measures to be adopted on the basis of the treaty, in the existing regulation of the transport of hazardous waste. Second, the CCTMW provides for the legislative standard to ensure the treaty's enforcement on the domestic level. More specifically, it requires state parties to adopt the necessary measures for the prevention and punishment of violations of the CCTMW, most notably through the imposition of criminal sanctions.

9 Legislative standards as part of international labour law

9.1 Implementation of the Maritime Labour Convention

9.1.1 General

The Maritime Labour Convention (MLC) was negotiated and adopted in the framework of the International Labour Organisation (ILO), an international organisation that was founded in 1919. In 1946 the ILO was incorporated in the newly established structure of the UN as a 'specialised agency'.[765] Its aim is to promote social justice and respect for labour rights. To this end it develops international labour standards.[766] They encompass not only general topics, such as forced labour, child labour, equal renumeration etc., but also instruments that are applicable to specified groups of workers. An example of this latter category is the MLC, which lays down rights for seafarers. It was adopted at the 94th International Labour Conference in 2006, which marked the end of a five year period of negotiations between representatives of states, shipowners and seafarers.[767] This process had been instigated by the shipowning industry, which complained about the vast body of applicable legal instruments, each of which was ratified by a varying number of states. They believed a new and consolidated international treaty would limit the negative consequences of the existing 'checkerboard of legal requirements'.[768] The MLC is considered to be the 'fourth pillar' of international law to make shipping safer and more humane, in addition to three instruments which are known under the abbreviations

765 The Instrument of Amendment to the ILO Convention and ChUN art 57, first paragraph.

766 Constitution of the International Labour Organization (adopted 28 June 1919, entered into force 28 June 1919) 225 CTS 189 (Constitution of the ILO, as amended) preamble and art 1. Also General Conference of the International Labour Organisation, 'Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia)' (26th session 10 May 1944) <http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration> (accessed 29 March 2018).

767 International Labour Conference, 'Adoption of an instrument to consolidate maritime labour standards' Report I (1a) (94th session 7-23 February 2006) <http://www.ilo.org/ilc/ILCSessions/94thSession/lang--en/index.htm> (accessed 29 March 2018).

768 J.I. Blanck jr., 'Reflections on the negotiation of the Maritime Labor Convention 2006 at the International Labor Organisation' 31 *Tulane Maritime Law Journal* 1 (2006) 35-55, 39. Also P.B. Payoyo, 'The contribution of the 2006 ILO Maritime Labour Convention to global governance' in: A. Chircop, T. McDorman and S. Rolston (eds), *The future of ocean regime-building. Essays in tribute to Douglas M. Johnston* (Brill, Leiden 2009) 385-408, 399.

SOLAS, MARPOL and STCW.[769] It replaces 37 earlier ILO-Conventions, the first of which have been adopted in 1920.[770] Therefore, the MLC has been described as 'the very first comprehensive consolidation of international labour standards'.[771] 84 States have ratified the MLC, which entered into force on August 20, 2013.[772]

9.1.2 Content of the Convention

The text of the MLC does not contain an express statement of its purpose, except for the preambular section that refers to the desire to 'create a single, coherent instrument embodying as far as possible all up-to-date standards of existing international maritime labour Conventions and Recommendations, as well as the fundamental principles to be found in other international labour Conventions […]' and the reference to 'decent employment' in article I MLC.[773] However, its aim can be said to be twofold: the improvement of labour conditions for seafarers[774] and to provide for a 'level playing field' for the industry. In other words, the MLC aims to ensure that dishonest shipowners do not enjoy competition advantages at the expense of their personnel, thus preventing a 'race to the bottom' in the protection of decent working conditions for seafarers.[775]

The MLC's structure and content may be summarised as follows. The MLC's core obligation is laid down in article I, which imposes the obliga-

769 The abbreviations refer to the International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 277; International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973, entered into force 2 October 1983) 1340 UNTS 184; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (adopted 7 Juliy 1987, entered into force 28 April 1984) 1361 UNTS 190 respectively. Blanck jr., 'Reflections on the negotiation of the Maritime Labor Convention' (n 768) 36-37. Also O. Adăscălței, 'The Maritime Labour Convention 2006. A long-awaited change in the maritime sector' 149 *Procedia Social and Behavioral Sciences* (2014) 8-13, 9; Payoyo, 'The contribution of the 2006 ILO Maritime Labour Convention to global governance' (n 768) 402.

770 MLC art X.

771 Payoyo, 'The contribution of the 2006 ILO Maritime Labour Convention to global governance' (n 768) 387.

772 In accordance with article VIII, third paragraph, of the Convention.

773 See also article I of the Convention and paragraph 7 of the Explanatory note to the Regulations and the Code of the Maritime Labour Convention, which identifies three 'underlying purposes': to lay down a firm set of rights and principles, flexibility in implementation and compliance and enforcement of those rights and principles. ILO, 'Explanatory note to the regulations and the code of the Maritime Labour Convention' <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:91:0::::P91_SECTION:MLCA_AMEND_N1> (accessed 29 March 2018).

774 P.J. Bauer, 'The Maritime Labour Convention: an adequate guarantee of seafarer rights, or an impediment to true reforms?' 8 *Chicago Journal of International Law* 2 (2008) 643-659, 643.

775 Blanck jr., 'Reflections on the negotiation of the Maritime Labor Convention' (n 768) 37. Also Payoyo, 'The contribution of the 2006 ILO Maritime Labour Convention to global governance' (n 768) 389, 392 and 394-395.

tion on states to 'give complete effect to [the treaty's] provisions in the manner set out in Article VI in order to secure the rights of all seafarers to decent employment'. Article VI refers to the 'Regulations' and the 'Code' that are annexed to the MLC. It thus comprises three parts: the articles, the Regulations and the Code. The articles and Regulations contain the 'core rights and principles and basic obligations' of states. The Code provides for additional guidance in a more detailed manner, which consists of mandatory 'standards' and non-mandatory 'guidelines'.[776]

The Regulations and the Code apply to five subject areas: minimum requirements for seafarers to work on a ship; conditions of employment; accommodation, recreational facilities, food and catering; health protection, medical care, welfare and social security protection; and compliance and enforcement.[777] These areas are covered by five 'titles', each of which contains regulations, standards and guidelines. As a rule, the Regulations tend to be more concise than the (mandatory) standards and (non-mandatory) guidelines; the three categories combined comprise 28 regulations and cover 73 pages.

In addition, articles III and IV MLC codify several 'fundamental rights and principles' and seafarer's rights, jointly referred to as the 'Seafarer Bill of Rights'[778] encompassing *inter alia* the abolition of child labour and the right to a safe and secure workplace.[779] The rights embodied in article IV are to be 'fully implemented in accordance with the requirements of this Convention'.[780]

Finally, pursuant to article V, first paragraph, a state party has a duty to 'implement and enforce laws or regulations or other measures that it has adopted to fulfil its commitments under this Convention with respect to ships and seafarers under its jurisdiction'. This requirement entails *inter alia* the exercise of jurisdiction and control over ships by the flag state, which is to be achieve 'by establishing a system for ensuring compliance' with the MLC.[781] In addition to the responsibilities of the flag state, port states may conduct inspections in order to determine whether the ship meets the requirements of the MLC.[782]

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776 Art VI, first paragraph, and ILO, 'Explanatory note' (n 773), par. 2-4. Also Blanck jr., 'Reflections on the negotiation of the Maritime Labor Convention' (n 768) 42-43.

777 ILO, 'Explanatory note' (n 773) par. 5.

778 Blanck jr., 'Reflections on the negotiation of the Maritime Labor Convention' (n 768) 45-46.

779 Artt III, sub c, and IV, first paragraph. As Payoyo notes, the fundamental rights enumerated in article III, refer to the 'core' ILO-Conventions which have been identified in the preamble to the Maritime Labour Convention. The rights referred to in article IV reflect the range of the 37 conventions, mentioned in article X, which the Maritime Labour Convention seeks to consolidate. Payoyo, 'The contribution of the 2006 ILO Maritime Labour Convention to global governance' (n 768) 404.

780 Art IV, fifth paragraph.

781 Art V, second paragraph.

782 Art V, fourth paragraph.

9.1.3 Legislative standards

9.1.3.1 Implementation, harmonisation and flexibility

In the previous section it was stated that parties are under the obligation to give 'complete effect' to the MLC's provisions. First and foremost, they include the extensive body of requirements embodied in the Regulations and the Code, as stated in article VI, second paragraph. Second, the obligation to give effect to the MLC relates to the employment and social rights entrenched in article IV. For both categories, states are required to 'implement and enforce laws or regulations or other measures that is has adopted to fulfill its commitments under this Convention'.[783]

Above is was argued that the Code, which is part of the MLC, distinguishes between mandatory regulations and standards ('Part A') and non-mandatory guidelines ('Part B'). Whereas the former category of norms have to be respected and implemented, the implementation of the latter category 'should be given due consideration'.[784] The consequence of this distinction is explained as follows:

> 'If, having duly considered the relevant Guidelines, a Member decides to provide for different arrangements which ensure the proper storage, use and maintenance of the contents of the medicine chest, to take the example given above, as required by the Standard in Part A, then that is acceptable. On the other hand, by following the guidance provided in Part B, the Member concerned, as well as the ILO bodies responsible for reviewing implementation of international labour Conventions, can be sure without further consideration that the arrangements the Member has provided for are adequate to implement the responsibilities under Part A to which the Guideline relates.'[785]

From this it may be derived that states are not only required to abide by the compulsory provisions of the MLC, but are also encouraged to observe its optional norms. The treaty thus imposes minimum requirements. This is also reflected in article 19, eighth paragraph, of the Constitution of the ILO, which provides that the conventions adopted in the framework of the ILO contain minimum requirements; states are allowed to provide for additional protection.[786]

In addition to its harmonisation efforts which consist of both mandatory and non-mandatory provisions, the regime allows for some measure of

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783 Artt I, first paragraph, and V, first paragraph.

784 Art VI, second paragraph.

785 ILO, 'Explanatory note' (n 773) par. 10. Also Bauer, 'The Maritime Labour Convention' (n 774) 646 and Payoyo, 'The contribution of the 2006 ILO Maritime Labour Convention to global governance' (n 768) 387.

786 Article 19, eighth paragraph, of the Constitution of International Labour Convention, reads: 'In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation'.

flexibility in accordance with the statement 'inflexible with respect to rights and flexible with respect to implementation'.[787] This flexibility is pursued in two ways. State parties may choose to give effect to the standards included in the Code through national measures which are 'substantially equivalent' to those standards, a term which was derived from the 1976 Merchant Shipping Convention.[788] This exemption does not apply to Title 5 of the Regulations and the Code regarding compliance and enforcement.[789] To determine whether the 'substantial equivalence'-criterion is met, the state party should satisfy itself that the national measure 'is conducive to the full achievement of the general object and purpose' of the relevant provision and that it 'gives effect' to that provision.[790] Moreover, flexibility was anticipated by the formulation of the mandatory provisions 'in a more general way, thus leaving a wider scope for discretion as to the precise action to be provided for at the national level'.[791]

9.1.3.2 Observance of specified human rights

Under the MLC, implementation must be performed in accordance with what we have termed 'legislative standards'. Article III on 'fundamental rights and principles' which provides that a state party 'shall satisfy itself that the provisions of its law and regulations respect, in the context of this Convention, the fundamental rights to freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation'. The substance of this duty remains somewhat vague due to the choice of the term 'satisfy', which may possess a nature that is less compulsory than, for instance, an obligation to 'ensure' that its domestic laws respect to aforementioned rights. In this regard, it is noted in the commentary to the MLC that the state has to satisfy itself that 'those fundamental rights are reflected in the relevant legislation'.[792] It is thus clear that domestic implementing legislation is circumscribed, to a certain extent at least, by the rights entrenched in article III.

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787 International Labour Conference, 'Adoption of an instrument to consolidate maritime labour standards' (n 767) 10.

788 Merchant Shipping (Minimum Standards) Convention (adopted 29 October 1976, entered into force 28 November 1981) ILO C147, art 2. Also Blanck jr., 'Reflections on the negotiation of the Maritime Labor Convention' (n 768) 51.

789 Title 5, paragraph 2, of the Regulations and the Code.

790 Art VI, third and fourth paragraph. Also I. Christodoulou-Varotsi, 'Critical review of the consolidated Maritime Labour Convention (2006) of the International Labour Organisation. Limitations and perspectives' 43 *Journal of Maritime Law and Commerce* 4 (2012) 467-489, 473-475.

791 ILO, 'Explanatory note' (n 773) par. 9.

792 International Labour Conference, 'Adoption of an instrument to consolidate maritime labour standards' (n 767) 19-20.

Interestingly, an inverse approach is taken with regard to the implementation of employment and social rights, embodied in article IV, to which seafarers are entitled. Contrary to the requirement of article III, discussed above, that fundamental rights shall be taken into account in the implementation of the convention, article IV prescribes that the MLC must be observed in the implementation of the employment and social rights.[793]

With regard to the implementation of the employment and social rights, it is noteworthy that it is expressly provided that '[…] such implementation may be achieved through national laws or regulations, through applicable collective bargaining agreements or through other measures or in practice'.[794] The MLC thus expressly addresses the nature of domestic measures aimed at the implementation of its codified human rights provisions. Although this may be considered remarkable as it specifically enumerates the various means of implementation that may be resorted to, the possible means of implementation are described in such a broad manner, especially as a result of the reference to 'other measures' and 'practice', that it is difficult to conceive of an implementing measure that would fall outside the scope of this provision.

9.1.3.3 Observance of applicable international and national law

In addition to the legislative standards which refer to human rights, which were discussed in the previous section and which are part of the MLC itself, one provision expressly requires that the adoption of domestic implementing measures should be performed in accordance with *other* norms of international law. As will be discussed below, the MLC contains an obligation to provide for sanctions in response to violations of the treaty. This obligation shall be performed 'in accordance with international law'.[795] What does this restriction entail? As may be derived from the commentary to the MLC, it encompasses 'other relevant Conventions, such as UNCLOS', referring to the United Nations Convention on the Law of the Sea.[796] The drafters may have had in mind article 217, eight paragraph, of this treaty, which reads: '[p]enalties provided for by the laws and regulations of States for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur'. This phrase is almost identical to its equivalent that is included in the MLC and may thus serve as a reminder that, as regards penalties, the MLC should be interpreted in conformity with UNCLOS.

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793 Art IV, fifth paragraph, first sentence, provides: 'Each Member shall ensure, within the limits of its jurisdiction, that the seafarers' employment and social rights set out in the preceding paragraphs of this Article are fully implemented in accordance with the requirements of this Convention'.

794 Art IV, fifth paragraph, second sentence.

795 Art V, sixth paragraph.

796 International Labour Conference, 'Adoption of an instrument to consolidate maritime labour standards' (n 767) 21.

In addition, the obligations codified in the MLC which require the adoption of domestic implementing legislation contain references to *national* law. A few examples may suffice here. Standard A1.1, second paragraph, stipulates that night work of seafarers under the age of 18 is prohibited. It is added that the term 'night' is to be defined in national law. With regard to medical care state parties have a duty to 'ensure that, t*o the extent consistent with the Member's national law and practice*, medical care and health protection services while a seafarer is on board ship or landed in a foreign port are provided free of charge to seafarers'.[797] Furthermore, under standard A.4.2, first paragraph, sub b, shipowners are required to 'provide financial security to assure compensation in the event of the death or long-term disability of seafarers due to an occupational injury, illness or hazard, *as set out in national law*, the seafarers' employment agreement or collective agreement'. Finally, a state party is under the obligation to ensure that all seafarers and, *to the extent provided for in its national law*, their dependents have access to social security protection.[798] The italicised phrase must be understood as to leave the determination of the particulars of coverage to the national law of the flag state.[799] The importance of these references to international law and national law lies in the fact that the drafters of the text have considered that the domestic implementing legislation should be subject to applicable international and national legal norms. In other words, the treaty obligations must be implemented in a way that is consistent with other applicable law of both national and international origin.

9.1.3.4 Compliance and enforcement

Compared to other international legal instruments, the MLC contains elaborate norms applicable to its enforcement. They have been called the 'lynchpin'[800] of the MLC and can be derived from article V, second paragraph, which stipulates: '[e]ach Member shall effectively exercise its jurisdiction and control over ships that fly its flag by establishing a system for ensuring compliance with the requirements of this Convention, including regular inspections, reporting, monitoring and legal proceedings under the applicable laws'. In addition to this responsibility of the flag state, port states are permitted to inspect foreign ships in order to determine whether they abide by the Convention requirements.[801] Title 5 of the Regulations and Code on compliance and enforcement includes 18 pages of mandatory and

797 Standard A4.1, first paragraph, sub d.
798 Regulation 4.5, first paragraph.
799 International Labour Conference, 'Adoption of an instrument to consolidate maritime labour standards' (n 767) 45.
800 Blanck jr., 'Reflections on the negotiation of the Maritime Labor Convention' (n 768) 53.
801 Art V, fourth paragraph.

non-mandatory provisions that describe in detail the responsibilities of state parties.[802] The mandatory provisions may be summarised as follows.

Flag states are responsible for the establishment of an effective system for the inspection and certification of maritime labour conditions. This system may include the authorisation of public institutions or other organisations to carry out inspections and to issue maritime labour certificates.[803] The entities authorised to carry out the inspections should be competent and independent, which means *inter alia* that they should have the necessary expertise in the relevant aspects of the MLC and an appropriate knowledge of ship operations.[804] Inspectors must be qualified to adequately perform their tasks and must be bestowed with the necessary powers.[805] The presence of a maritime labour certificate is required for ships over 500 gross tonnage and is *prima facie* evidence that the ship has satisfied the requirements set forth in the MLC.[806] The document, a model of which is annexed to the MLC, can only be obtained after inspection and is usually valid for five years.[807] In addition, flag states have a duty to provide for on-board complaint procedures for the fair, effective and expeditious handling of seafarer complaints about alleged breaches MLC, to initiate an investigation into any serious marine casualty which results in injury or loss of life.[808]

Whereas flag states have an obligation to perform inspections, port states may subject ships to such procedures as well. In absence of any indication to the contrary, port states shall accept the maritime labour certificate as *prima facie* evidence of compliance with the MLC.[809] If, on the other hand, an official of the port state has reasons to believe that the ship does not entirely abide by the MLC's provisions, he may carry out a more detailed inspection and, if necessary, take appropriate measures, including the prevention of sailing.[810] Finally, a port state is, similar to the flag state, required to provide for an onshore procedure through which seafarers can file a complaint in relation to an alleged breach of the MLC.[811]

Enforcement also encompasses penalisation. Above it was noted that a state party is under the obligation to 'prohibit violations of the requirements of this Convention' and to establish, in accordance with international

802 S. Ruano Albertos, and A. Vicente Palacio, 'Adopting European legislation to the Maritime Labour Convention 2006 regulations in relation to the state responsibilities of both the flag state and the control of ships by port state control' 4 *Beijing Law Review* 4 (2013) 141-146; Bauer, 'The Maritime Labour Convention' (n 774) 648.

803 Regulation 5.1.1, second and third paragraph.

804 Regulation 5.1.2, first paragraph, and standard A5.1.2, first paragraph.

805 Regulation 5.1.4 and standard A5.1.4, first, second, third and seventh paragraph.

806 Regulation 5.1.1, first and third paragraph.

807 Regulation 5.1.1, third and fifth paragraph, and standard A5.1.3, first paragraph, and appendix A5-II.

808 Regulations 5.1.5 and 5.1.6.

809 Regulation 5.2.1, second paragraph, and standard A5.2.1, first paragraph.

810 Standard 5.2.1.

811 Regulation 5.2.2.

law, 'sanctions or require the adoption of corrective measures under its laws which are adequate to discourage such violations'.[812] The prohibition and penalisation of transgressions of the MLC will, given the principles of *nullum crimen sine lege* and *nulla poena sine lege*, often require the adoption of domestic legislation. The standard which is imposed by the MLC thus does not go beyond the element of deterrence ('adequate to discourage violations').

In sum, the MLC provides for an extensive regulatory framework in order to ensure compliance with and enforcement of the treaty. The mandatory provisions of this framework must be included in the domestic implementing legislation.

9.1.3.5 Prohibition of favourable treatment of third states

Finally, an important element of the MLC regime can be found in the prohibition of a more favourable treatment of states that are not a party in the implementation of [the] responsibilities under the treaty.[813] This, of course, is an important component of the international legal regime that aims to improve labour conditions of seafarers across the globe, as it removes competitive advantages that states, and ships flying under their flags, may enjoy as a consequence of non-ratification.[814] For the states party to the MLC, this means that domestic implementing legislation applicable to the treatment of foreign ships may not distinguish between states bound by the MLC and states that are not, if that distinction gives rise to more favourable treatment of ships flying the flag of a third state.

9.1.4 Overview

The MLC consolidates many existing ILO-conventions and serves to protect the rights of seafarers. It does so by prescribing detailed standards laid down in mandatory and non-mandatory provisions. State parties are under the obligation to give effect to its provisions. To this end, they must adopt implementing measures on the national level. These implementing measures are governed by several elements of the MLC, which may be summarised as follows. First of all, domestic implementing legislation should not infringe on the fundamental rights to which seafarers are entitled. Second, national measures that serve to implement specific MLC obligations refer to (other) international law and national laws, thereby

812 Art V, sixth paragraph.

813 Article V, seventh paragraph, provides: 'Each Member shall implement its responsibilities under this Convention in such a way as to ensure that the ships that fly the flag of any State that has not ratified this Convention do not receive more favourable treatment than the ships that fly the flag of any State that has ratified it'.

814 Blanck jr., 'Reflections on the negotiation of the Maritime Labor Convention' (n 768) 45-46.

ensuring consistency with other applicable norms. Third, particular attention has been given to compliance and enforcement of the MLC, which imposes obligations on flag states and port states to ensure that the MLC's provisions and domestic implementing legislation is respected. The importance attributed to issues of compliance and enforcement may be explained by the MLC's aim to create a 'level playing field' between shipowners across the globe. This objective was also the motivation for the inclusion of a prohibition of favourable treatment of third parties.

9.2 Implementation of the Convention concerning Decent Work for Domestic Workers

9.2.1 General

While the ILO-Convention that was discussed in paragraph 9.1 is particularly aimed at seafarers' rights, the Convention concerning Decent Work for Domestic Workers (CDWDW) aims to enhance the protection of, as the name indicates, domestic workers. It has been estimated that the number of domestic workers worldwide is between 53 and 100 million persons, compared to roughly 1 million seafarers.[815] Domestic workers, often women, perform household tasks in a 'largely unregulated and unprotected sector of the economy'.[816] This may be explained by the fact that domestic work is performed in the privacy of the employer's household.[817] In this environment, domestic workers are confronted with poor working conditions and exploitation.[818] Moreover, the existing body of international labour standards were perceived to address the problems faced by domestic wokers in an incomplete manner.[819] In order to provide the necessary protection to this group of workers, efforts were made to draft a legally binding international treaty, which was adopted in 2011. The underlying assumption of the CDWDW is that domestic workers should be treated as any other employee and therefore should receive equal protection. In other words, it is the employment relationship that counts, not the type of work.[820] Once such relationship has been established, the CDWDW

815 A. Blackett, 'Current developments. The Decent Work for Domestic Workers Convention and Recommendation, 2011' 106 *American Journal of International Law* 4 (2012) 778-794, 779-780.

816 M. Tomei and P. Belser, 'New ILO standards on decent work for domestic workers. A summary of the issues and discussions' 150 *International Labour Review* 3-4 (2011) 431-438, 432.

817 Ibid. Also E. Albin and V. Mantouvalou, 'Recent legislation. The ILO Convention on Domestic Workers. From the shadows to the light' 41 *Industrial Law Journal* 1 (2012) 67-78, 69.

818 Albin and Mantouvalou, 'Recent legislation' (n 817) 69.

819 M. Oelz, 'The ILO's Domestic Workers Convention and Recommendation. A window of opportunity for social justice' 153 *International Labour Review* 1 (2014) 143-172, 149.

820 Albin and Mantouvalou, 'Recent legislation' (n 817) 75-76. Also Blackett, 'Current developments' (n 815) 779-780.

provides for certain human rights to which the domestic worker is entitled. It was supplemented by the non-binding Recommendation concerning Decent Work for Domestic Workers, which offers additional guidance for the implementation of the Convention. As yet, 24 states have ratified the CDWDW, which entered into force in 2013.[821]

9.2.2 Content of the Convention

The purpose of the CDWDW is not expressly codified in the body of the treaty, but can be derived from its preamble. It is stated that domestic workers are 'particularly vulnerable to discrimination in respect of condition of employment and of work, and to other abuses of human rights'. Against this background, it was considered 'desirable to supplement the general [ILO-]standards with standards specific to domestic workers so as to enable them to enjoy their rights fully'.[822]

In order to achieve this objective, the CDWDW contains various obligations, such as the duty to set a minimum age for domestic workers in accordance with the provisions of the Minimum Age Convention and the Worst Forms of Child Labour Convention.[823] Furthermore, state parties must take measures to ensure that domestic workers enjoy effective protection against abuse, harassment and violence, and fair terms of employment and decent working conditions and, if domestic workers reside in the household, decent living conditions that respect their privacy.[824] Article 9 provides for additional rights for domestic workers, such as the freedom to reach agreement with their (potential) employer on whether to reside in the household and the right to keep their identity documents. Moreover, state parties are under the obligation to take measures ensuring equal treatment between domestic workers en workers generally in relation to 'normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave' in accordance with domestic law.[825] These words were agreed upon after it was concluded that measuring working hours was impractical due to the varying intensity of domestic work as a result of the changing needs of the household throughout the day.[826] Domestic workers are also entitled to minimum wage coverage, if such coverage exists, and to a safe and healthy

821 Information available at: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:2551460> (accessed 29 March 2018).

822 In this regard, '[g]eneral' refers to other ILO-Conventions and recommendations which are not *particularly* aimed at domestic workers, but which are applicable to domestic workers nonetheless, such as the Migration for Employment Convention.

823 Convention Concerning Minimum Age for Admission to Employment (adopted 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297 (Minimum Age Convention) art 4, first paragraph.

824 Art 5 and 6.

825 Art 10, first paragraph.

826 Tomei and Belser, 'New ILO standards on decent work for domestic workers' (n 816) 435.

working environment.[827] Another important right which is created by the CDWDW is laid down in article 14, first paragraph, which provides that states have to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including with respect to maternity.[828]

9.2.3 Legislative standards

9.2.3.1 Implementation and harmonisation

Pursuant to article 3, first paragraph, '[e]ach Member shall take measures to ensure the effective promotion and protection of the human rights of all domestic workers, as set out in [the] Convention'. This provision may be viewed as the *general* obligation to adopt implementing legislation on the national level, which must be distinguished from various *particular* obligations to enact domestic legislation with a view of achieving a specified policy aim. An example of such particular obligation may be found in article 8, fourth paragraph, which reads: 'Each Member shall specify, by means of laws, regulations or other measures, the conditions under which migrant domestic workers are entitled to repatriation on the expiry or termination of the employment contract for which they were recruited'.

Article 3, first paragraph, is complemented by the requirement entrenched in article 18, which stipulates:

> 'Each Member shall implement the provisions of this Convention, in consultation with the most representative employers and workers organisations, through laws and regulations, as well as through collective agreements or additional measures consistent with national practice, by extending or adapting existing measures to cover domestic workers or by developing specific measures for them, as appropriate.'

Aside from the duty to consult employers and workers organisations, the normative value of this general provision is probably limited, however, as the suggested means and methods of implementation are formulated in a very broad manner; it may be hard to imagine a domestic implementing measure which cannot be accepted to meet the standards set out in article 18.

In addition to the general obligation embodied in article 3, first paragraph, the CDWDW also imposes the obligation to take the measures set out in the treaty to 'respect, promote and realize the fundamental principles and rights at work'. According to article 3, second paragraph, these encompass *inter alia* the freedom of association and the effective abolition of child labour.

As was noted with regard to the MLC, discussed in section 9.1 the CDWDW contains minimum standards; state parties are permitted to main-

827 Artt 11 and 13, first paragraph.
828 Art 14, first paragraph.

tain or adopt national measures that are more favourable from the worker's perspective.

The efforts to harmonise national policies towards domestic workers have resulted in binding norms, codified in the CDWDW, which have to be observed by the state parties. As stated above, these norms are supplemented by the non-binding Recommendation concerning Decent Work for Domestic Workers, which should be considered in conjunction with the provisions of the CDWDW. Above it was stated that domestic workers are entitled, under article 6 CDWDW, to decent working conditions and, if they reside in the household, decent living conditions that respect their privacy. This may include the provision of food and accommodation, if the worker and his employer so agree in accordance with article 7 CDWDW. Pursuant to paragraph 17 of the Recommendation, these rights are supplemented with the following, non-mandatory provision:

> 'When provided, accommodation and food should include, taking into account national conditions, the following: (a) a separate, private room that is suitably furnished, adequately ventilated and equipped with a lock, the key to which should be provided to the domestic worker; (b) access to suitable sanitary facilities, shared or private; (c) adequate lighting and, as appropriate, heating and air conditioning in keeping with prevailing conditions within the household; and (d) meals of good quality and sufficient quantity, adapted to the extent reasonable to the cultural and religious requirements, if any, of the domestic worker concerned.'

Put briefly, the Recommendation contains additional guidelines, often with a more specific character than the provisions laid down in the CDWDW. Thus, the Recommendation's provisions go beyond what is strictly required by the CDWDW. In one respect, however, the CDWDW itself seems to make a distinction between mandatory and non-mandatory measures and thus permits states to go beyond the minimum requirements. According to article 7, states are under the obligation to take measures to ensure that domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner. '[P]referably, where possible', it is added, such information must be provided 'through written contracts' which contain certain specified elements that are enumerated in the CDWDW.[829]

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829 These elements include: the name and address of the employer and of the worker; the address of the usual workplace or workplaces; the starting date and, where the contract is for a specified period of time, its duration; the type of work to be performed; the remuneration, method of calculation and periodicity of payments; the normal hours of work; paid annual leave, and daily and weekly rest periods; the provision of food and accommodation, if applicable; the period of probation or trial period, if applicable; the terms of repatriation, if applicable; and terms and conditions relating to the termination of employment, including any period of notice by either the domestic worker or the employer. For additional, non-mandatory elements, see paragraph 6, sub 2, of ILO Recommendation R201: Recommendation concerning Decent Work for Domestic Workers (100th Conference session Geneva 16 June 2011).

9.2.3.2 *Observance of applicable international and national law*

Some provisions of the CDWDW expressly refer to other international legal instruments that have to be observed during its implementation. Article 8, first paragraph, contains the right of migrant domestic workers, once they are recruited in one country to work in another, to receive written job offers or contracts of employment that are enforceable in the latter country. This provision, however, does not apply to 'domestic workers who enjoy freedom of movement for the purpose of employment under bilateral, regional and multilateral agreements, or within the framework of regional economic integration areas'. Of course, this exception aims to accommodate the existence of regions which consist of multiple states, such as the EU, in which employees can move freely.

There is another example of a CDWDW provision which refers to other international legal instruments for the purpose of its implementation. Pursuant to article 19, the CDWDW 'does not affect more favourable provisions applicable to domestic workers under other international labour Conventions'. In section 9.2.2 it was argued that the CDWDW was intended to 'supplement' the general ILO-standards to which domestic workers are entitled. The provision contained in article 19 emphasises the supplementary, instead of exclusive, nature of the CDWDW. In giving effect to the CDWDW's provisions, therefore, state authorities must ensure that the implementation is performed in a way that is consistent with other, for domestic workers more favourable, provisions which are applicable to domestic workers.

Other parts of the treaty prescribe that applicable domestic laws must be respected during the implementation. Article 13, first paragraph, requires state parties to 'take, *in accordance with national laws, regulations and practice,* effective measures […] to ensure the occupational safety and health of domestic workers'. Furthermore, with regard to the right of domestic workers to be paid directly in cash at regular intervals at least once a month, as laid down in article 12, first paragraph, such payment can be made by bank transfer, bank cheque, postal cheque or other lawful means of monetary payment, '[u]nless provided for by national laws, regulations or collective agreements'.[830] These examples indicate that the implementation of the CDWDW should be performed in a way that is consistent with domestic laws.

Domestic law can be relevant in other, more subtle ways. Under the CDWDW, a domestic worker is 'any person engaged in domestic work within an employment relationship'.[831] Blackett notes that the use of terms 'employment relationship' bears the risk that migrant workers without legal

830 Similar references to domestic law can be found in articles 7, 10, first and third paragraph, 14, first paragraph, 15, first paragraph, sub a, 16 and 17, second and third paragraphs.

831 Art 1, sub b.

migration status fall outside the scope of the definition of 'domestic worker' if their employment contracts are considered unenforceable, since domestic legal practice varies on the effects of migrant status on the employment relationship.[832] Of course, such 'interaction with national legal doctrines',[833] with respect to the interpretation of terminology agreed upon on the international level, is inherent to any international regime that requires the adoption of national implementing measures.[834]

Furthermore, article 4, first paragraph, refers to both international law *and* national law, since it stipulates that state parties are under the obligation to 'set a minimum age for domestic workers consistent with the provisions of the the Minimum Age Convention […] and the Worst Forms of Child Labour Convention, […] and not lower than that established by national laws and regulations for workers generally'.[835] In practice, this means that domestic work is considered to be child labour when workers below the age of 18 are younger than the minimum age required for admission to work or if they are in a situation amounting to work that is detrimental to children, including slavery.[836] With regard to the determination of a minimum age for domestic workers, the adoption of implementing legislation must be consistent with these national and international legal provisions.

9.2.3.3 Remedies, complaint mechanisms, monitoring of compliance and enforcement

The codification of domestic workers' rights may remain without practical effect unless those rights can be enforced on the domestic level. Therefore, state parties have accepted the obligation to 'establish effective and accessible complaint mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers'. Similarly, they have to 'ensure […] that all domestic workers, either by themselves or through a representative, have effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally'. Moreover, they have a duty to 'develop and implement measures for labour inspection, enforcement and penalties […] in accordance with national laws and regulations'.[837] In other words, the enforcement of the CDWDW on the

832 Blackett, 'Current developments' (n 815) 787.
833 Ibid.
834 In this context, Oelz notes that the Convention's preamble contains a reference to the Employment Relationship Recommendation which contains some guidance on the existence of an employment relationship. Oelz, 'The ILO's Domestic Workers Convention and Recommendation' (n 819) 154.
835 Also Recommendation concerning Decent Work for Domestic Workers (n 829) par. 5.
836 Oelz, 'The ILO's Domestic Workers Convention and Recommendation' (n 819) 158.
837 Artt 16 and 17, first and second paragraph. With regard to migrant workers, see also Recommendation concerning Decent Work for Domestic Workers (n 829) par. 21, sub e and f.

national level, in accordance with the provisions cited above, is envisaged in two ways. First, enforcement by or on behalf of the domestic worker who claims that his rights have been violated through national courts, tribunals or similar complaint procedures. Second, enforcement by the public authorities through inspections and the imposition of penalties for violation of the domestic worker's rights. As regards the latter, the treaty negotiators were aware of the fact that labour inspections will, given the nature of domestic work, often require access to private premises. As a result, labour inspections were considered to be problematic, given the inviolability of the home, as entrenched in international human rights law and national constitutions.[838] This may explain why the CDWDW does not prescribe how the domestic worker's right to protection and the employer's right to privacy must be balanced; it is left to states to 'specify the conditions under which access to household premises may be granted, having due respect for privacy'.[839]

9.2.3.4 Non-discrimination

In section 9.2.1 it was argued that the underlying assumption of the CDWDW is that domestic workers should be treated as any other employee and therefore should receive equal protection. Thus, the notion of non-discrimination of domestic workers (*vis-à-vis* other categories of workers) lies at the heart of the CDWDW and influences the adoption of national implementing legislation in several respects. For instance, article 10, first paragraph, provides that states must take measures towards 'ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations and collective agreements, taking into account the special characteristics of domestic work'.[840] Arguably, it goes too far to derive from this provision a requirement that domestic legal regimes applicable to domestic workers on the one hand, and to other categories of workers on the other hand, must be identical. Nevertheless, discrepancies between the legal regimes seem to be acceptable only if they relate to the 'special characteristics of domestic work'.

838 Oelz, 'The ILO's Domestic Workers Convention and Recommendation' (n 819) 166-167.

839 Art 17, third paragraph. Paragraph 24 of the (non-binding) Recommendation adds: 'In so far as compatible with national law and practice concerning respect for privacy, Members may consider conditions under which labour inspectors or other officials entrusted with enforcing provisions applicable to domestic work should be allowed to enter the premises in which the work is carried out'. Also Tomei and Belser, 'New ILO standards on decent work for domestic workers' (n 816) 437-438.

840 See also artt 12, second paragraph, and 14, first paragraph.

9.2.3.5 Consultation with stakeholders

In several provisions of the CDWDW reference is made to the requirement of consultation with stakeholders. For example, pursuant to article 15, first paragraph, state parties should take various measures aimed at the protection of domestic workers, including migrant domestic workers, who are recruited or placed by private employment agencies against abusive practices. These measures include the obligation to regulate the operation of private employment agencies, to provide for procedures for the investigation of complaints, alleged abuses and fraudulent practices by those agencies and measures to ensure that fees charged by such agencies are not deducted from the remuneration of domestic workers.[841] In giving effect to these provisions, state parties shall 'consult with the most representative organisations of employers and workers and, where they exist, with organisations representative of domestic workers and those representative of employers of domestic workers'.[842]

Why was the obligation to consult the aforementioned organisations included in the treaty text? It may be explained by the important role they fulfill in the defense of the domestic workers' interests, which is also reflected by their involvement in the treaty negotiations. As Oelz puts it, 'the [CDWDW and the Recommendation] recognize that workers' and employers' organisations are important not only because they support their members and for the purpose of collective bargaining, but also because they are actors in the development of policies to promote decent work for domestic workers more generally.'[843]

9.2.3.6 Information to employers and domestic workers

Finally, it is 'recommended', instead of mandatory, that state parties take additional measures aimed at informing stakeholders of their rights and obligations, most notably employers and domestic workers. With regard to employers, it is suggested that employers' awareness of their obligations be enhanced by 'providing information on good practices in the employment of domestic workers, employment and immigration law obligations regarding migrant domestic workers, enforcement arrangements and sanctions in cases of violation'.[844] Furthermore, states are requested to provide

841 Art 15, first paragraph, sub a, b and e.

842 Article 15, second paragraph. Similar obligations are contained in articles 13, second paragraph, 14, second paragraph and 18.

843 Oelz, 'The ILO's Domestic Workers Convention and Recommendation' (n 819) 165. Similarly, Blackett argues that the Convention and the Recommendation reaffirm the contemporary relevance of social dialogue in working to forge consensus in international law'. Blackett, 'Current developments' (n 815) 794.

844 Recommendation concerning Decent Work for Domestic Workers (n 829) par. 21, sub d, of the Recommendation concerning Decent Work for Domestic Workers.

for a 'public outreach service' to inform domestic workers of their rights, applicable laws, available complaint mechanisms and legal remedies etc.[845] This recommendation thus acknowledges the importance of complementing the adoption of domestic implementing legislation with the provision of information to the public, in particular to those groups to which the newly adopted legislation applies.

9.2.4 Overview

From the foregoing it may be concluded that the CDWDW contains minimum standards. They may be supplemented with additional domestic measures, for which the non-binding Recommendation on Decent Work for Domestic Workers may be a source of inspiration. Furthermore, the CDWDW provides for several legislative standards that may derived from its text. First, states are under the obligation to ensure consistency with applicable international and national law. The applicable international legal provisions concern other international labour standards to which domestic workers are entitled and regional arrangements for the free movement of persons. The CDWDW relies on domestic laws to ensure, for instance, the occupational safety and health of domestic workers. A second legislative standard may be found in the duty of states to establish enforcement mechanisms, both in the form of procedures accessible to injured persons and of public enforcement through labour inspections. Third, domestic workers are entitled to treatment that, in principle, is equal to the treatment of other categories of workers. In other words, the CDWDW imposes the legislative standard of non-discrimination. Other legislative standards that have been identified above concern the consultation with stakeholders and the provision of information to workers and employers on their rights and obligations.

845 Recommendation concerning Decent Work for Domestic Workers (n 829) par. 21, sub d, of the Recommendation concerning Decent Work for Domestic Workers.

Conclusion to Part II

In this part we have explored the requirements applicable to domestic implementing legislation under selected international legal regimes. Our analysis has revealed a diverse practice with regard to the regulation of implementing legislation: whereas some regimes stipulate in much detail the standards that national legislatures should comply with, other regimes provide hardly any guidance in this regard. An example of the former category can be found in the FCTC and its supporting documents (such as the 'Guidelines for implementation'), which contain several prescribed features of national implementing legislation and legislative procedure. Considerably less legislative standards can be discerned under the criminal legal regimes discussed in the present part, such as CTOC and ICSFT. The question arises how these differences can be explained. Apparently, drafters of international legal regimes have deemed it necessary or desirable to provide guidance to the national legislature responsible for the adoption of implementing legislation to a varying extent. Although it is impossible to explain the willingness (or reluctance) to include legislative standards in a specific regime on the basis of the findings of Part II alone, a possible hint might be found in the regime's subject matter and its perceived link to the state's sovereignty (which may be stronger in the case of instruments which affects a state's criminal law, such as CTOC and ICSFT).

Although the findings presented in this chapter are based on a limited number of international regimes and, as a result, apply only to the regimes discussed above, it has become clear that the regulation of implementing legislation on the domestic level seems to possess common features. The most prominent legislative standard is what may be called to criterion of 'effectiveness', although the exact substance of this standard may vary from regime to regime. As we have seen, this overarching standard is often supplemented by several standards of a more specific character. They include consistency with other applicable law, including the prohibition of non-discrimination, consultation with stakeholders, the provision of information to the public, monitoring of compliance, enforcement, remedies and evaluation. Of these standards, the requirements of consistency with applicable law and of enforcement are the most firmly engrained in international practice; they emerge under almost every regime discussed in Part II. Other legislative standards, in contrast, can be identified under two regimes only, such as the standards to perform a consultation with stakeholders or to perform *ex post* evaluation of implementing legislation. In addition, there may also be formal standards pertaining to domestic implementing legisla-

tion in the interest of legal certainty, although this criterion only comes to the fore under the case law that flows from the ECHR, the ICESCR and EU law. In other words, it is a legislative standard 'created' by judges and (in the case of the ICESCR) independent experts. The aforementioned legislative standards will be further elaborated and assessed in Part III.

Part III

Assessment of legislative standards under international law

Introduction to Part III

In Part II we have explored several international legal regimes in order to provide an answer to the question to what extent domestic implementing legislation is regulated by international law. The purpose of the present part is twofold. First, in Chapter 10 we explore the methods of harmonisation pursued by international regimes and the scope, character and substance of the legislative standards established in Part II. This will enable us to further clarify the common features of the international legal regimes discussed in Part II. Second, the present part aims to make an assessment of those features. In doing so, it builds on the findings presented in Part II and in Chapter 10. This assessment aims to establish whether the international legal regulation of implementing legislation can be considered adequate. As we have explained in Chapter 1, this question coincides with the question to what extent this regulation ensures legislative quality. The notion of legislative quality will be explored in Chapter 11. It will be the yardstick through which we assess international legal practice in Chapter 12.

10 Methods of harmonisation and legislative standards under international law: common features

10.1 Introduction

The findings presented below further clarify the various features of domestic implementing legislation which are prescribed under several international regimes, as we have established in Part II. They are important, as they shed light on the means and methods of implementation that are deemed relevant by international policy makers in the fulfilment of their objectives. As we will see, the various international legal regimes reveal several common features. Together, these components constitute what may be called a legislative framework that will be further elaborated in this chapter.

Admittedly, the term 'legislative framework' is somewhat misleading, as it seems to suggest the existence of *one coherent* legal framework that is applicable to domestic implementing legislation. As we have seen, this does not reflect current international legal practice; the framework presented below is not part of positive law. Rather it must be seen as an abstract concept which is *inferred from* international legal practice. Practice itself with regard to legislative standards is, as we have also established, highly fragmented. First and foremost, this is the consequence of the lack of an authoritative international codification of such principles similar to the role played by, for instance, the VCLT and the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, in the fields of the law of treaties and the law of state responsibility respectively.[846]

This fragmentation is, however, also present *within* international legal regimes. This is the result of a varying scope of application of a particular legislative standard: whereas in some cases a legislative standard's scope of application is confined to one particular aspect of the required implementing legislation, in other cases a legislative standard may be applicable to the whole body of implementing legislation that is required on the basis of the specified international legal regime. An example of the former category can be found in article 13, fourth paragraph, sub a, FCTC, which provides that misleading or false tobacco advertising and which is just one of many topics covered by that Convention, must be prohibited in accordance with the constitutional principles of the state party. On the most general level, a legislative standard may be applicable to implementing measures in general, not only those of legislative nature. In those cases, of course, the term 'legislative standard' is not entirely adequate, since the

846 (n 36) and (n 15).

standard's scope of application is not limited to 'legislation'. An example of such legislative standard is the prohibition of discrimination, entrenched in article 14 ECHR. This provision stipulates that the 'enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination […]'. As was discussed in section 4.1.3.2, this phrase also applies to domestic implementing legislation that is adopted in order to perform the positive obligations under the ECHR.

Prior to the analysis of the legislative framework, section 10.2 explores the various methods of harmonisation that may be derived from the international legal regimes discussed in Part II. Although methods of harmonisation do not have particular relevance for our understanding *of the legislative standards* included in the aforementioned legal regimes, they are closely related to the regimes' implementation on the national level, as they determine the extent to which an international regime leaves room for national considerations in the implementation. With a view to providing a complete picture of the subject matter, the methods of harmonisation will be addressed below.

10.2 Methods of harmonisation under international law

10.2.1 Harmonisation

Let us assume, somewhat simplistically, that states enter into international agreements in order to solve common problems. Such agreements produce legal regimes which prescribe specified conduct in a specified policy field. As we have seen, they often require implementation on the domestic level. As a consequence, national laws in that particular field will converge.

Carbonara and Parisi distinguish between three methods to diminish the differences between legal systems. 'Legal transplantation' is a process in which states transplant laws present in foreign domestic legal orders into their own legal order. This concept, however, is controversial, as some authors argue that legal transplantation is impossible given the close relationship between 'law' and the culture or society in which it emerges. The migration or borrowing of law from other societies neglects this close bond, it is contended, and thus cannot exist.[847] This point of view was defended by Pierre Legrand, who asserted that:

> 'At best, what can be displaced from one jurisdiction to another is, literally, a *meaningless* form of words. […] In any *meaning-ful* sense of the term, 'legal transplants' cannot happen.

847 V. Perju, 'Constitutional transplants, borrowing and migrations' in: M. Rosenfeld and A. Sajó (eds), *The Oxford handbook of comparative constitutional law* (1st edn OUP, Oxford 2012) 1304-1327, 1309-1310. Also S. Choudhry, 'Migration as a new metaphor in comparative constitutional law' in: Idem (ed), *The migration of constitutional ideas* (CUP, Cambridge 2006) 1-35, 17.

> No rule in the borrowing jurisdiction can have any significance as regards the rule in the jurisdiction from which it is borrowed. This is because, as it crossed boundaries, the original rule necessarily undergoes a change that affects it *qua* rule. The disjunction between the bare propositional statement and its meaning thus prevents the displacement of the *rule* itself.'[848]

Alan Watson, who has adopted a diametrically opposed stance in this debate, has conceded that 'a transplanted rule is not the same thing as it was in its previous home'.[849] However, in Watson's view legal borrowing or legal transplanting (which he seems to treat as synonyms) are the main cause of similarities between legal systems.[850] Contrary to what Legrand has considered impossible, Watson observes that 'massive successful borrowing is commonplace in law'.[851] In our view, this could hardly be denied.

'Legal harmonisation' refers to a common approach in which states agree on a shared set of policy aims. Each state subsequently makes the modifications to its domestic legislation it deems necessary to meet the formulated policy aims. Finally, the concept of 'legal unification' means that the applicable domestic laws are *replaced* with a single set of rules agreed upon on the intergovernmental or supranational level.[852]

In this view, legal unification may be seen as an extreme version of legal harmonisation.[853] Legal unification in the international legal sphere is not without problems, however, as it presupposes the existence of a unified legal order. As we have seen in Part I, this does not reflect the current state of international law, under which international law is not *per se* valid in the domestic legal order. As a consequence, the crucial element of legal unification, the replacement of domestic legal rules by a common set of international norms, cannot materialise until all state parties have accepted the norms' legal validity in the domestic legal order and have repealed concurring domestic laws. This cannot be easily achieved. For this reason, Wilets has argued that:

> '[t]he globalization of norms that result from the process of [transnational legal harmonisation] frequently consists of harmonisation of rules rather than direct vertical application of international norms from a supranational body'.[854]

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848 P. Legrand, 'The impossibility of legal transplants' 4 *Maastricht Journal of European and Comparative Law* 2 (1997) 111-124, 120.

849 A. Watson, *Legal transplants and European private law* (Ius Commune lectures on European private law, Ius Commune Research School, Maastricht 2000) 2.

850 Ibid, 4.

851 Ibid, 12.

852 E. Carbonara and F. Parisi, E., 'The paradox of legal harmonisation' 132 *Public Choice* 3-4 (2007) 367-400, 368.

853 N. Garoupa and A. Ogus, 'A strategic interpretation of legal transplants' 35 *Journal of Legal Studies* (2006) 339-363, 343.

854 J.D. Wilets, 'A unified theory of international law, the state, and the individual: transnational legal harmonisation in the context of economic and legal globalization' 31 *University of Pennsylvania Journal of International Law* 3 (2014) 753-825, 756.

In this respect, the nature of the legal order of the European Union seems to provide for better conditions for legal unification, which implies 'the wholesale integration of domestic legal orders, effectively replacing national law with Union legislation'.[855] In particular, regulations of the EU reflect a process of legal unification, which, as we have seen, are *qua* EU law directly applicable in the legal orders of EU member states. In addition, EU law prohibits the existence of domestic laws that regulate subject matter covered by the EU legislation. In practice, this amounts to the direct application of a common set of norms: legal unification. The example of EU regulations also makes clear that in practice, harmonisation and unification often go hand in hand; while a regulation may provide for a unified legal framework which is directly applicable in the legal orders of the member states, they often contain provisions that require additional implementing measures as well.

Furthermore, whereas legal transplantation is a unilateral process, harmonisation and unification require multilateral action. As we have seen in the previous part, such multilateral conduct often consists of treaty negotiations between state representatives. On other occasions, international legal regimes have been developed in the framework of an international organisation, such as the IHR of the WHO. In both situations, however, the multilateral nature of the convergence process is evident. This is not to say that the *implementation of* the said harmonised international legal regimes is a multilateral process. That is certainly not the case, as the adoption of domestic implementing measures, including legislation, falls within the domain of the state.

It follows that the international legal regimes examined in the previous part, with the exception of regulations of the European Union, are manifestations of 'legal harmonisation' in the meaning attributed to this term by Carbonara and Parisi. Legal harmonisation itself is, however, an ambiguous term. This may be explained by the fact that policy aims on the one hand, and the legislative means to achieve these ends on the other hand, cannot always be easily distinguished. To clarify this point, it is necessary to explore the various forms or methods through which harmonisation has taken shape under the international legal regimes discussed in Part II. This will be the subject of the following sections.

10.2.2 Harmonisation through minimum requirements

The international legal regimes discussed in the previous part have been developed in order to protect certain interests, both of the individual and of the community. They include, *inter alia*, as we have seen, the 'freedom from fear and want' of individuals, the combat against terrorism, the protection of public health against the international spread of disease, the protection of species of wild flora and fauna and decent labour conditions for seafarers.

855 M. Dougan, 'Approximation of laws in the EU' in: P. Cane and J. Conaghan (eds), *The New Oxford Companion to Law* (OUP, Oxford 2009).

Most of the regimes discussed in the previous part aim to protect the identified policy aims through the imposition of minimum requirements on state parties. This can be derived from, for instance, article 34, third paragraph, CTOC, which reads:

> 'Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime'.[856]

Under this and similar provisions, states may adopt measures that go beyond what is required as a minimum under the relevant international regime. In other words, the instrument may be said to reflect the lowest common denominator that state parties can agree upon in a particular policy area. It raises the question about the nature of the domestic laws beyond this threshold. With regard to the above-cited provision of the CTOC, for instance, what does 'more strict' or 'more severe' mean? Given the purpose of the CTOC, these phrases may be loosely translated as 'harsher' on crime; in other words, they may refer to more severe sanctions.[857] Similarly, under article 2, first paragraph, FCTC, states may impose stricter requirements 'in order to better protect human health'. It means that additional domestic measures are permitted if they further restrict the use of tobacco products. Thus, the meaning of the term 'strict' in these examples is closely related to and dependent upon the objective(s) of the applicable legal regime. Arguably, under the international legal regimes discussed in Part II, this will not constitute a problem, as the objective(s) are formulated in a rather clear manner.

Also in the case of directives of the EU, it is often necessary to determine the nature and purpose of the regime and, as a result, whether specific additional measures are permitted. The imposition of minimum requirements in directives is commonly known as 'minimum harmonisation', whereby a minimum standard is set in the EU directive, but which also allows states to put in place norms that exceed the minimum standard.[858]

An example from the CJEU's case law may clarify the concept of minimum harmonisation as laid down in EU directives. Mr. Zeman, a Slovakian national, was in possession of a firearms licence which allowed him to carry a weapon for a specific aim: the protection of his person and his property in Slovakia. He applied for a European firearms pass, on the basis of directive 91/477/EEC on control of the acquisition and possession of weapons, which would enable him to move freely with his weapon within

856 CTOC art 34, third paragraph. Similarly, see IHR art 43, first paragraph; FCTC art 2, first paragraph; CITES art XIV, first paragraph, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal art 4, eleventh paragraph. The 'minimum' character of the Maritime Labour Convention and the Convention concerning Decent Work for Domestic Workers follows from article 19, eighth paragraph, of the Constitution of the ILO.

857 UNODC, *Legislative Guides* (n 554) par. 41.

858 Craig and De Búrca, *EU Law* (n 525) 84 and 600.

the European Union.[859] In particular, Mr. Zeman relied on article 1, fourth paragraph, of the directive, which stipulates that 'a European firearms pass shall be issued on request by the authorities of a Member State to a person lawfully entering into possession of and using a firearm'. However, pursuant to Slovakian implementing legislation, a European firearms pass could only be issued for hunting and targeted shooting purposes; not for the aim for which Mr. Zeman had acquired his licence. Accordingly, the Slovakian authorities had refused his request. The question which was submitted to the CJEU was whether directive 91/477/EEC permitted the adoption of national legislation which authorised the issue of a European firearms pass *only* to holders of weapons used for hunting and target shooting purposes.[860] In order to provide an answer to this question, the CJEU first analysed the directive's objectives, which included establishing the internal market and the abolition of controls on the safety of objects transported and on persons. This has resulted in the approximation of weapons legislation.[861] In particular, the Court derived from several of the directive's recitals that:

> 'one of the objectives of Directive 91/477 is the prohibition, in principle, of cross-border transport within the European Union of firearms which are not used for hunting or target shooting purposes […].'[862]

Subsequently, the CJEU established that the directive entailed minimum harmonisation, since article 3 of the directive stipulates that 'Member States may adopt in their legislation provisions which are more stringent than those provided for in [the] directive, subject to the rights conferred on residents of the member states by [article 12, second paragraph, of the directive]'.[863] The latter provision stipulates that, put briefly, hunters and marksmen may freely travel across the EU's internal border with their weapons upon presentation of a European firearms pass. On the basis of a textual analysis of the directive, the CJEU found that the obligation of member states to issue a European firearms pass is limited to hunters and sport shooters.[864] The right of member states to impose more stringent requirements than those included in directive 91/477/EEC, as embodied in article 3, cited above, is thus restricted by the obligation to ensure the rights of hunters and sport shooters. As a consequence, member states are not required to issue a European firearms pass to *other* holders of weapons.[865]

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859 Council Directive 91/477 of 18 June 1991 on control of the acquisition and possession of weapons as amended by Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 (OJ 1991, L 256).

860 CJEU, *Zeman,* case C-543/12, judgment of 4 September 2014, ECLI:EU:C:2014:2143, par. 40.

861 Ibid, par. 41-42.

862 Ibid, par. 46.

863 Art 3.

864 CJEU, *Zeman* (n 860) par. 53.

865 Ibid, par. 54.

Thus, in this case, the Slovak authorities had chosen to adhere to the minimum standard entrenched in the directive. In doing so, the CJEU concluded, the Slovakian legislature had acted in accordance with the directive. This example makes clear that the precise consequences of minimum harmonisation in the context of a particular EU directive may not be as obvious as the implications of minimum requirements under other international legal regimes discussed in Part II.[866]

It is important to note that the domestic measures which go beyond the minimum standard laid down in the directive, must meet the standards laid down in the TFEU. In practice, this means that additional domestic restrictions on the 'four freedoms' (i.e. the free movement of goods, persons, services and capital) have to serve a legitimate aim and have to be proportional etc.[867] This, of course, is an important difference with the other international legal regimes discussed in Part II, which can be explained by the (regulation of the) EU internal market. An additional limitation on more stringent domestic measures can be found in the condition that those measures 'are not liable seriously to compromise achievement of the result prescribed by the directive in question'.[868]

From the foregoing it may be concluded that under the international legal regimes discussed in Part II, harmonisation of national legislation often is cast in the form of minimum harmonisation. Also in the framework of the EU minimum harmonisation is a widely used method of harmonisation.[869] In addition to the minimum norm, national legislators are free to impose *additional* norms to protect the common interest.

10.2.3 Other methods of harmonisation

10.2.3.1 Optional provisions

In addition to the imposition of minimum standards, harmonisation may occur through the inclusion of optional provisions. As appears from our discussion of several international legal regimes, this method of harmonisa-

866 Admittedly, the cases brought before the CJEU can be presumed to be the more controversial ones. Were it clear from the outset to what extent directive 91/477/EEC provided for the harmonisation of laws in the field of weapons control, the Slovakian national court would not have found it necessary to make a request for a preliminary ruling by the CJEU under article 267 TFEU.

867 L. Woods and Ph. Watson, *EU Law* (12th edn OUP, Oxford 2014) 349.

868 CJEU, *Muladi,* case C-447/15, judgment of 7 July 2016, ECLI:EU:C:2016:533, par. 43.

869 It is important to note, however, that many EU directives prescribe 'complete' harmonisation. In contrast to EU directives which contain minimum harmonisation, complete harmonisation does not allow states to adopt additional domestic norms which go beyond the minimum standard. In other words, the EU directive *exhaustively* prescribes the content of domestic implementing legislation. This particular form of harmonisation is characteristic for the EU's legislative instruments and cannot be found under the other regimes discussed in Part II. Therefore, it will not be further explored in the present study.

tion has been used, although not very often. One of the few examples of optional provisions that may give rise to implementing measures on the domestic level is article 12, fourth paragraph, ICSFT, which stipulates that:

> '[e]ach State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability'.

Similarly, as we have seen in Part II, article 17 CTOC, reads:

> 'States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by this Convention, in order that they may complete their sentences there'.

Such provisions contain a suggestion and perhaps a recommendation to undertake the described conduct, but the establishment of the said mechanisms and the conclusion of agreements respectively are by no means mandatory. Other regimes, as we have seen, distinguish between mandatory provisions and non-mandatory provisions on a more structural basis. The Code annexed to the MLC, for instance, contains regulations and standards contained in Part A on the one hand, and guidelines contained in Part B on the other hand. The implementation of the latter category 'should be given due consideration', a clear indication of its optional character.[870]

Under EU law, 'optional harmonisation' is a more common phenomenon and thus widely present in the legislative instruments of the EU. By way of example, we could refer to directive 2014/60/EU on the return of cultural objects, article 3 of which stipulates that cultural objects that have been unlawfully removed from the territory of a member state, should be returned in accordance with the procedure laid down in that directive.[871] While the directive contains binding provisions with regard to cultural objects removed from a member state's territory after 1992, it is added that:

> '[e]ach Member State may apply the arrangements provided for in this Directive to requests for the return of cultural objects unlawfully removed from the territory of other Member States prior to 1 January 1993.' [872]

Thus, extension of the directive's temporal scope is optional and, as a consequence, so is this particular aspect of the implementation of the directive.

It may seem contradictory to consider the inclusion of optional provisions in an international regime beneficial to the harmonisation of laws.

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870 Art VI, second paragraph.

871 Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (OJ 2014, L 159).

872 Artt 14 and 15, second paragraph.

If state parties are not required to comply with a certain provision as its character is merely optional, how could this positively contribute to the convergence of national laws? In this regard, it must be recalled that international legal regimes are the products of negotiations of several, or even many, (state) representatives. Whenever they cannot reach consensus on the codification of a certain agreement as a mandatory requirement, inclusion as an optional provision may prove to be the best possible result to its proponents. Therefore, the inclusion of non-mandatory provisions in an international legal regime should not be seen as an alternative to the inclusion of mandatory provisions, but as an alternative to *not* including norms on a particular topic at all.[873] This perspective justifies the conclusion that optional provisions, in fact, have a positive impact on the harmonisation of domestic legislation. This size of this impact is, of course, dependent on the number of states that chooses to implement the particular provision within their respective national legal orders, despite its optional character.

10.2.3.2 Language

Another interesting aspect of the implementation of international legal regimes consists of the use of language. Stricty speaking, the use of language is not in itself a method of harmonisation. Rather it may be viewed as an element of a certain 'style of legislation'.[874] However, since the use of domestic legal terms and concepts differs among domestic legal systems, the imposition of limitations on this variety may prove beneficial to harmonisation. For this section, therefore, it is particularly relevant to what extent harmonisation *of language* has been deemed feasible. This question came to the fore in the framework of the CTOC and the MLC, but is inherent to any international regime that pursues legal harmonisation.

With regard to the CTOC, in section 6.1.3.1 it was argued on the one hand that is was considered desirable to achieve uniformity in language as much as possible. To this end, terminology used in domestic legislation should correspond to the language used in the treaty. This would, it was stated in the Legislative Guide, simplify extradition proceedings between states. On the other hand, legislative drafters were encouraged to ensure consistency with domestic legal terms and definitions, which would often imply a deviation from the CTOC's terminology, in order to avoid conflicts

873 Moreover, in the framework of EU law, the inclusion of a provision as 'optional' may a be *necessity* if the directive at hand constitutes complete harmonisation, i.e. the member states are not allowed the apply additional laws to the subject matter under regulation. In that situation, an exception to the general (mandatory) regime laid down in the directive could only be applied by member states if it is expressly acknowledged in that directive as an 'option'.

874 W.J.M. Voermans, 'Styles of legislation and their effects' 32 *Statute Law Review* 1 (2013) 38-53, 41-42.

and uncertainty about the judicial application of the new provisions in practice.[875]

The latter element, discretion of states with regard to the use of terminology in domestic implementing legislation, emerged under the MLC as well. However, the motivation for its inclusion was a different one; as we have seen in section 9.1.3.1, the drafters of the MLC had opted for a formulation of the mandatory provisions in a more general way, since this would leave 'a wider scope for discretion as to the precise action to be provided for at the national level'.[876] Thus, whereas terminological discretion for state parties under the CTOC would serve the purpose of legal certainty on the domestic level, under the MLC it would enhance flexibility with regard to the choice of implementing measures.

On a more abstract level, the issue raised under the CTOC and the MLC embodies the tension between the advantage of convergence of domestic laws on the hand, and discretion granted to states in the implementation of the applicable international legal regime. How these interests are balanced, will vary from one regime to the other.

10.2.3.3 Equivalent measures

A final method of harmonisation may be found in the possibility to adopt measures that are equivalent to the measures prescribed by a particular regime. Article VI, third paragraph, MLC, provides:

> 'A Member which is not in a position to implement the rights and principles in the manner set out in Part A of the Code may, unless expressly provided otherwise in this Convention, implement Part A through provisions in its laws and regulations or other measures which are *substantially equivalent* to the provisions of Part A'.

In order to determine whether domestic laws meet the standard of substantial equivalence, a state party must satisfy itself that the applicable piece of legislation 'is conducive to the full achievement of the general object and purpose' of the applicable Convention provisions and that it 'gives effect' to them.[877]

Also in the field of international labour law, article 2, second paragraph, sub a, CDWDW, stipulates that:

> 'A Member which ratifies this Convention may, after consulting with the most representative organisations of employers and workers and, where they exist, with organisations representative of domestic workers and those representative of employers of domestic workers, exclude wholly or partly from its scope […] categories of workers who are otherwise provided with *at least equivalent protection*'.

875 Section 6.1.3.1.
876 (n 791).
877 MLC art VI, fourth paragraph.

Under EU law the implementation of legal instruments of the EU may only be performed through the adoption of 'equivalent measures' if it is expressly stipulated in the applicable instrument. An example can be found in directive 2010/31/EU on the energy performance of buildings, which provides, *inter alia,* that member states 'shall lay down the necessary measures to establish a regular inspection of the accessible parts of systems used for heating buildings […]. That inspection shall include an assessment of the boiler efficiency and the boiler sizing compared with the heating requirements of the building.'[878] It is added that:

> 'As an alternative to [the provision cited above] Member States may opt to take measures to ensure the provision of advice to users concerning the replacement of boilers, other modifications to the heating system and alternative solutions to assess the efficiency and appropriate size of the boiler. The overall impact of this approach shall be *equivalent* [emphasis added] […]'.[879]

When no harmonisation in the form of specific EU legislation has been undertaken, convergence of legal systems is influenced by the principle of 'mutual recognition' in the context of the internal market. In practice, this principle may demonstrate great similarity with harmonisation through equivalent measures. It originates from the CJEU's judgment in *Cassis de Dijon.* This case concerned the legality of German requirements on the minimum alcohol content of beverages. The question arose whether the German authorities could legally prohibit the market entry of a French fruit liquer, *Cassis de Dijon,* which contained less alcohol. Since there was no EU legislation on alcohol levels in beverages, the CJEU had to investigate whether the German national legislation amounted to a 'measure having equivalent effect' in the sense of article 34 TFEU.[880] The CJEU held:

> 'Obstacles to movement within the community resulting from disparities between national laws relating to the marketing of the products in question must be accepted insofar as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. […] It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community'.[881]

878 Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (OJ 2010, L 153) art 14, first paragraph.

879 Art 14, fourth paragraph.

880 Article 34 TFEU provides: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'

881 CJEU, *Cassis de Dijon,* case C-120/78, judgment of 20 February 1979, ECLI:EU:C:1979:42, par. 8 and 14.

The CJEU thus ruled that the German authorities were obliged to admit the import of French fruit liquer in Germany, even though it contained a lower alcohol percentage than prescribed by German law.[882] Put differently, the CJEU held that whenever a product was lawfully placed on the market in one of the member states, it should also be accepted in other member states; 'the foreign must be recognised as functionally equivalent, at least in all really important aspects, to the domestic'.[883] Of course, mutual recognition benefits economic actors that sell their products across the internal borders of the EU, since they have to comply with one regulatory regime only. From this point of view, the principle of mutual recognition, as entrenched in article 34 TFEU, should a considered as a particular manifestation of harmonisation through equivalent measures. In sum, in the framework of the EU, harmonisation through equivalent measures could based on a specific legislative instrument or, in the absence thereof, on article 34 TFEU (although in the latter case, its scope is limited to the internal market).

It can be argued that the possibility to adopt 'equivalent measures' may have a negative impact on the convergence of domestic laws in a particular area, and perhaps even promote divergence, as it provides states with a certain measure of discretion with regard to the choice of means to achieve the identified policy aims. This statement may be true, but it ignores the fact that the possibility to adopt equivalent measures provides an additional manner to obtain the aims which are pursued under an international legal regime. In this regard, it may be useful to emphasise the distinction between a specified policy aim and the means to achieve that aim; while the provision for the adoption of equivalent measures under an international legal regime may promote convergence between national legal orders with regard to the achievement of a specified policy aim, it may promote divergence with regard to the choice of means on the domestic level. Moreover, similar to what has been argued above in respect of the inclusion of optional provisions, the permission of 'equivalent measures' may be a prerequisite for consensus among state representatives; if states cannot reach consensus on the choice of means to attain a certain policy aim, the permission of 'equivalent measures' may be a price worth paying to attain international agreement.

10.3 Legislative standards

10.3.1 Introduction

Now we have analysed the various ways in which international legal regimes encourage the convergence of laws in specific policy fields and, as a corollary, the extent to which an international regime leaves room for national considerations in its implementation, it is time to resume our

882 CJEU, *Cassis de Dijon* (n 881).
883 Chalmers, Davies and Monti, *European Union law* (n 468) 775.

analysis of the legislative standards in Part II. In this section, therefore, we will examine the substance and scope of those standards. This enquiry is a prerequisite for their assessment in the light of theory and practice with regard to legislative quality.

The outline of this section reflects a certain hierarchy between legislative standards. In this hierarchy, the standard of effectiveness is considered the supreme, overarching legislative standard. Several other legislative standards are presented as subsidiary to the standard of effectiveness. How can this distinction be justified? The answer to that question is that the legislative standards of a subsidiary nature ultimately serve the purpose of ensuring the regime's effectiveness. In other words, they are not an end in itself, but only a means to achieve a 'higher' objective: effectiveness. The standard of effectiveness and its subsidiary elements thus fundamentally differ in the purpose they serve.

Indications for the existence of such hierarchy between effectiveness and other legislative standards can also be derived from the grounds that led to the inclusion of the subsidiary legislative standards under the regimes discussed in the previous part. For instance, in the context of our discussion of the CTOC, it was argued that consistency with fundamental principles of domestic law serves to 'ensure the *effectiveness* of the Convention itself as it dissuades state parties from adopting national implementing legislation that, as a result of contravention of domestic laws or principles of higher rank, will remain without legal force'.[884] A similar point can be made with regard to the relation between the legislative standards of legal certainty and effectiveness under the ECHR, as we will see below. Having said that, let us now turn to the legislative standards that constitute the legislative framework referred to in section 10.1.

10.3.2 Effectiveness

10.3.2.1 Effectiveness under the selected international legal regimes

The examination of the international legal regimes, as conducted in Part II, reveals that the notion of effectiveness has a prominent place as a legislative standard. It demands that domestic implementing legislation is adopted and applied in such a way that a specified international legal regime is effective within the domestic legal order. Its place is, however, not identical under the various international legal regimes. In this section it is argued that 'effectiveness' as a legislative standard, according to which state parties must adopt domestic legislation that puts into effect the objectives formulated in the legal instrument, is present on two distinct levels. These levels differ in scope. On both levels, however, express reference to 'effectiveness' or its equivalent is not required. This will be clarified below.

884 Section 6.1.3.2.

First of all, the adoption of effective implementing measures may be required with regard to the international legal regime in its entirety. As we have seen, the way in which it is codified may vary from regime to regime. In the context of the ICESCR, for instance, the notion of effectiveness is termed 'realisation'; the core obligation of that treaty imposes the obligation to take measures 'with a view to achieving progressively the full realization of the rights' embedded in it.[885] Apart from the exact meaning of the notion of progression, which was discussed in Part II, it is difficult to see how 'realisation' and 'effectiveness' can be distinguished in the legal context of this regime. In the same vein, the legislative standard of effectiveness is firmly embedded in the ECHR. Whereas the ICESCR contains the term 'realisation', the ECHR provides that the rights and freedoms embedded in it, must be 'secured to everyone'.[886] The prominence of the notion of effectiveness was also recalled by the ECtHR when it famously stated that 'the Convention is intended to guarantee not rights that are theoretical and illusory but rights that are practical and effective'.[887] For this reason, Rietiker asserts that the principle of effectiveness has become a fundamental cornerstone for the protection of Convention rights and freedoms'.[888]

Outside the context of the protection of human rights, effectiveness as a legislative standard which is applicable to an international regime in its entirety, can be identified under several of the regimes discussed in Part II. Again, the absence of the term 'effectiveness' does not justify the conclusion that this legislative standard does not apply. Article 4, fourth paragraph, CCTMW, stipulates that state parties are under the obligation to take 'appropriate legal, administrative and other measures to implement and enforce' its provisions. Similarly, article 3 FCTC states that its provisions are 'to be implemented by the Parties'. While under the MLC state parties are required to 'give complete effect' to its provisions, parties to the CTOC have a duty to take 'necessary measures […] to ensure the implementation of its provisions'.[889] In sum, the legislative standard of effectiveness which applies to the relevant regime as a whole, can be found under several of the regimes discussed in Part II. The exact terms in which this standard is phrased, however, are not identical.

Second, 'effectiveness' may be required with regard to a specified policy aim embodied in the international instrument. Here, the scope of the standard of effectiveness is usually limited to a specified and detailed policy aim, in contrast to the notion of effectiveness which applies to the regime

885 Art 2, first paragraph.
886 Art 1.
887 *Airey v Ireland* (n 347) par. 24.
888 D. Rietiker, 'The principle of "effectiveness" in the recent jurisprudence of the European Court of Human Rights: its different dimensions and its consistency with public international law- no need for the concept of treaty *sui generis*', 79 *Nordic Journal of International Law* 2 (2010) 245-277, 256.
889 MLC art I and CTOC art 34, first paragraph.

as a whole. In principle, this standard of effectiveness with a narrow scope is inherent to any international legal provision that requires the adoption of implementing legislation on the domestic level. Thus, it can be argued that effectiveness and implementation overlap. Exactly this point was made in section 1.2 when it was argued that there is no such thing as implementation which is not effective.

A few examples may be sufficient to emphasise the diversity of the norms that contain this narrow application of the standard of effectiveness. Often, in its most general sense, it is present in the obligation to 'ensure' the attainment of a specified policy aim, which leaves the means to achieve that objective entirely to the state party. For instance, in order to combat the spread of infectious diseases, states 'shall ensure […] that container loading areas are kept free from sources of infection or contamination, including vectors and reservoirs'.[890] If, under the CCTMW, hazardous waste is object of illegal traffic, the state of export 'shall ensure that the wastes in question are taken by the exporter […]'.[891] Moreover, in the field of the prevention of the financing of terrorism, states 'shall ensure […] that legal entities liable [for transgressions of the treaty] are subject to *effective*, proportionate and dissuasive criminal, civil or administrative sanctions'.[892]

Sometimes express reference is made to the means through which a specified policy aim must be pursued, even though these means are often formulated in general terms. Examples include obligations to 'institute domestic regulatory and supervisory regimes for banks […] in order to deter and detect all forms of money-laundering';[893] to 'adopt and implement effective legislative, executive, administrative or other measures requiring manufacturers and importers of tobacco products to disclose to governmental authorities information about the contents and emissions of tobacco products';[894] to 'take appropriate measures to prohibit trade in specimens in violation [of the Convention]'[895].

This overview also begs the question to what extent the legislative instruments of the EU, most notably directives and regulations, fit within the categorisation presented in this section. It is important to note that they are *instruments* (similar to treaties or other sources of international law) instead of *regimes* in the meaning attributed to this term in the present study.[896] As a consequence, directives and even regulations which have been adopted by the institutions of the EU contain provisions that are similar to all the aforementioned manifestations of the standard of effectiveness, just as treaties and other binding decisions of international organisa-

890 IHR art 34, second paragraph.
891 Art 9, second paragraph, sub a.
892 ICSFT art 5, third paragraph.
893 CTOC art 7, first paragraph, sub a.
894 FCTC art 10.
895 CITES art VIII, first paragraph.
896 Section 5.1.1.

tions do.[897] Moreover, as was already discussed in section 3.4.2, EU law contains a general principle of effectiveness, closely related to the principle of loyalty as embodied in article 4, third paragraph, TEU, which requires that '[t]he measures taken by the Member States must be such as to ensure that a directive is fully effective, in accordance with the objective which it pursues'.[898] In other words, also in the implementation of legislation adopted in the framework of the EU, the legislative standard of effectiveness must be observed.

Perhaps the most important step following the adoption of implementing legislation is its application in practice. This requirement makes clear that the mere existence of implementing legislation is not sufficient for a state to respect its international obligations; it must be applied in practice as well. Put differently, the implementation of international law within the domestic legal order must go beyond the drafting or modification of legal texts. It is reflected in the statement of the ECtHR, already cited in section 4.1.3.1, that the ECHR intends to guarantee rights that are 'practical and effective', instead of 'theoretical and illusory'.[899] This requirement cannot be considered a separate legislative standard, however, since it does apply neither to the substance or form of legislation, nor to legislative procedure. Nevertheless, it has received special attention in the case law of the CJEU, which has stated that domestic implementing legislation should be 'effectively applied and enforced in practice'. This responsibility rests upon all state authorities or private entities which are attributed with public powers under the relevant legislation.[900]

In view of the above, it is safe to conclude that the legislative standard of effectiveness has a prominent place within the legal regimes discussed in Part II. What is more, it has become clear that this standard may vary in scope and manifests itself in various formulations. Furthermore, it does not only apply to the legislation itself, but also, under EU law and the ECHR at least, to its application in practice. This notwithstanding, the standard of effectiveness acquires practical relevance only after the national legislature has engaged in the *interpretation of* the applicable international legal provision with a view of establishing its substance, since the act of interpretation provides an answer to the question which national legislation is required in order to ensure the effectiveness of the applicable international legal provision that has to be implemented. The act of interpretation itself is also subject to norms of international law, in particular the law of treaties, under which the notion of effectiveness emerges once again.

897 It must be recalled that the directives and regulations are different in nature. See (n 461).
898 CJEU, *Von Colson* (n 297) par. 15.
899 *Airey v Ireland* (n 347) par. 24.
900 Sections 5.1.2.4 (with regard to EU directives) and 5.2 (with regard to EU regulations).

10.3.2.2 *Effectiveness in the context of treaty interpretation under general international law*

In addition to the importance of the notion of effectiveness under the international legal regimes discussed in Part II, we can also discern a principle of effectiveness under general international law. The principle of effectiveness emerges in different international legal contexts, among them the context of treaty interpretation.[901] Since most international legal regimes that we have examined derive from treaty law, this principle of interpretation deserves our attention. The notion of effectiveness is reflected in the maxim *ut res magis valeat quam pereat*, which can be translated as 'that the matter may have effect rather than fail'.[902] Put briefly, it requires that a treaty provision is interpreted in a manner that renders the applicable norm 'effective'.

To what extent can it be considered part of international law? Lauterpacht, writing in 1949, argued that the principle of effectiveness is firmly rooted in both national law and international law.[903] In particular, he has demonstrated that international case law, most notably of the PCIJ, has 'constantly acted upon the principle of effectiveness as the governing canon of interpretation'.[904] In 1961, Lord McNair took a rather skeptical stance when he stated:

> '[…] we doubt whether this so-called rule means more than to say that the contracting parties obviously must have had some purpose in making a treaty, and that it is the duty of a tribunal to ascertain that purpose and do its best to give effect to it, unless there is something in the language used by the parties which precluded the tribunal from doing so'.[905]

The case law of the ICJ has made clear that the attribution of effectiveness to a treaty provision is neither the only, nor the most important rule of treaty interpretation. This was emphasised in the *South West Africa Cases*, in which the ICJ was confronted with the question whether it was entitled to apply the teleological principle of interpretation according to which 'instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes'.[906] The ICJ had to decide whether Ethiopia and Liberia, as former members of the League of Nations (LoN, which ceased to exist after the Second World War), could be considered to have a legal right or interest with regard to the governance of the Mandate of South West

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901 For an overview of the various meanings given to the principle of effectiveness under international law, see H. Taki, 'Effectiveness' in: R. Wolfrum (ed), *Max Planck Encyclopedia of public international law* (online edn OUP, Oxford).

902 Ibid, par. 1 and 17.

903 H. Lauterpacht, 'Restrictive interpretation and the principle of effectiveness in the interpretation of treaties' 26 *British Yearbook of International Law* (1949) 48-85, 68.

904 Ibid.

905 Lord McNair, *The law of treaties* (Clarendon Press, Oxford 1961) 385.

906 *South West Africa Cases (Ethiopia v South Africa and Liberia v South Africa)* [1966] ICJ Rep 6, par. 91.

Africa.[907] The Mandate of South West Africa had been established after the First World War and constituted the international administration on behalf of the LoN, under which the former colony German South West Africa was placed. The ICJ dismissed the claim advanced by Ethiopia and Liberia. On the basis of interpretation of the applicable instruments, most notably article 22 of the Covenant of the LoN, the ICJ asserted that the power to intervene in the governance of the Mandate was vested in the LoN institutions, not in its individual members.[908] A reference to the principle of effectiveness could not alter this conclusion, as the ICJ stated that:

> '[t]he principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.'[909]

The principle of effectiveness is not mentioned as such in the VCLT, the authoritative 1969 (which was only 3 years after the ICJ delivered judgment in the *South West Africa Cases*) codification of the law of treaties. However, it must be regarded as the teleological principle of interpretation underlying article 31, first paragraph, VCLT, which contains the obligation to interpret treaty provisions in the light of their object and purpose. In this view, '[c]onsideration of a treaty's object and purpose together with good faith will ensure the effectiveness of its terms'.[910]

In view of the foregoing, the principle of effectiveness is relevant for the interpretation of treaty provisions in conformity with article 31 VCLT. This was reaffirmed in the *Fisheries Jurisdiction Case*, in which the ICJ stated that the principle of effectiveness 'has an important role in the law of treaties and in the jurisprudence of this Court'.[911] The references to this principle in international case law seem to justify the conclusion that the principle of effectiveness is part and parcel of the obligation to interpret treaty provisions in the light of their object and purpose. This applies equally to treaty provisions that call for the enactment of implementing legislation in the domestic legal order.

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907 Ibid, par. 14.

908 Ibid, par. 34-35.

909 Ibid, par. 91. The Court referred to *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second phase)* (Advisory Opinion) [1950] ICJ Rep 221, p. 229.

910 M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, Leiden 2009) 428. Similarly Aust, *Modern treaty law and practice* (n 165) 208-209; R. K. Gardiner, *Treaty interpretation* (2nd edn OUP, Oxford 2015) 179; Sorel and Boré Eveno maintain the view that effectiveness is a 'mixture of the criteria of the object and purpose and of the principle of good faith'. Sorel and Boré Eveno (n 38) 817. Also Rietiker, 'The principle of "effectiveness"' (n 888) 256.

911 *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) (Judgment) [1998] ICJ Rep 432, par. 52.

10.3.3 Subsidiary elements of effectiveness

10.3.3.1 Legal certainty

Now we have explored the prominence of 'effectiveness' under international legal norms that require the adoption of implementing legislation on the domestic level, let us proceed to its subsidiary legislative standards, among them the requirement of legal certainty. Legal certainty is a multifaceted concept which is considered an essential component of the rule of law. This is not the place to engage in a thorough discussion of the various meanings attributed to the notion of legal certainty.[912] Nevertheless, for the purpose of the present study, we should clarify how this notion has been referred to under the regimes discussed in Part II. It may be surprising that, out of the regimes explored in Part II, the notion of legal certainty arises only under the ECHR, the CESCR and under the law of the EU. From this we might derive a general reluctance to include the standard of legal certainty in the regulation of implementing legislation beyond the community of European states.

In section 4.1 we have seen that the standards of legal certainty and of effectiveness are closely related. In this view, legal certainty is an indispensable element of effective protection to which individuals are entitled under the ECHR. In *A., B. and C. v Ireland*, the ECtHR considered that article 8 ECHR requires the adoption of domestic legislation which contains an 'accessible and effective procedure' according to which women could establish whether they qualify for a lawful abortion. The ECtHR held that the applicable Irish constitutional provision contributed to substantial uncertainty, which constituted 'a significant chilling factor for both women and doctors in the medical consultation process'. After all, they ran the risk of criminal prosecution.[913]

As we have seen in section 4.2, the CESCR has made an almost identical argument with regard to the uncertainty surrounding the Irish legislation on abortion. On a more general level the CESCR demands national legislation which is clear and unambiguous, especially when the application of vague norms may constitute impediments to the enjoyment of economic, social and cultural rights embedded in the ICESCR.[914]

Furthermore, as we have seen, on the basis of the ECtHR's case law it can be argued that the standard of legal certainty demands that domestic implementing legislation is formulated in sufficiently clear terms in order to ensure its deterrent effect. This can be derived from *Siliadin v France*, in which a Togolese woman had come to France as a minor and was held in servitude and was subjected to forced labour for several years.[915] The

912 Such as the relevance of 'legitimate expectations'.
913 *A., B. & C. v Ireland* (App no 25579/05) ECHR 2010-VI 185, par. 254.
914 Section 4.2.3.8.
915 Section 4.1.2.2.

French Criminal Code covers the acts of 'exploitation through labour and subjection to working and living conditions that are incompatible with human dignity'. In the view of the ECtHR, however, these provisions did not afford the applicant practical and effective protection, as appears from the fact that they had been open to 'very different interpretations from one court to the next'.[916] In other words, the ECtHR suggested, the French criminal legal provisions lacked an effective deterrent character.[917]

Both cases have in common that they involve formal requirements pertaining to the domestic implementing legislation. In the view of the ECtHR they follow from the standard of legal certainty and are expressly related to the notion of 'effective protection' of the individual. What is more, in both cases the ECtHR emphasised the need to clearly circumscribe acts threatened with criminal punishment; it is thus relied on in a criminal legal context. This latter similarity may suggest that the notion of legal certainty has, in the context of domestic legislation which implements the (positive) obligations under the ECHR, a rather narrow scope. This raises the question whether the ECtHR has referred to the notion of legal certainty in other areas, including outside the context of legislation that gives effect to the positive obligations under the ECHR.

The answer is: yes, the ECtHR has, in particular in the field of the implementation of limitations of ECHR rights. The most important human rights treaties allow for the limitation of the rights entrenched in the conventions (with the exception of the so-called 'absolute rights', from which no derogation is permitted), under the condition that the imposed limitations meet the requirements that have been established under the applicable convention. These specific requirements may vary from one convention to the other. Nevertheless, they have at least one common denominator: the limitation imposed upon the individual's rights must be provided for by the domestic law of the state. This criterion may be considered an aspect of the concept of legal certainty, which stipulates that the state could not infringe upon its citizens' liberty except with a legal basis, and should prevent arbitrariness on the part of state authorities. As a result of this common feature, domestic legislation which provides for a limitation on the enjoyment of specified human rights by the state's citizens (or, more accurately: domestic legislation which, in order to achieve the formulated policy aims, also imposes restrictions on the enjoyment of some specified human rights), to a large extent resembles what has been previously called domestic 'implementing legislation'. Admittedly, domestic limitations on human rights differ from other categories, because, contrary to other international legal norms that give rise to implementing legislation on the domestic level, the limitation of human rights is not prescribed by international law. Indeed, from the perspective of international law, as may become clear from a human rights treaty's object and purpose, such limitations must be discouraged.

916 *Siliadin v France* (n 327) par. 142-149.
917 Ibid, par. 144.

It remains true, nonetheless, that if a state prefers to impose limitations on the rights incorporated in a human rights treaty, such restrictions should meet criteria *established by international law*. In this sense, they must be viewed as subject to normative frameworks that are applicable to domestic implementing legislation.

How has this particular manifestation of the standard of legal certainty been applied by the ECtHR? The notion of legal certainty can be said to be referred to by the ECHR with the phrases 'prescribed by law' or 'in accordance with the law'.[918] In *Sunday Times v the United Kingdom*, the ECtHR observed that the requirement of a basis in law does not necessarily demand legislation or norms of lower rank, including regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by the legislature, but may also encompass unwritten law.[919] Thus, the finding of established case law in national courts may suffice to fulfil the requirement of legal certainty.[920]

The ECtHR has adhered to a substantive standard, which comprises two elements: accessibility and foreseeability. Accessibility refers to the requirement that 'the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case'.[921] This condition will be fulfilled if the relevant legislation has been published in the official gazette.[922] The criterion of foreseeability demands that the domestic law which imposes the restriction upon the ECHR rights is sufficiently precise in order to enable citizens to 'foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail'.[923] Those consequences include the formalities, conditions, restrictions or penalties which may be attached to such conduct if it is established that the conduct constitutes a breach of the applicable national law.[924] As the ECtHR has

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918 Articles 5, first paragraph (right to liberty), 8, second paragraph (right to respect for private and family life) 9, second paragraph (freedom to manifest one's religion or beliefs), 10, second paragraph (freedom of expression), and 11, second paragraph (right to freedom of peaceful assembly and to freedom of association with others).

919 *Sunday Times v the United Kingdom* (App no 6538/74) ECHR 26 April 1979, par. 47; *Cantoni v France* (App no 17862/91) ECHR 11 November 1996, par. 35; *Başkaya and Okçuoğlu v Turkey* (App no 23536/94 and 24408/94) ECHR 1999-IV 261, par. 36; *Špaček s.r.o. v Czech Republic* (App no 26449/95) ECHR 9 November 1999, par. 54; *Association Ekin v France* (App no 39288/98) ECHR 2001-VIII 323, par. 46; *Sanoma Uitgevers B.V. v the Netherlands* (App no 38224/03) ECHR 14 September 2010, par. 83.

920 *Couderc and Hachette Filipacchi Associés v France* (App no 40454/07) ECHR 14 June 2007, par. 33.

921 *Sunday Times v United Kingdom* (n 919) par. 49. Also *Silver and others v the United Kingdom* (App no 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75) ECHR 25 March 1983, par. 85-88.

922 *Piroğlu and Karakaya v Turkey* (App no 36370/02 and 37581/02) ECHR 18 March 2008, par. 53; *Rotaru v Romania* (App no 28341/95) ECHR 2000-V 109, par. 54.

923 *Sunday Times v United Kingdom* (n 919) par. 49. Also *Silver and others v United Kingdom* (n 921) par. 85-88.

924 *Kazakov v Russia* (App no 1758/02) ECHR 18 December 2008, par. 23; *Siryk v Ukraine* (App no 6428/07) ECHR 31 March 2011, par. 35.

submitted on various occasions, this condition serves to protect individuals against arbitrary interferences by the public authorities. To this end, the law must 'indicate with sufficient clarity the scope of any such discretion and the manner of its exercise'.[925] The interpretation of the criterion of foreseeability in an individual case depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed.[926] It may give rise to specific responsibilities for the persons involved, which may include the task to take appropriate legal advice.[927] In particular, this applies to persons who are engaged in professional activities. As may be derived from the ECtHR's case law, they cannot easily claim that legal provisions that have been relied upon to their detriment, lack the foreseeability that is required under the ECHR.[928] It means, for example, that it could be expected from a business company that wishes to broadcast across the border to inform itself fully about the telecom regulations in force in that country, if necessary with the help of advisers.[929] Moreover, a manager of a supermarket who claimed to be under the impression that he had engaged in the lawful sale of medicinal products, should have taken steps to inform himself about the possible consequences of what turned out to be the unlawful sale of medicinal products.[930]

In addition to the element of precision, the criterion of foreseeability requires that 'the applicable law must provide minimum procedural safeguards commensurate with the importance of the principle at stake'.[931] Such principle may include press freedom and the journalistic privilege of source protection. In *Sanoma Uitgevers B.V. v the Netherlands* the ECtHR investigated the forcing of journalists to disclose the identity of journalistic sources, or information that could lead to the identification of the sources, which allegedly contravened article 10 ECHR. Journalists who had attended an illegal street race, had made photographs of the participants. One of the cars that participated, it was suspected by the police and the prosecuting authorities, had been used as a getaway car following a ram raid. Therefore, the authorities had summoned the journalists to hand over the photographs

925 *Svyato-Mykhaylivska Parafiya v Ukraine* (App no 77703/01) ECHR 14 June 2007, par. 127-128; *Koretskyy and others v Ukraine* (App no 40269/02) ECHR 3 April 2008, par. 47; *Munjaz v the United Kingdom* (App no 2913/06) ECHR 17 July 2012, par. 88.

926 *Cantoni v France* (n 919) par. 44.

927 *Tolstoy Miloslavsky v the United Kingdom* (App no 18139/91) ECHR 13 July 1995, par. 37; *Grigoriades v Greece* (App no 24348/94) ECHR 25 November 1997, par. 37.

928 *July and SARL Libération v France* (App no 20893/03) ECHR 14 February 2008, par. 52; *Cantoni v France* (n 919) par. 35; *Chauvy and Others v France* (App no, judgment of 29 June 2004, par. 43-45; *Delfi AS v Estonia* (App no 64569/09) ECHR 16 June 2015, par. 128-129; *Varvara v Italy* (App no 17475/09) ECHR 29 October 2013, par. 34.

929 *Groppera Radio AG and others v Switzerland* (App no 10890/84) ECHR 28 March 1990, par. 68.

930 *Cantoni v France* (n 919) par. 35.

931 *N.K.M. v Hungary* (App no 66529/11) ECHR 14 May 2013, par. 48; *Gáll v Hungary* (App no 49570/11) ECHR 25 June 2013, par. 47; *R.Sz. v Hungary* (App no 41838/11) ECHR 2 July 2013, par. 37; *Sanoma Uitgevers B.V. v the Netherlands* (n 919) par. 88.

of the street race. After their initial refusal to cooperate, the journalists, put under pressure by the authorities, had complied with the request. Before the ECtHR, the journalists' employer, applicant in the present case, argued that the domestic legal basis for the seizure of the photographs, an interference with its right to receive and impart information, as protected by article 10 ECHR, lacked foreseeability. The ECtHR agreed and stressed the 'vital importance' of press freedom and the protection of journalistic sources. In those circumstances, it maintained, the required minimal procedural safeguards should have included the guarantee of review by a judge or other independent and impartial decision-making body to make an assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources.[932]

Thus, in addition to the standard of legal certainty as applied by the ECtHR to domestic legislation which implements the positive obligations of the ECHR, the ECtHR has turned to the requirement of legal certainty in the assessment of domestic legislation that imposes limitations on the ECHR rights. In both cases, legal certainty relates to formal aspects of domestic law, such as clarity, accessibility and foreseeability.

The legislative standard of what we have termed 'legal certainty' also emerges in the case law of the CJEU. As we have seen in Chapter 5 on the implementation of the EU's legislative instruments, this entails, *inter alia*, that national implementing measures should have 'unquestionably binding force'. Contrary to implementation through mere administrative practices, implementation through binding law ensures appropriate publicity.[933] The underlying premise is that individuals should be able to inform themselves on the law currently in force. Moreover, domestic implementing legislation should meet the requirements 'specificity, precision and clarity necessary to satisfy the requirements of legal certainty'. In the view of the CJEU, they enable individuals to 'ascertain the full extent of their rights and obligations'.[934] These elements from the CJEU's case law show a striking similarity to the case law of the ECtHR: both institutions have formulated requirements to the formal aspects of implementing legislation, which encompasses criteria pertaining to the text of the law and criteria pertaining to its accessibility and foreseeability. Apparently, both courts consider these elements part and parcel of the notion of legal certainty and a legislative standard to be observed by states that adopt national implementing measures.

Nevertheless, under the ECHR and EU law the application of the notion of legal certainty is not restricted to formal aspects of domestic implementing legislation. On several occasions the ECtHR has stated that the notion of legal certainty is an underlying value of the ECHR, thus suggesting a very broad application of this standard.[935] It is 'implicit in all the Articles

932 *Sanoma Uitgevers B.V. v the Netherlands* (n 919) par. 90.
933 Section 5.1.2.2.
934 Section 5.1.2.3.
935 *Fabris v France* (App no 16574/08) ECHR 2013-I 425, par. 66.

of the Convention and constitutes one of the basic elements of the rule of law'.[936] In the view of the ECtHR, it requires, *inter alia,* that where the courts have finally determined an issue, their ruling should not be called into question.[937] Also under EU law, the notion of legal certainty, often referred to as the 'principle' of legal certainty, has a broader application than merely encompassing formal elements of domestic implementing legislation.[938] In *Heinrich,* the CJEU stated:

> '[…] the principle of legal certainty requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.'[939]

In addition to the requirement of clarity, to which we referred above, the principle of legal certainty prevents a measure from taking effect prior to its publication (retroactivity). It may apply to legal situations which have been concluded at the time of publication of the relevant measure, or to situations which continue to exist after the publication. It cannot be deviated from when imposing penalties.[940]

In view of the discussion of the various manifestations of the standard of legal certainty under the ECHR, the ICESCR and the law of the EU, as presented above, can we make some general statements about the standard's scope and application? In the context of a discussion of the features of domestic implementing legislation, the foregoing has made clear that the notion of legal certainty demands that implementing legislation is drafted in clear and precise terms. Moreover, the law must be accessible and foreseeable, requirements that are intended to ensure that individuals can inform themselves about the laws in force.

10.3.3.2 Observance of applicable international and national law

Another legislative standard that may be derived from our examination of international legal practice in Part II is 'consistency with applicable law'. This requirement provides that domestic implementing legislation should be in conformity with other laws in force. As we have seen, they may have international or national origins. In Part II we described the relation

936 *Beian v Romania (no. 1)* (App no 30658/05) ECHR 2007-V 193, par. 39.
937 *Brumărescu v Romania* (App no 28342/95) ECHR 1999-VII 201, par. 61.
938 T.C. Hartley, *The foundations of European Union law. An introduction of the constitutional and administrative law of the European Union* (8th edn OUP, Oxford 2014) 162-164. Also Chalmers, Davies and Monti, *European Union law* (n 468) 441.
939 CJEU, *Heinrich*, case C-345/06, judgment of 10 March 2009, ECLI:EU:C:2009:140, par. 44.
940 Hartley, *The foundations of European Union law* (n 938) 162-164. Also Chalmers, Davies and Monti, *European Union law* (n 468) 441. For a thorough analysis of the principle of legal certainty and the related concept of legitimate expectations, see P. Craig, *EU Administrative law* (Collected courses of the Academy of European Law, 2nd edn OUP, Oxford 2012) 549-589.

between domestic implementing legislation and other laws applicable to the same subject matter with the metaphor of a double-edged sword. It makes clear that references to national and international norms in an international legal instrument serve to ensure the effectiveness of that instrument and, at the same time, to protect the sovereignty of states.

We have seen that many international legal regimes refer to national laws.[941] Such references can be divided into two categories. On the one hand, domestic implementing legislation should not contravene domestic laws of higher rank, as it would render the implementing legislation ineffective.[942] This standard of observance of applicable law is thus closely linked to the standard of effectiveness. On the other hand, international legal regimes may expressly grant states the freedom to 'fill in' parts of it on the national level. Examples include, as we have seen, the liberty to adopt immunity or leniency provisions and to provide for conditions for extradition under the CTOC[943], to determine the meaning of the terms 'temporary' and 'permanent' residence under the IHR[944], to extend the scope of the CCTMW to categories of waste that are labelled 'hazardous' under national law[945] and to specify during which nocturnal hours seafarers under 18 are allowed to work.[946] Such references indicate that international policy makers considered it unnecessary or undesirable to harmonise these particular elements. From a different angle, the inclusion of such references in international legal regimes may be said to serve the protection of state sovereignty.

In addition, our analysis has made clear that international legal regimes often refer to other international norms.[947] Again, these references serve two distinct purposes, both of which are relevant for the drafting of domestic implementing legislation. On the one hand, they make clear that domestic implementing legislation should respect certain legal limits. They consist of, *inter alia*, the principles of sovereign equality and territorial integrity of states and the principle of non-intervention in the affairs of other states under the CTOC[948] and the ICSFT[949] and obligations under international treaties establishing transnational trade areas or customs unions under the CITES[950]. On the other hand, a reference to other, existing international norms may clarify that the regime is intended to build on, instead of deviate from, those existing norms. As a consequence, domestic implementing legislation should equally rely on those norms. Examples include, as we have seen, the

941 CTOC, ICSFT, IHR, FCTC, CITES, CCTMW, MLC and CDWDW.
942 This point has been expressly made with regard to CTOC and ICSFT. Section 6.1.3.2 with regard to CTOC and section 6.2.3.2 with regard to ICSFT.
943 Section 6.1.3.2.
944 Section 7.1.3.3.
945 Section 8.2.3.2.
946 Section 9.1.3.3.
947 ICESCR, CTOC, ICSFT, IHR, FCTC, CITES, CCTMW, MLC and CDWDW.
948 Section 6.1.3.2
949 Section 6.2.3.2.
950 Section 8.1.3.3.

reliance on 'international guidelines and protocols established by UN agencies' in the interpretation of article 12 ICESCR on the rights to sexual and reproductive health[951], on 'relevant initiatives of regional, interregional and multilateral organisations against money laundering' under the CTOC[952], on the packaging and labeling of hazardous waste in accordance with 'generally accepted and recognized international rules and standards' under the CCTMW[953] and on the regulation of penalties under the MLC in accordance with the UNCLOS[954]. Despite their distinct purposes, references to other international norms in international legal regimes have in common that they aim to ensure that the national legislature takes into account other relevant international norms when it is adopting domestic implementing legislation.

Such references thus also have some harmonising effects, as they contribute to the convergence of domestic legislation of the policy fields covered by the international legal norms to which is referred. The references' normative force differs, however. In some instances, they make clear that observance of a specific international legal norm is compulsory. In other situations, references are formulated in looser terms. In order to perform their obligations to implement article 12 ICESCR, states 'should be guided by contemporary human rights instruments and jurisprudence, as well as the most current international guidelines and protocols established by United Nations agencies, in particular WHO and the United Nations Population Fund (UNFPA)'.[955]

The distinction between references to national law and references to international law may prove not entirely accurate if we try to fit in national legislation which serves to implement legislation adopted in the framework of the EU. However, the same mechanism applies: the enforcement of domestic implementing legislation should not contravene 'EU law and its general principles', which includes human rights principles, as we have elaborately discussed in section 5.1.2.4.

This raises the question whether compliance with human rights should be considered as an autonomous legislative standard to be distinguished from the observance of (other) national and international law. Practice with regard to the regulation of implementing legislation suggests a negative answer to this question, since we have established that only the IHR stress the importance of 'dignity, human rights and fundamental freedoms' in the context of the imposition of health measures on travelers.[956] Admittedly, the MLC also contains references to human rights and fundamental freedoms, but these are *internal* references, as they point to the rights codified in the MLC itself.

951 Section 4.2.3.4.
952 Section 6.1.3.2.
953 Section 8.2.3.3.
954 Section 9.1.3.3.
955 Section 4.2.3.4.
956 Section 7.1.3.2.

In contrast, the principle of non-discrimination seems to be more firmly embedded as an important legislative standard to be observed in the adoption of domestic implementing legislation. Similar to the aforementioned general principles of EU law, the standard of non-discrimination may be difficult to categorise, as it may apply on the basis of both international law and national law. The legislative standard of non-discrimination has been recognised under the ECHR[957], the ICESCR[958], the IHR[959] and the CDWDW[960]. It demands that preferential treatment of persons in domestic implementing legislation is allowed only if that distinction could be, in the phrase used by the ECtHR, 'objectively and reasonably justified'.[961]

In sum, from international practice we can derive a legislative standard that prescribes the observance of international and national law in the adoption of domestic implementing legislation. It may be considered to encompass the principle of non-discrimination as well. In the context of EU law, references to 'EU law and its general principles' fulfil a similar role.

10.3.3.3 Consultation with stakeholders

The next legislative standard that could be inferred from the international legal regimes discussed in Part II entails the requirement to enter into consultation with relevant parties in the process of the adoption of national implementing legislation.[962] Three questions arise: with whom, why and when?

Which parties are deemed relevant? The CDWDW expressly refers to representative organisations of workers and employers.[963] As we have seen in section 4.2.3.3, under the ICESCR, stakeholders may include workers' and employers' organisations, partners that may be considered particularly relevant for the adoption of domestic implementing legislation on labour rights. Other interest groups encompass organisations that represent minority groups.[964] Of the regimes that have been part of our examination, the FCTC has the most extensive enumeration of actors that should be involved in the consultation process: businesses, restaurant and hospitality associations, employer groups, trade unions, the media, health profes-

957 Section 4.1.3.2.
958 Section 4.2.3.2.
959 Section 7.1.3.2.
960 Section 9.2.3.4.
961 *Marckx v Belgium* (n 50) par. 43.
962 Under EU law, however, there is no obligation for member states to organise a consultation process whenever they adopt domestic implementing legislation. On the contrary, consultation is part of the EU's legislative process. On this subject, see J. Mendes, *Participation in EU-Rulemaking. A rights-based approach* (Oxford Studies in European Law, OUP, Oxford 2011).
963 Section 9.2.3.5.
964 CESCR, 'General Comment no. 23' (n 397) par. 56 and 65, sub c. Also paragraphs 35 and 40 on exceptions to limitation on daily hours of work or weekly rest periods respectively.

sionals, organisations representing children and young people, institutions of learning or faith, the research community and the general public.[965] In short, stakeholders include groups and organisations whom are particularly affected by the envisaged implementing legislation.

What purpose does consultation with stakeholders serve? The CESCR has argued that, in relation to the domestic legislation that gives effect to the right to take part in cultural life, as embedded in the ICESCR, consultation with stakeholders ensures that domestic implementing legislation is 'acceptable to the individuals and communities involved'.[966] Similarly, under the FCTC, consultation serves to 'facilitate support for legislation after its enactment'.[967] One motivation for the involvement of stakeholders thus seems to consist of public support for domestic implementing measures.

Consultation with stakeholders is closely related to, and may considerably overlap with, the participation of civil society. Under the FCTC, civil society seems to encompass academic institutions and non-governmental organisations.[968] The treaty itself is unambiguous on the importance of civil society participation; it is considered 'essential' in attaining the objectives of the FCTC and its Protocols.[969] Elsewhere the aim of civil society participation is described in more vague terms, as it is believed to 'create a climate of attitude that [*inter alia*] identifies legislative priorities and helps develop and enforce legislative measures' implementing the FCTC.[970] Thus, here the main rationale for stakeholder participation seems to lie in the desire to enact materially sound legislation that can be applied and enforced in practice.

The question remains in which phase of the legislative process the consultation should be undertaken. A corollary of the aforementioned purposes of consultation is, first and foremost, that stakeholders must be involved during the legislative drafting process. However, this involvement should not cease upon the enactment or entry into force of the applicable laws, as may be inferred from the international legal regimes discussed in Part II. Rather, under the ICESCR, it is considered 'advisable' to continue stakeholder consultation after the moment on which the adopted laws come into effect; it is also needed during the implementation in practice of the adopted legislation, and the reviewing and monitoring thereof.[971]

965 WHO, *Guidelines for implementation* (n 177) 24. A distinction must be made between the tobacco industry and other stakeholders. As regards the former, states should take into account in article 5, third paragraph, which provides that national public health policies regarding the use of tobacco product should be protected from commercial or other interests of the tobacco industry.

966 CESCR, 'General Comment no. 21' (n 395) par. 16, sub c.

967 WHO, *Guidelines for implementation* (n 177) 24.

968 WHO, *Guidelines for implementation* (n 177) 44.

969 Art 4, seventh paragraph.

970 WHO, *Guidelines for implementation* (n 177) 83.

971 CESCR, 'General Comment no. 23' (n 397) par. 56 and 65, sub c.

In sum, under the regimes discussed in Part II, consultation is believed to enhance both support for, and quality of, domestic implementing legislation, before and after its entry into force. This may be reflected in one of the 'principles' identified under article 8 FCTC, which reads:

> 'Civil society has a central role in building support for and ensuring compliance […] with measures, and should be included as an active partner in the process of developing, implementing and enforcing legislation'.[972]

10.3.3.4 Provision of information concerning legislation

Another legislative standard that must be considered part of our legislative framework is the requirement to provide information to the public with regard to the newly established or modified legal regime. Contrary to consultation, the provision of information is a non-interactive process; it is limited to the communication in one direction only: from the state authorities to the public. Furthermore, the legislative standard that will be discussed in this section does not extend to the policy instrument of information or education campaigns in general, but is confined to the provision of information *concerning the adopted legislation*. Admittedly, this distinction cannot always be easily upheld, as both campaigns may be initiated simultaneously and may even be traced back to the same legal instrument. The FCTC, for instance, refers to both; whereas on the one hand it is stated that 'there should be an education campaign […] outlining the law', on the other hand it emphasises the need of 'raising awareness among the public and opinion leaders about the risk of second-hand tobacco smoke exposure'.[973]

Having said that, to whom should the information about the newly adopted legislation be directed? Under the FCTC, the information campaign should be aimed at business owners and building managers whom are addressed by the norms of the treaty.[974] Similarly, under the CDWDW, the circle of recipients of the said information is also limited; it is recommended that the information is directed towards employers and domestic workers, the two groups whose position is directly affected by domestic measures which implement the CDWDW.[975] The information that is to be provided includes newly enacted legal obligations, enforcement arrangements and sanctions in case of violations, complaint mechanisms and legal remedies.[976] The objectives which are pursued by the provision of information to the public consist of an 'increase in the likelihood of smooth implementation

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972 WHO, *Guidelines for implementation* (n 177) 21. A similar statement is made with regard to domestic implementing measures under article 12 of the Convention. Ibid, 37.

973 WHO, *Guidelines for implementation* (n 177) 24.

974 Ibid.

975 Recommendation concerning Decent Work for Domestic Workers (n 829) par. 21, sub d and f.

976 Ibid.

and high levels of voluntary compliance'.[977] Also in the context of the implementation of the obligations contained in the ICESCR, the CESCR has recommended to undertake information campaigns in order to bring the new legislation to the attention of its addressees.[978]

From the foregoing it may be concluded that international law envisages the instigation of information campaigns following the adoption of domestic implementing legislation. They should be aimed at the persons or entities affected by the newly adopted legislation. However, it must be added that this legislative standard has emerged under only three of the regimes discussed in Part II.

10.3.3.5 Monitoring of compliance

Once domestic implementing legislation has entered into force, it has been considered imperative to monitor compliance with the newly established regime. This legislative standard has been recognised under several of the international legal regimes discussed in Part II and consists of multiple elements. First and foremost, it encompasses the obligation to establish mechanisms for compliance monitoring at the national level.[979] The existence of these arrangements, of course, is a prerequisite for the enforcement of the newly adopted legislation in practice, which is probably the reason to expressly include this standard in the applicable international legal instrument. On the other hand, this standard may be viewed as self-evident, thus not requiring any codification. The fact is, however, that of the regimes discussed in Part II, only four have made reference to the legislative standard to establish mechanisms for compliance monitoring.

Under the CDWDW this obligation is formulated in concise terms, without further details on the specific features of these monitoring mechanisms.[980] A similar statement can be made with regard to the monitoring of compliance of implementing legislation under the ICESCR. In section 4.2.3.5, it was argued that, apart from references to 'national mechanisms for […] monitoring' and 'effectively functioning labour inspectorates', there is hardly any more detailed provision on the scope and substance of the legislative standard to ensure the monitoring of compliance. This is different under the MLC, where a similar treaty provision is elaborated in 'the Code'. As we have seen in section 9.1.3.4, the Code is relatively elaborate in respect of the requirements pertaining to the monitoring of compliance. They encompass, *inter alia*, the provision that inspectorates must be competent

977 WHO, *Guidelines for implementation* (n 177) 24.
978 Section 4.2.3.9.
979 MLC art V, second paragraph; CDWDW art 17, second paragraph; CESCR, 'General Comment no. 15' (n 409) par. 50; CESCR, 'General Comment no. 16' (n 410) par. 24. Also CESCR, 'General Comment no. 23' (n 397) par. 47, sub f.
980 CDWDW art 17, second paragraph.

(i.e., in possession of the necessary expertise) and independent.[981] On the level of individual inspectors, it is stated that 'inspectors [should] have the training, competence, terms of reference, powers, status and independence necessary or desirable so as to enable them to carry out [their task]'.[982] These powers include the power to board ships, to carry out examinations, tests and inquiries and to give orders with a view of addressing 'deficiences'.[983] Furthermore, it must be guaranteed that inspectors have the 'status and conditions of service to ensure that they are independent of changes of government and of improper external influences'.[984] Finally, inspections must be performed on a regular basis and at least once in a three year period.[985] Less detailed provisions on compliance monitoring can be discerned under the FCTC.

In short, most of the international legal regimes seem to presuppose a responsibility of state parties to ensure the monitoring of compliance with the newly established legal regime; only four of them include an express codification of this legislative standard. The MLC and its supporting documents contain the most elaborate description this standard and stress, *inter alia*, the importance of competent and independent inspectorates.

10.3.3.6 Enforcement

In accordance with the legislative standards which may be most widely accepted under the international legal regimes we have discussed in Part II, domestic implementing legislation must be enforced. Contrary to the standard of compliance monitoring, 'enforcement' entails the use of force in response to non-compliant conduct. The relevant provision of the CCTMV is exemplary for the international codification of the legislative standard of enforcement and requires state parties to 'enforce [its provisions], including measures to prevent and punish conduct in contravention of the Convention'.[986] Similarly, under the CDWDW, state parties are under the duty to 'develop and implement measures for […] enforcement and penalties […]'.[987] This requirement, which is closely related to the legislative standard of compliance monitoring, may be considered to encompass two elements. First, it demands that states put in place a regulatory framework for the enforcement of implementing legislation (regulatory element). Second, this regulatory framework should be used by the responsible authorities in order to ensure that legislation is enforced in practice (practical element).

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981 Regulation 5.1.2, first paragraph.
982 Standard A5.1.4, third paragraph.
983 Standard A5.1.4, seventh paragraph.
984 Standard A5.1.4, fourth paragraph.
985 Regulation 5.1.4, first paragraph, and standard A5.1.4, fourth paragraph.
986 Section 8.2.3.3.
987 Section 9.2.3.3.

The regulatory element of enforcement requires first and foremost the identification of the national authorities responsible for the regime's enforcement. Often, this will be the same entity or entities as those endowed with the task of compliance monitoring, as we have discussed in the previous section. Furthermore, states should put in place the legislative framework required for the imposition of penalties in response to violations of domestic implementing legislation. In this regard, the analysed international legal regimes, including the legislative instruments adopted in the framework of the EU, take a rather uniform approach, which consists of effective, proportionate and sufficiently deterrent penalties. Under EU law, this obligation is supplemented with the principle of equivalence, which demands that the conditions under which infringements of EU law are punished should be equal to the enforcement of similar domestic legal provisions.[988]

In addition to the imposition of penalties, the international legal regimes may refer to other enforcement measures to be implemented on the domestic level. In the terminology of the MLC, they are labelled 'corrective measures'.[989] The CESCR refers to *inter alia* 'administrative measures' when it clarified the obligations under the ICESCR.[990] In exceptional cases, the international legal regimes more specifically prescribe the nature of such alternative enforcement measures. Under the FCTC, for instance, states are called upon to endow their national enforcement authorities with the authority to seize, forfeit and destroy' non-compliant tobacco products.[991] Under the CITES, states are obliged to take measures for the confiscation or return to the exporting state of specimens that were traded unlawfully.[992] These exceptions notwithstanding, our examination has demonstrated that states are left with a wide margin of discretion to further specify the open norms pertaining to the severity of penalties and on the nature of alternative enforcement measures.

The regulatory element of the legislative standard to enforce domestic implementing legislation seems to fulfil a slightly different role under two of the regimes that we have discussed in Part II, both of which are part of international criminal law: the CTOC and the ICSFT. Their character differs from the other regimes' nature, because under the CTOC and the ICSFT, enforcement itself is the policy aim central to the regimes; both treaties' core obligations demand the establishment as criminal offences of the acts that fall under their scope and to impose sanctions in response to the criminalised conduct. Compared to the other international legal regimes, therefore, the requirement of enforcement seems be more prominent under the CTOC and the ICSFT. However, the obligation to establish as criminal offences

988 Section 5.1.2.4.
989 Section 9.1.3.4.
990 Section 4.2.3.5.
991 Section 7.2.3.3.
992 Section 8.1.3.4.

infringements of the international legal regimes' provisions, is by no means limited to international criminal law. As we have seen, criminalisation may also be required under the positive obligations derived from the ECHR[993], the ICESCR[994], the FCTC[995] and the CCTMW.[996]

The second element requires that domestic implementing legislation should be enforced *in practice*. Arguably, this requirement is self-evident and must be read into the treaty or other obligations that call upon states to ensure the effectiveness or the enforcement of the international legal instrument at hand. Nevertheless, the practical element of enforcement has received separate attention under the ECHR. In the view of the ECtHR, states have to 'properly implement' the applicable laws, which may entail *inter alia* the obligation to institute criminal proceedings in response to any intentional taking of life under article 2 ECHR.[997]

10.3.3.7 Remedies

Furthermore, the provision of legal remedies may been considered imperative for the adoption of domestic implementing legislation. 'Remedies' can be loosely defined as legal procedures open to individuals to enforce rights to which they are entitled; the availability of remedies enables aggrieved individuals to enforce their rights. For the purpose of the present study, we are particularly interested in the remedies to enforce rights entrenched in domestic implementing legislation.

The legislative standard to provide for remedies differs from the enforcement of domestic implementing legislation by non-judicial public authorities, such as labour inspectorates or the criminal prosecutor. On the other hand, it remains true that remedies serve as a means to enforce domestic legislation, just as labour inspectorates and the criminal prosecutor do. This common purpose, namely enforcement, has been underlined in the framework of the implementation of the positive obligations under the ECHR. As we have seen in section 4.1.3.3, under the right to life, the ECtHR makes a distinction between the 'intentional taking of life' and other breaches of the right to life. While the former requires action by the public prosecutor, the latter category may also be addressed through the establishment of legal procedures which can be followed *by individuals* in order to obtain civil redress. For the purpose of the present section, therefore, it is important to note that the availability of legal remedies *complements* the enforcement of legislation through public authorities.

993 Sections 4.1.2.1, 4.1.2.2 and 4.1.3.3.
994 Section 4.2.3.5.
995 Section 7.2.3.3.
996 Section 8.2.3.3.
997 Section 4.1.3.3.

The legislative standard to ensure the existence of legal remedies for aggrieved individuals has been acknowledged under several of the regimes discussed in Part II. Since remedies serve as an instrument to enable individuals to enforce their rights, their importance has been recognised primarily under legal regimes that endow individuals with certain rights. Therefore, it may come as no surprise that the establishment of remedies, as a legislative standard, can be found most notably under human rights instruments. Perhaps the most prominent codification of the obligation to provide for an effective remedy can be found in article 13 ECHR, as was discussd in section 4.1.3.3.

Under the ICESCR, the existence of legal remedies in order to enforce the rights embedded in the treaty has been considered 'advisable', as we have seen in section 4.2.3.6. The purpose of remedies under the ICESCR lies in the enforcement of rights through reparation, which encompasses restitution, compensation, satisfaction or guarantees of non-repetition.[998] While the specific features of the required remedies remain unspecified, the CESCR has formulated three principles which must be observed: availability, accessibility and quality. Together, they ensure that the remedies that have been put in place truly enable an individual to enforce his right(s).

The right to a legal remedy is also firmly established under EU law and also applies to rights and obligations prescribed by national implementing legislation. Its origins may be traced back to the CJEU's ruling in *Johnston*, in which it was called 'a general principle of law which underlies the constitutional traditions common to the member states'.[999] Nowadays it is often referred to as the principle of effective judicial protection.[1000] It is codified in article 19 TEU, which provides:

> 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

For the purpose of this section, we limit ourselves to remedies available to individuals, as opposed to EU institutions or member states, to enforce rights conferred upon them by implementing legislation adopted by the EU member states. Such remedies must be obtained before national courts, as individuals do not have the right to directly institute proceedings before the CJEU (or the General Court).[1001] Typically, in situations like these, an

998 Section 4.2.3.6.

999 CJEU, *Johnston*, case C-222/84, judgment of 15 May 1986, ECLI:EU:C:1986:206, par 18.

1000 For instance CJEU, *UNIBET*, case C-432/05, judgment of 13 March 2007, ECLI:EU:C:2007:163, par. 37; CJEU, *Associação Sindical dos Juízes Portugueses*, case C-64/16, judgment of 27 February 2018, ECLI:EU:C:2018:117, par. 35.

1001 Article 263, second and fourth paragraph, TFEU. However, national courts could request the CJEU to issue a so-called 'preliminary ruling' under article 267 TFEU. They do so by referring particular questions on the interpretation of EU law, raised in a legal case before it, to the CJEU.

individual claims that his rights under EU law have been violated as a consequence of inadequate implementation on the part of the member state.

Does EU law further specify the requirements for national remedies? Some basic elements are included in article 47 CFR.[1002] But even before the entry into force of the CFR, the CJEU had developed a doctrine regarding national remedies. This doctrine basically entails three principles, which were stated by the CJEU in *Rewe* in 1976:

> '[I]n the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature'.[1003]

The CJEU thus departs from the view that member states are at liberty to shape the legal remedies in their domestic legal order, which is commonly called the principle of procedural autonomy. However, member states must observe two additional principles. First, the conditions for the enforcement of rights derived from EU law must be identical to the enforcement of rights derived from purely national law (principle of equivalence). Or, as the CJEU put it, the 'procedural rule at issue [should apply] without distinction to actions alleging infringements of Community law and to those alleging infringements of national law'.[1004] The application of this standard thus requires a comparison between the procedural safeguards applicable to rights derived from EU law and national law. Second, the available remedy must provide effective protection (principle of effectiveness).[1005] In recent case law, this principle is referred to as requiring that '[…] the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from EU law, […] do not render practically impossible or excessively difficult the exercise of rights conferred by EU law'.[1006] Since

1002 It reads: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'.

1003 CJEU, *Rewe* (n 515) par. 5.

1004 For instance, CJEU, *Edis*, case C-231/96, judgment of 15 September 1998, ECLI:EU:C:1998:401, par. 36.

1005 Woods and Watson, *EU Law* (n 867) 183-184.

1006 CJEU, *W and others*, case C-621/15, judgment of 21 June 2017, ECLI:EU:C:2017:484, par. 27.

Rewe the CJEU has produced a large amount of case law on the application of those principles to individual cases.[1007]

A different, but closely related, question concerns the situation in which an individual has suffered losses as a result of the failure of a member state to correctly implement EU directives. Thus, it is a very particular kind of remedy available to individuals under EU law. In such a situation, should the state award compensation? The CJEU has answered this question in the affirmative and has accepted the existence of state liability, provided that the conditions developed in its case law have been fulfilled. The conditions originate from the *Francovich* judgment:

> 'The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.'[1008]

In *Brasserie du Pêcheur*, which concerned the liability of member states for violations of EU law in general (instead of for non-transposition of a directive), the CJEU 'replaced' the second condition from the *Francovich* judgment, cited above, with the requirement that the breach committed by the state is 'sufficiently serious', although the criteria developed in *Francovich* still apply in situations of non-transposition of EU directives.[1009] The application of this test, the CJEU stated, involves *inter alia* an assessment of the clarity and precision of the rule breached, and of the measure of discretion left by that rule to the national authorities.[1010] If the EU instrument at hand leaves discretion to the member state to make 'legislative choices', a sufficiently serious breach cannot be established until the state has 'manifestly and gravely' disregarded the limits of its rule-making powers. If, on the other hand, the EU instrument leaves only a small margin of discretion, or no discretion at all, a mere infringement of EU law may be enough to find a 'sufficiently serious' breach.[1011]

If we leave the domain of EU law and return to other international legal regimes, discussed in Part II, it becomes clear that a particular kind remedy lies in complaint mechanisms. In the framework of the CDWDW, state parties have an obligation to provide for complaint mechanisms,

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1007 For a recent overview, see M. Avbelj, 'National procedural autonomy: concept, practice and theoretical queries' in: A. Lazowski and S. Blockmans (eds) *Research handbook on EU institutional law* (Edward Elgar Publishing, Cheltenham and Northampton 2016) 421-440.

1008 CJEU, *Francovich,* cases C-6/90 and C-9/90, judgment of 19 November 1991, ECLI:EU:C:1991:428, par. 40.

1009 CJEU, *Brasserie du Pêcheur*, joined cases C-46/93 and C-48/93, judgment of 5 March 1996, ECLI:EU:C:1996:79, par. 51-55. Also Woods and Watson, *EU Law* (n 867) 213.

1010 CJEU, *Brasserie du Pêcheur* (n 1009) par. 56.

1011 CJEU, *Dillenkofer,* joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, judgment of 8 October 1996, ECLI:EU:C:1996:375, par. 25.

which must be 'effective' and 'accessible'.[1012] Although the treaty and the applicable Recommendation are silent on the origin of those complaints, the group most likely to issue complaints, consists of domestic workers, given their vulnerable position.[1013] Similarly, under the MLC, flag states have a duty to provide for 'on-board complaint procedures for the fair, effective and expeditious handling of seafarer complaints'.[1014] These qualifications of the applicable complaint procedure have a general nature; the regimes at hand do not prescribe in more detail the various requirements that should be met. Apparently, this is for states themselves to decide.

In sum, a legislative standard to provide for legal remedies as a means of enforcement, including complaint mechanisms, can be discerned under several of the international legal regimes discussed in Part II. Criteria pertaining to the substance of such remedies are largely left for state parties to decide, a freedom which may be described as 'national procedural autonomy'. An exception to this general rule may be found under the ICESCR, where it has been argued that remedies must meet the standards of availability, accessibility and quality. Similarly, under EU law national remedies should respect the principles of effectiveness and equivalence. Finally, article 13 ECHR demands a remedy that is effective 'in law and practice'.

10.3.3.8 Ex post evaluation of legislation

Finally, we can derive from the regimes analysed in Part II a legislative standard which requires the evaluation of domestic implementing legislation after it has been adopted (*ex post*). First, several provisions of the ICESCR have been understood as containing an obligation to periodically review legislation in order to assess whether it still corresponds to the rights laid down in the treaty.[1015] A similar requirement can be identified under various provisions of the FCTC.[1016] It must be added, however, that this legislative standard can be found under two of the examined regimes only, which may be viewed as an indication that international policy makers do not demonstrate a widely shared willingness to accept such an standard.

What is the purpose of the *ex post* evaluation of implementing legislation? This purpose may be twofold, as appears from our analysis in Part II. First of all, the evaluation of implementing legislation enables state parties to assess whether they comply with the applicable international

1012 Art 17, first paragraph. A similar requirement can be identified under the MLC (regulation 5.2.2).

1013 Article 15, first paragraph, sub b, of the Convention, refers to the 'investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies in relation to domestic workers'.

1014 Section 9.1.3.4.

1015 Section 4.2.3.7.

1016 Section 7.2.3.5.

legal regime. Second, the evaluation of implementing measures is an important towards the improvement of those measures.[1017] Arguably, both aims are closely related, especially in the context of regimes which can be characterised by their 'dynamic' nature. As an example, we could refer to the ICESCR, which contains, as we have seen, the obligation the 'progressively realize' the rights set forth in the treaty. Thus, the ICESCR requires the *improvement of* domestic law from a human rights' perspective rather than a static legal situation to be realised by the state parties. Against this background, it could be argued, periodic *ex post* evaluation of domestic legislation is of great importance, as it is a tool to measure progress on the part of the state.

10.3.4 Conclusion

With regard to legislative standards, our examination of the international legal regimes indicates that the standard of effectiveness, in various manifestations, could be viewed as the overarching standard that must be observed by states bound to which the regime applies. According to this standard, states must ensure that domestic implementing legislation is adopted and applied in such a way that a specified international legal regime is effective. Furthermore, the regimes discussed in Part II justify the conclusion that several legislative standards of a subsidiary nature ultimately serve the purpose of effectiveness. In this chapter, eight of those standards have been identified. Our exploration of the scope and substance, as conducted in the previous sections, has unveiled both their rudimentary character and the high level of fragmentation that can be observed.

With regard to the rudimentary character of the legislative standards, it is not easy to overlook the fact that they have been formulated in broad terms, without giving much detail as to how those standards must be complied with. For instance, it is clear that the monitoring of compliance with domestic implementing legislation, under some of the analysed regimes at least, is considered imperative under the applicable international legal regime. *How* this compliance monitoring must be performed, however, is often not described in detail.

With regard to fragmentation, it is (re-)emphasised that the legislative standards under the various international legal regimes discussed in Part II differ from one regime to the other; some regimes contain more legislative standards than other regimes. Moreover, fragmentation can even be observed *within* single international legal regimes. For instance, a specified legislative standard may apply to some provisions of the regime only; it is thus of no relevance to other norms contained in the said regime. In sum, as we may conclude here, the regulation of domestic implementing legislation under the regimes discussed here is neither extensive nor coherent.

1017 WHO, *Guidelines for implementation* (n 177) 67.

10.4 Binding character of legislative standards

In the previous sections we have presented, on the basis of the selected regimes discussed in Part II, the common features (or: standards) of the international regulation of domestic implementing legislation. We have also pointed to the fragmentation which emerges from our analysis; the various international legal regimes differ in the ways in which they regulate implementing legislation. This is true not only for an international legal regime vis-à-vis other regimes, but also for the various obligations to adopt implementing legislation *within* each regime.

In the present section, we highlight a third aspect of the established fragmentation. This aspect is related to the character of the legislative standards entrenched in the various international legal regimes discussed in Part II. It stresses the fact that in some cases international policy makers (and judges) have accepted legislative standards as 'binding', which for the purpose of this section must be understood as flowing from one of the formal sources of international law, most notably treaty law. In other cases, as we have seen in Part II, legislative standards have been 'accepted', but only as part of non-binding documents. Put differently, we examine the *character* of legislative standards (as binding law or as non-binding norms) which have been formulated under the international legal regimes discussed in Part II. Roughly three categories can be distinguished.

At the one end of the spectre we find legislative standards which are firmly embedded in the applicable and binding international legal instrument. In some cases they can be derived from a treaty or a decision of an international organisation on the basis of a textual analysis of the instrument at hand. An example of this category can be found in article 8, first paragraph, ICSFT, which demands the 'observance of domestic legal principles' in the adoption of national implementing legislation on the identification, detection, freezing or seizure of funds (allegedly) used for terrorist purposes. Furthermore, we could refer to the right to an effective remedy, which is codified in article 13 ECHR. In other cases, they have been read into the text by judges entrusted with the task to authoritatively interpret the text. The most prominent example of this category can be found in the jurisdiction of the CJEU, which, as we have seen, has developed an extensive body of case law on the implementation of directives and regulations by the EU member states. Whatever the method of interpretation, textual or otherwise, under both categories the source of the legislative standard can be traced back to the applicable binding legal instrument.

At the other end of the spectre we find legislative standards which cannot be directly based on a binding international legal instrument. Instead, they must be derived from supporting documents. In section 7.2.3.3 on the enforcement of the FCTC, for instance, we have seen that the 'Guidelines for Implementation' prescribe the imposition of proportionate penalties for violations of several FCTC provisions, whereas such an obligation cannot be directly derived from the FCTC text. Other documents

which codify legislative standards have names such as 'Legislative guide' or 'Toolkit for implementation in national legislation'. They tend to have one thing in common: they have been drafted by experts under the auspices of an international organisation which serves as the instrument's guardian. While the 'Toolkit for implementation in national legislation' was drafted by the secretariat of the WHO 'in response to requests for guidance', the 'Legislative guide' for the implementation of the CTOC was drafted by a professor in the field of criminal justice with the participation of other experts and national governments' and international organisations' representatives.[1018] As a result, from a legal point of view, the weight attached to the guidance provided in the documents may be rather limited.

The third category basically covers everything in between. It includes legislative standards which can be traced back to the applicable binding legal instrument. At the same time, the legislative standard at hand is *elaborated* in supporting documents. A case in point may be the Code annexed to the MLC, Title V of which covers the topic of 'compliance and enforcement'. It contains a binding norm and imposes the duty to bestow upon inspectors the necessary powers for *inter alia* the boarding of ships and the performance of inspections.[1019] This (binding) *standard* is supplemented with a (non-binding) *guideline* which prescribes the attribution of several additional powers to inspectors, including the power to question the ship's master and the power to take samples of products.[1020] In other words, legislative standards which can be categorised under this group are partly binding, and partly non-binding.

The examples included in the second and third category make clear that the distinction between three groups is, indeed, a rough one; in the end, it cannot always be determined from the outset whether an established legislative standard is derived from the binding legal text itself. A typical example is the ICESCR. While the legislative standard of non-discrimination is firmly embedded in the treaty itself, many of the other legislative standards referred to in section 4.2 seem to be 'invented' by the CESCR in the general comments. In this regard, it could be argued that the general comments produced by the CESCR fulfil a similar function as implementing guidelines, handbooks etc. under the second category. This view may be contested by others who take the stance that the CESCR's general comments do not *complement* the text of the ICESCR, but merely serve as an *interpretation of* it.

In sum, the extent to which a particular legislative standard can be traced back to the international legal instrument itself, can be a matter of dispute. The availability of an authoritative interpretation, most notably through courts on the basis of compulsory jurisdiction, can provide some welcome guidance for policy makers involved in the adoption of domestic

1018 WHO, 'Toolkit. Questions and answers' (n 627) 4. UNODC, *Legislative Guides* (n 554) v.
1019 Standard A.5.1.4, seventh paragraph.
1020 Guideline B.5.1.4, eighth paragraph.

implementing legislation. In other situations, similar direction can be given in the form of implementing guidelines, legislative guides etc. This information is not only relevant as an element of our examination of the international law governing implementing legislation, but also indicates to what extent states, as negotiating parties, have (voluntarily) contracted legal *obligations* in this regard. Apparently, we may conclude, states are reluctant to accept legislative standards of a binding nature; they may consider it neither necessary nor desirable to restrict space for national decision making on implementing legislation.

10.5 Conclusion

In this chapter, we have approached the findings of Part II more systematically. This view has enabled us to identify the commonalities and differences of the various international legal regimes that have been under examination in the previous part. The findings in this chapter may be summarised as follows.

The regimes discussed in Part II constitute 'legal harmonisation', instead of transplantation or unification. This means that the policy aims to be achieved are formulated on the international level, whereas the means to achieve those aims within domestic legal orders are for state parties to decide. An important aspect of this harmonisation is the imposition of minimum requirements which may be complemented with domestic laws that provide additional protection to a (public) interest. In a few cases, we have found that the inclusion of optional provisions may contribute to further harmonisation, as may the permission to consider domestic 'equivalent measures' a substitute for the implementation of certain aspects of regimes that are part of international labour law.

Furthermore, we have deduced a virtual framework on the quality of implementing legislation under international law. This framework includes requirements, entrenched in binding or non-binding instruments, that govern the way in which the domestic implementation through legislative means must be performed. It has been argued that 'effectiveness' is the most prominent of elements incorporated in the framework. That standard is, however, complemented by subsidiary legislative standards which have been discussed in section 10.3.3. Together, they constitute a rudimentary set of criteria that must be observed, either mandatory or non-mandatory, by states that adopt implementing legislation in their national legal order.

We have also argued that the application of legislative standards is highly fragmented. This means that there is no uniform set of rules that is applied by international policy makers whenever a new international legal instrument is drafted. It is for this reason that the framework presented in this chapter has been called a *virtual* framework pertaining to the quality of implementing legislation. Hence, it reflects international legal practice regarding several existing legal regimes, but is itself not part of inter-

national law. Consequently, the overview presented in Part II and in the present chapter cannot be accepted as an adequate reflection of current international law *as a whole*. Given the small number of regimes that were selected in Part II, our analysis is too limited for statements on international legal practice in general. However, such statements on international legal practice in general are not essential in order to achieve the purposes of this study. What *is* essential, on the contrary, is the assessment from the perspective of legislative quality, of the legislative standards to which international policy makers have resorted, as we have seen in Part II and in this chapter. This assessment will be conducted in the next chapter.

11 Legislative standards and the quality of implementing legislation

11.1 Introduction

In the previous chapter we explored the scope and substance of identified legislative standards under selected international legal regimes. To complete our assessment of those standards, it is imperative to determine to what extent they contribute to the quality of domestic implementing legislation. Therefore, in the present chapter we turn to existing policies -both international and national- in an attempt to determine to what extent the quest for legislative quality has been translated in international and national efforts on the subject. Subsequently we will explore theories and practices with regard to the quality of implementing legislation. In this way, this chapter aims to present an answer to the question how the notion of legislative quality must be understood and discusses the relevance of legislative standards for the assessment of a law's quality. Together, our findings will enable us to make a comparison -in Chapter 12- between current practice with regard to the inclusion of requirements pertaining to implementing legislation in international legal regimes on the one hand, and the state of the art with regard to policies to enhance legislative quality on the other hand.

The present chapter is divided into several sections. Section 11.2 is dedicated to national practices in the Netherlands and the United Kingdom with regard to quality of domestic implementing legislation in general, and legislative standards in particular. Then our focus shifts towards two international approaches, adopted in the framework of the OECD and the EU respectively (section 11.3). Building on the findings from these national and international practices, the concept of 'quality of legislation' and its most important (and problematic) aspects will be further elaborated in section 11.4.

11.2 National approaches to the quality of implementing legislation

11.2.1 Introduction

How do national governments approach the concept of legislative quality, or, more specifically, which legislative standards have been identified in order to increase the quality of legislation in general and of implementing legislation in particular? For reasons of space, the analysis contained in this chapter is limited to two domestic legal orders: the Netherlands and

the United Kingdom. Their inclusion is not only the somewhat arbitrary product of the language barrier; also the diverse way in which international law is received in their legal orders and their characterisation as civil law and common law justify the selection these two legal orders. Of course, the findings presented in this chapter cannot be said to reflect *all existing* national approaches to implementing legislation; the Netherlands and the United Kingdom serve as mere examples.

11.2.2 The Netherlands

11.2.2.1 General policy on the quality of legislation, including implementing legislation

The backbone of Dutch policy on legislative quality has been laid down in the Instructions for law-making. They are codified in an internal guidance document that was adopted by the prime-minister. The initial version of the document in its present form entered into force on 1 January 1993, although earlier guidance documents go back to 1951;[1021] over the years, the Instructions for law-making have been revised several times.[1022] They apply to various kinds of legislation that is adopted by the central government[1023] and, if expressly indicated, to 'treaties, binding decisions of the European Union and other decisions of international organisations'.[1024]

The Instructions for law-making consolidate the evolution of Dutch legislative policy, the modern origins of which may be traced back to the early 1990's, when a policy document was formulated 'with a view of the further development and implementation of a general legislative policy, aimed at the improvement of rule of law aspects and administrative aspects of government policy'.[1025] To this end, several measures were proposed, including the formulation of quality standards applicable to legislation.[1026]

These standards require, first of all, that legislative proposals do not infringe on law of higher rank, such as EU law and (under Dutch constitutional law) international law, and on general principles of law such as the principle of legal certainty. In this context, it was noted that to an increasing extent international and EU law had been restricting room for domestic policy making. Therefore, it was expressly added, attention had to be paid to supranational law, with regard to both the development of 'autonomous'

1021 Ph. Eijlander and W. Voermans, 'Nieuwe aanwijzingen voor de regelgeving' *Nederlands Juristenblad* 5 (1993) 169-174, 170.

1022 'Instructions for law-making', issued by the Prime-Minister (18 November 1992) (*Stcrt*. 1992, 230). Available through http://wetten.overheid.nl (in Dutch) (accessed 29 March 2018).

1023 Instruction 4.

1024 Instruction 1.

1025 Minister van Justitie, 'Zicht op wetgeving' (5 March 1991) Parliamentary Papers II 1990/91, 22008, no. 2.

1026 Ibid, 22.

national legislation and national implementing legislation.[1027] Second, legislation must, in an efficient manner, contribute to the realisation of the formulated policy objectives. The standards of effectiveness and efficiency require a clear and exhaustive formulation of policy aims underlying the proposed piece of legislation.[1028] Third, the requirements of subsidiarity and proportionality serve to protect the 'balance between government and society'. Subsidiarity demands that, as a rule, responsibilities must be entrusted to municipal and provincial governments and non-governmental actors, unless action by the central government is inevitable. 'Proportionality' refers to the standard that requires a balancing between the costs and benefits of the intervention. Fourth, legislation must be practicable and enforceable. The inclusion of this standard is motivated by the assumption that laws which cannot be applied in practice and enforced will remain ineffective. This, it is noted, is unacceptable from a policy perspective and a rule of law perspective.[1029] Fifth, laws must contribute to the coherence of the whole body of legislation in force for the purpose of transparency and the coordination of policies and exercise of powers. In absence of consistency with other applicable laws, it is argued, the achievement of the formulated policy aims will be impeded.[1030] Sixth, laws must be simple, clear and accessible.[1031] Although it was acknowledged that in practice it may not always be possible to satisfy all of the aforementioned legislative standards, policy makers should seek to observe the quality criteria to the largest extent possible.[1032]

A few years later, in 1994, the Dutch government established a ministerial commission on competition, deregulation and legislative quality in an attempt to 'reinforce economic growth'.[1033] As part of this effort, the government pledged to decrease and simplify laws that unjustifiably impeded civilian and economic life. This approach entailed, *inter alia*, a decrease of the regulatory and administrative burden to a minimum, the repeal of laws that unnecessarily obstruct competition and the enhancement of legislative quality.[1034] In 2000, the Dutch government reaffirmed the importance of the quality standards it had formulated less than a decade before, although it observed an increased emphasis on the criteria of practicability and enforceability.[1035]

1027 Ibid, 25.
1028 Ibid.
1029 Ibid, 27.
1030 Ibid, 29.
1031 Ibid, 30.
1032 Ibid, 16.
1033 Minister van Justitie, 'Marktwerking, deregulering en wetgevingskwaliteit' Parliamentary Papers II 1994/95, 24036, no. 1, p. 1.
1034 Ibid, 2-3.
1035 Minister van Justitie, 'Wetgevingskwaliteitsbeleid en wetgevingsvisitatie' (6 November 2000) Parliamentary Papers II 2000/01, 27475, no. 2, p. 5-6 and 8-9.

In a policy document that was published in 2008, the government announced a shift of attention towards the decision making process; the formulation of quality criteria was not sufficient, it held, but should be complemented by guidance during the preparatory stages of the policy process.[1036] It thus introduced an 'Integrated framework for the assessment of policy and legislation'.[1037] In brief, this document includes several questions that serve as guidance for policy makers. They emphasise, among other things, the problem analysis, the policy aim, the choice of the appropriate policy instrument, its legality, and the expected consequences for affected persons, companies, the environment etc. Although the Integrated framework for the assessment of policy and legislation is closely related to the quality of legislation, it has a wider scope than quality of *legislation* as it extends to public policy in general, also encompassing policies that do not require the adoption of legislation. Therefore, for the following discussion of the legislative standards adhered to in the Netherlands we will rely primarily on the Instructions for law-making. They can be divided into three categories: instructions dealing with substantive legislative issues, instructions regarding legislative technique and instructions regarding legislative procedure.[1038]

The instructions dealing with substantive legislative issues are part of Chapter 2 of the Instructions. One of the most important provisions is Instruction 6, which provides that the process to develop a legislative proposal shall be set in motion only if the adoption of legislation is strictly necessary. Once this test has been passed, policy makers should acquire all relevant knowledge on the relevant subject and formulate in specific terms the policy aims that are to be achieved. Subsequently, it must be discussed whether the aspired objectives can be realised without government intervention and, if this is not the case, whether existing legislative instruments suffice. If this question must be answered in the negative as well, a new legislative proposal can be justified.[1039] Moreover, the Instructions for law-making stipulate that whenever policy makers consider the various options to obtain the policy objectives, special attention must be paid to the extent to which a new law may contribute to the realisation of those objectives, to the consequences of the considered piece of legislation and to the expected regulatory burden (such as administrative or financial obligations) for affected individuals, companies or other institutions.[1040] With regard to the latter element, a legislative proposal must be designed in a manner that

1036 Minister van Justitie, 'Integraal wetgevingsbeleid' (6 October 2008) Parliamentary Papers II 2008/09, 31731, no. 1, p. 7.
1037 Ibid, 7-8 and 10.
1038 N.A. Florijn, 'The instructions for legislation in the Netherlands. A critical appraisal' 4 *Legisprudence* 2 (2010) 171-191, 175.
1039 Instruction no. 7.
1040 Instruction no. 9.

reduces the regulatory burden to a minimum.[1041] In respect of foreseen negative consequences, if applicable, they must be proportionate compared to the pursued aims.[1042] Furthermore, a new law may not be introduced until it has been clarified whether it could be applied and enforced in practice.[1043] Another important legislative standard requires the observance of legal norms of higher rank, such as EU law or the Dutch Constitution.[1044]

The instructions regarding legislative technique can be found in Chapters 3, 4 and 5 of the Instructions. For instance, legal text must be formulated as concise as possible; the use of superfluous terms must be avoided.[1045] Moreover, drafters should use common language to ensure comprehensibility.[1046] Other instructions concern the consistent use of terms, not only within a single legal instrument, but across the entire body of Dutch legislation. Examples can be found in Instructions 71 and 88b, which prescribe the way in which laws should refer to the overseas territories of the Netherlands and the institutions of the European Union respectively. Furthermore, the Instructions for law-making stipulate the various elements, both formal and substantive, which should be included in the proposed legal instrument. The formal components include, among other things, the formulation of the preambular section of a law.[1047] The legislative standards with regard to substantive components of a law concern, among other things, directives which require a thorough motivation of the establishment of advisory organs or quasi-governmental organisations or the mutual recognition of goods, if applicable.[1048] Elements of laws that emerge more often include the appointment of supervisory authorities, the attribution of powers for the purpose of enforcement, a legal basis for the imposition of penalties on offenders, provisions on legal remedies against the exercise of governmental authority, provisions for the *ex post* evaluation of a law's effectiveness and transitional provisions.[1049]

The instructions on legislative procedures, codified in Chapter 6 of the Instructions, contain directives with regard to the involvement of actors in the legislative process, including departments of the central government and advisory bodies such as the Council of State. They stipulate, for instance, that legislative drafts must be assessed by the Legal Section of the Ministry of Justice and Security, in particular with regard to the extent they meet the six legislative demands described above.[1050] Furthermore, legislative drafts must be sent to the EC if they impose 'technical regulations'

1041 Instruction no. 13.
1042 Instruction no. 15.
1043 Instruction no. 11.
1044 Instruction no. 18.
1045 Instruction no. 52.
1046 Instruction no. 54.
1047 Sections 4.1, 4.2 and 4.3.
1048 Instructions no. 123a, 124a and 131c respectively.
1049 Instructions no. 133 and sections 4.9, 4.10, 4.13, 4.14.
1050 Instruction no. 254.

which may constitute an impediment to the free movement of goods across the internal borders of the EU.[1051]

11.2.2.2 Specific legislative standards applicable to legislation to implement EU instruments

In addition to the directives applicable to legislative proposals in general, Dutch legislative policy provides for instructions which apply to laws aimed at the implementation of EU instruments in particular. They can be found in Chapter 8 of the Instructions for law-making. The instructions included in this chapter aim to ensure the timely and correct implementation of binding decisions of the EU in the Dutch legal order.[1052] As a point of departure, it is stipulated that the instructions on legislation in general, as discussed above, equally apply to legislative proposals that serve to implement binding decisions of the EU, unless indicated otherwise.[1053] In other words, in principle, the legislative standards codified in the Instructions for law-making do not distinguish between implementing legislation and non-implementing legislation.

For the purpose of timely implementation, implementing legislation may not contain elements that are not strictly required by the EU instrument at hand, in order to avoid delay as a consequence of political debates on added 'national' elements for which there may be no tight deadline.[1054] For the same reason, the Dutch legislature may choose to delegate the power to adopt implementing measures to the council of ministers or even a particular minister, if the provisions that require implementation are highly detailed or leave little room for decision making on the national level.[1055] Such delegation decreases the time needed to accomplish implementation, since the adoption of legislation by the council of ministers or a particular minister tend to be less lengthy procedures.

In addition to Chapter 8 of the Instructions for law-making, the Dutch authorities have drawn up a manual on implementation matters, among them the requirements pertaining to legislation that serves to implement binding decisions adopted in the framework of the EU.[1056] These requirements primarily flow from the case law of the CJEU on questions of imple-

1051 Section 6.1a. The obligation to inform the European Commission and other EU member states in the case of the introduction of 'technical regulations' is derived from Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision on information in the field of technical regulations and of rules on information society services (codification) (OJ 2015, L 241).

1052 Instruction no. 328, explanatory note.

1053 Instruction no. 329.

1054 Instruction no. 331.

1055 Instruction no. 334, sub a and b.

1056 Ministerie van Justitie, *Handleiding Wetgeving en Europa. De voorbereiding, totstandkoming en nationale implementatie van Europese regelgeving* (Ministerie van Justitie, Den Haag 2009) <http://www.kcwj.nl> (in Dutch) (accessed 29 March 2018).

mentation. This case law has been discussed extensively in Part II and will not be repeated here. Through the manual, policy makers and legislative lawyers are supported to prepare their legislative proposals in full conformity with EU case law on the matter.

11.2.2.3 Specific legislative standards applicable to legislation to implement non-EU international instruments

Chapter 7 of the Instructions for law-making is dedicated to 'treaties', although it encompasses both treaties and decisions of international organisations.[1057] With regard to treaties, Instruction 311, second paragraph, distinguishes between the act of approval (*goedkeuring*), in accordance with the terms used in article 91 of the Dutch Constitution, and the act of implementation (*implementatie* or *uitvoering*). As a rule, the approval of a treaty requires the adoption of a parliamentary act of approval.[1058] Whether implementation also requires the enactment of legislation by the Dutch legislature, depends on the substance of the treaty and on the answer to the question whether existing legislation provides for the delegation of the power to adopt implementing legislation to the government or to a specified minister. If existing domestic legislation is not in conformity with the treaty regime and, as a consequence, the enactment of an amending parliamentary act of implementation is required, Instruction 311, second paragraph, states that, as a rule, the act of approval and the act of implementation must be submitted for parliamentary approval simultaneously. Furthermore, the explanatory memorandum to the act of approval must provide insight into the legal consequences, including the consequences for domestic legislation, of the treaty for which approval is sought.[1059]

There are some additional instructions that apply to decisions of international organisations, such as the requirement that representatives of the state that are engaged in negotiations on a new decision must pay heed to the consequences for domestic legislation.[1060]

However, it is clear that the instructions contained in Chapter 7 of the Instructions for law-making concern procedural issues only, such as the involvement of advisory bodies, relevant policy makers and the overseas territories that are part of the Kingdom of the Netherlands. In other words, Dutch policy on legislative quality does not provide for legislative standards that apply *particularly* to domestic legislation that implements non-EU international instruments.

1057 The terms 'treaties' (*verdragen*) and decisions of international organisations (*besluiten van volkenrechtelijke organisaties*) are derived from articles 94 and 95 of the Dutch Constitution.

1058 Act on the approval and publication of treaties (*Rijkswet goedkeuring en bekendmaking verdragen*) art 4.

1059 Instruction no. 313, fourth paragraph.

1060 Instruction no. 310, first paragraph. A similar instruction is included for treaties (Instruction 307, first paragraph).

11.2.3 The United Kingdom

11.2.3.1 General policy on the quality of legislation, including implementing legislation

In the United Kingdom, the most prominent actor in the legislative process is the Office of Parliamentary Counsel (OPC), which performs the actual drafting of a bill. The OPC is part of the Cabinet Office, a ministerial department which supports the Prime Minister. Contrary to countries such as France, Germany, Sweden, Switzerland and the Netherlands, the task of drafting legislative text is thus entrusted to a centralised government agency.[1061] The OPC consists of around forty specialised legislative drafters, who work from instructions prepared by departmental lawyers and the bill team, which is composed of several civil servants of the responsible government ministry.[1062] It has often been argued that the OPC's considerations are limited to matters of form, whereas policy and substance fall within the domain of policy officers etc. An example can be found in Dale, who in 1977 published *Legislative drafting: A new approach*.[1063] It contains a comparative analysis of the drafting of laws in France, Germany, Sweden and the United Kingdom and was made at the request of the secretary-general of the Commonwealth.[1064] In the study's preface, Dale points at a difference in approach between the United Kingdom and the 'continent'. Whereas to the continental lawyer the '"drafting" of a law is not a process independent of the formulation of its content', in the reality of the common law world this distinction is upheld.[1065] Nevertheless, it has also been pointed out that form and substance cannot be entirely separated.[1066] As Laws puts it, the Parliamentary Counsel are not just 'wordsmiths' but are also counsel who provide legal advice and, in doing so, may have considerable influence on the process of policy formulation.[1067] In this regard, the size of the jurisdiction may play a role as well; legislative drafters who work in smaller jurisdictions tend to be more involved with substance and policy than their colleagues in larger jurisdictions.[1068]

1061 S. Höffler, M. Nussbaumer and H. Xanthaki, 'Legislative drafting' in: U. Karpen and H. Xanthaki (eds), *Legislation in Europe. A comprehensive guide for scholars and practitioners* (Hart Publishing; Oxford and Portland, Oregon, 2017) 145-163, 153-156.

1062 M. Zander, *The law-making process* (7th edn Hart Publishing, Oxford and Portland, Oregon, 2015) 9 and 18.

1063 W. Dale, *Legislative drafting: A new approach. A comparative study of methods in France, Germany, Sweden and the United Kingdom* (Butterworths, London 1977).

1064 Ibid, vii.

1065 Ibid, viii.

1066 C. Stefanou, 'Drafters, drafting and the policy process' in: H. Xanthaki and C. Stefanou (eds), *Drafting legislation. A modern approach* (Routledge, London 2008) 321-333, 321.

1067 S. Laws, 'Drawing the line' in: H. Xanthaki and C. Stefanou (eds), *Drafting legislation. A modern approach* (Routledge, London 2008) 19-34, 20.

1068 Stefanou, 'Drafters, drafting and the policy process' (n 1066) 325 and 332.

With regard to regulation in a broad sense rather than legislation, which is only one means of government regulation[1069], the United Kingdom has defined five principles of good regulation: proportionality, accountability, consistency, transparency and targeting. The application of these principles determine whether government intervention can be justified and, if so, which regulatory tool should be selected.[1070] Thus, the principles of good regulation may serve a similar purpose as the 'Integrated framework for the assessment of policy and legislation' in the Netherlands. The principles of good regulation have been codified in the Legislative and Regulatory Reform Act 2006.

Turning from regulatory policy to legislative policy, the United Kingdom has, contrary to the Netherlands, only recently taken up the task to codify its policy with regard to legislative quality. Indeed, in 2010 Xanthaki stated that 'the UK still rejects the introduction of a manual for drafting applicable to its own territory'.[1071] Recent developments suggest a change in attitude towards the use of manuals. An event that deserves to be mentioned here is the publication of the report *Ensuring standards in the quality of legislation* by the Political and Constitutional Reform Committee of the House of Commons.[1072] It was written in reaction to 'repeated criticism in recent years' about the quantity and quality of legislation.[1073] In this report, the Committee recommended the formulation of a 'Code of Legislative Standards' for good quality legislation (a draft of which was annexed to the report), since it considered such code a necessary precondition for the improvement of legislative quality.[1074] The committee emphasised the code's character as a draft and invited the government and Parliament to consider it 'as the basis for discussion and agreement'.[1075] From the absence of *codified* legislative standards until the publication of the draft code, can we draw the conclusion that a government policy with regard to legislative quality, or even legislative quality itself, has been non-existent in the United

1069 The distinction between regulation and legislation will be further discussed in section 12.2.4.

1070 C. Radaelli and F. De Francesco, *Regulatory quality in Europe: concepts, measures and processes* (Manchester University Press, Manchester 2007) 33.

1071 H. Xanthaki, 'Drafting manuals and quality in legislation. Positive contribution towards certainty in the law or impediment to the necessity for dynamism of rules?' 4 *Legisprudence* 2 (2010) 111-128, 120.

1072 House of Commons (Political and Constitutional Reform Committee), *Ensuring standards in the quality of legislation, vol I, Report, together with formal minutes, oral and written evidence* (1st report of session 2013-2014) (The Stationary Office, London 2013) <https://publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/85/85.pdf> (accessed 29 March 2018). A brief discussion of the document can be found in A. Samuels, 'Ensuring standards in the quality of legislation' 34 *Statute law review* 3 (2013) 296-299.

1073 House of Commons, *Ensuring standards in the quality of legislation* (n 1072) 5.

1074 Ibid, 18 and 47.

1075 Ibid, 21.

Kingdom? Certainly not, as drafting manuals are neither a sufficient, nor the only way to achieve legislative quality.[1076]

The codification process has not yet been successfully concluded and it remains uncertain whether it will in the future; in a response on the report's publication, the government stated that '[it] does not believe that a Code of Legislative Standards is necessary or would be effective in ensuring quality legislation'.[1077] Nevertheless, it is interesting to briefly examine the draft Code of Legislative Standards, which encompasses fourteen subjects.[1078] From this examination it becomes clear that the draft code exclusively covers legislative drafts' substantive aspects. Although formal criteria seem to emerge as part of the standard of 'understandability and accessibility' of the draft, a closer look reveals that this element refers to purpose or overview clauses, definitions, formulae and new drafting techniques or innovations. Indeed, it is expressly noted in the report that the document does not contain 'set standards for drafting'.[1079] The legislative standards included in the draft code are formulated as commands or questions. For instance, the legislative draft should make clear how the bill relates to existing legislation, including EU legislation. Also it must be explained what the policy objectives of the bill are, its desired outcome and why legislation was necessary to fulfill the policy objective. With regard to the involvement of stakeholders, the draft code prescribes that a summary of the internal or external consultation must be written, as well as an estimation of the costs of preparing and implementing the law.[1080]

In 2013, the OPC launched the 'Good law initiative', which stresses the importance of necessary, clear, coherent, effective and accessible laws. In the view of the OPC, the quality of laws is determined by four interconnected topics: content, language and style, architecture of the statute book and publication. 'Content' includes the necessity of a law, the level of detail and its consistency with other laws. Under the heading 'language and style' the OPC emphasises the importance of laws that are easy to understand. The 'architecture of the statute book' refers to the structure of statute law and to the delegation of legal provisions to regulations. Finally, the way in which a law is presented to the (online) user of legislation is considered to be part of the 'publication'.[1081]

1076 This will be further discussed in section 11.3.2.

1077 House of Commons, *Ensuring standards in the quality of legislation* (n 1072) appendix, section 12.

1078 They include: responsibility for the bill; purpose; extent, application and devolution; legislative background; policy background; pre-legislative scrutiny; consultation; emergency legislation; public bodies; large multi-topic bills; is the legislation understandable and accessible?; offences; costs; scrutiny and secondary legislation.

1079 House of Commons, *Ensuring standards in the quality of legislation* (n 1072) annex A.

1080 Ibid.

1081 The Good law initiative's website is: <https://www.gov.uk/guidance/good-law> (accessed 29 March 2018).

Only a couple of years later, in August 2015, the OPC issued a *Drafting guidance*. As stated in the introduction to the document, the guidance is an instrument for internal use and does not aspire to be a 'comprehensive guide to legislative drafting or to clarity in legal writing'; members of the OPC are 'asked to have regard to' it.[1082] The Drafting guidance consists of eleven parts, each of which is solely concerned with formal aspects of legislation.[1083] This gives the guidance its character as a highly technical document, which can be explained by the OPC's role in the legislative process, as discussed above. Put differently, the document is limited to the activity of drafting, which can be described as the process whereby the conceptualisation of some new legislation is transformed into an actual legislative text and which encompasses planning, composing, revising and editing.[1084] For instance, for the sake of clarity, members of the OPC are requested to use short sentences, to tell their story in a 'moderate, level tone', to use the active voice instead of the passive voice and to use precise and concrete words.[1085] With regard to language and style, it is recommended to draft legislation in a gender-neutral manner, to use figures for all numbers above 10 and to use the '%' mark as a substitute of 'per cent'.[1086] Part 3 of the guidance in concerned with the structure of the legislative text and suggests the inclusion of headings in order to help people to find what they are looking for. Moreover, it is recommended to avoid the use of 'sandwiches' and unnecessary cross-references in legal clauses.[1087] Furthermore, in respect of definitions, it is stipulated that labels must not cover terms that are not expected by the reader and should not include operative provisions.[1088] The document also contains detailed directives on the way in which legislative drafts should refer to domestic or EU legislation, and how amendments (including repeals) to existing legislation should be formulated.[1089] Other provisions which underline the highly technical character of the Drafting guidance include the preference, with regard to the creation of statutory bodies, for '[name] is established' over 'there is to be [name]' and, with regard to reference to periods of time, of '14 days beginning with' over '14 days beginning on'.[1090] Part 9 is concerned with subordinate (delegated) legislation, including procedures applicable to it. The final provisions of legislative proposal are the subject of Part 10, which *inter alia* prescribes

1082 Office of Parliamentary Counsel, *Drafting guidance* (2015) I <https://www.gov.uk/government/publications/drafting-bills-for-parliament> (accessed 29 March 2018).

1083 The 'parts' of the document concern the following subjects: clarity; language and style; structure; definitions; citation; amendments; bodies corporate; periods of time; subordinate legislation; final provisions; words and phrases.

1084 Höffler, Nussbaumer and Xanthaki, 'Legislative drafting' (n 1061)152.

1085 Office of Parliamentary Counsel, *Drafting guidance* (n 1082) 1-6.

1086 Ibid, 7-12.

1087 Ibid,13-21 and 26.

1088 Ibid, 30 and 31.

1089 Ibid, 32-50.

1090 Ibid, 51 and 53.

the running order of the final provisions, including provisions with regard to the entry into force and applications in the jurisdictions of the United Kingdom, transitional provisions and sunset clauses.[1091] Finally, in Part 11, the Drafting guidance clarifies the exact meaning of several terms in order to facilitate their correct use in legislative texts.

Also of interest to us is the *Guide to making legislation*, which was published by the Cabinet Office in April 2017.[1092] The Guide describes the procedures for the drafting and adoption of primary legislation and aims to support bill teams and policy officials.[1093] The document not only sheds light on the 'Good law initiative', but also contains some standards pertaining to the quality of legislation. First of all, the Guide states the need to ensure compliance with the ECHR. The bill team should include an explanation of this particular point in their instructions to the OPC; observance of the ECHR should also be part of the explanatory notes to the legislative proposal.[1094] Furthermore, under section 19 of the Human Rights Act 1998, which incorporates the ECHR in the domestic legal order of the United Kingdom, as we have seen in Part I, the responsible minister should make a statement ('section 19 statement') to both houses of Parliament as to the proposal's compatibility with the ECHR.[1095] While compliance with the ECHR receives a considerable amount of attention in the Guide, the conformity with other international legal obligations of the United Kingdom, including human rights treaties, receives far less attention.[1096] Second, the Guide provides that consideration should be given to the EU law aspects of the proposal to ensure there is no conflict with EU law. A third legislative standard that can be derived from the Guide is the requirement to perform impact assessments for all 'government interventions of a regulatory nature' that cover economic, social, environmental and equality impacts.[1097] This impact assessment should contain an identification of the problem, a statement of policy objectives, possible solutions, the impacts, costs and benefits of each solution, an analysis of enforcement and of the proposal's application in practice and, finally, a plan for evaluation.[1098] Fourth, as part of the pre-legislative scrutiny procedure, which entails the examination of legislative drafts by a parliamentary committee prior to their formal introduction

1091 Ibid, 65-74.

1092 Cabinet Office, *Guide to making legislation* (2017) <https://www.gov.uk/government/publications/guide-to-making-legislation> (accessed 29 March 2018).

1093 Ibid, 5.

1094 Ibid, 72 and 103.

1095 Ibid, 117.

1096 Nevertheless, in the Guide the role of the Joint Committee on Human Rights of Parliament is explained. In this context, it is stated that '[t]he JCHR may also ask about compliance with any international human rights instrument which the UK has ratified; it does not regard itself limited to the ECHR. Cabinet Office, *Guide to making legislation* (n 1092) 120.

1097 Ibid, 125-129.

1098 Ibid, 126.

in Parliament, drafts may also be published as part of public consultation. This has 'enormous value' for stakeholders, it is stated, 'as it provides an extra opportunity for them to comment having seen how the legislation would work in practice'.[1099] In 2016 the Cabinet Office published a short document on 'consultation principles' in which it elaborated the contours of the public consultation procedure. The principles stipulate, for instance, that consultation should have a purpose and be informative, targeted and proportional.[1100]

11.2.3.2 Specific legislative standards applicable to legislation to implement EU instruments

The United Kingdom, as a member of the EU, is under the obligation to adopt the necessary measures for the implementation of the EU's legislative instruments. Again, a guidance document sets out the policy with regard to those implementing measures: *Transposition guidance: How to implement European directives effectively,* which also encompasses the *Guiding principles for EU legislation.*[1101] As a point of departure, this document stipulates that before starting transposition it must be determined how the aims of the EU law and domestic policies 'will be brought into harmony so that transposition neither has unintended consequences in the UK nor risks infraction'.[1102] This task must be carried out in a way that implementing legislation delivers what is required by the EU instrument without going beyond its minimum requirements.[1103] However, 'goldplating' may be the preferable option in exceptional circumstances if it is 'justified by a cost-benefit analysis and consultation with stakeholders'.[1104] Similarly, as a general rule, the Transposition guidance states that the date of entry into force of implementing legislation should be on the date prescribed by the EU instrument rather than *before* that date. On the other hand, early implementation is recommended if that provides an advantage to businesses or other stakeholders.[1105]

Moreover, the document recommends the inclusion of a statutory provision containing an obligation to review the implementing law every five years. This is an 'essential check on whether the original policy objectives

1099 Ibid, 169.

1100 Cabinet Office, *Consultation principles: guidance* (2016) 1-2 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/492132/20160111_Consultation_principles_final.pdf> (accessed 29 March 2018).

1101 HM Government, *Transposition guidance: How to implement European directives effectively* (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf> (accessed 29 March 2018).

1102 Ibid, 31.

1103 Ibid.

1104 Ibid, 7-8.

1105 Ibid, 12-13.

(including expected benefits and costs) are being achieved, and whether any changes or improvements could be made'. Also, the findings of the evaluation could be used in future discussions on the EU level.[1106] With regard to the evaluation, it is argued in particular that:

> 'The principal focus should be on identifying areas where implementation and enforcement could be improved to reduce burdens or increase effectiveness, learning from experience both in the UK and in other Member States. Where other Member States have implemented EU legislation, you should consider aligning implementation in the UK to ensure British businesses are not put at a competitive disadvantage. However, you should also consider whether there is evidence, and potential for an alliance with other EU Member States, that would support taking a request for a wider review of the objectives of the underlying Directive to the European Commission'.[1107]

This means that under the United Kingdom legislative policy it is recommended to engage in a periodical evaluation of the implementing law, irrespective of whether an evaluation of the EU instrument itself is foreseen. This might lead to the situation in which the evaluation of the domestic implementing law reveals some serious flaws in the applicable regime, even though this regime cannot be changed without the adoption of a new legislative proposal to amend the existing EU regime, with all its lengthy discussions on the EU level.

Finally, in respect of consultation of legislative proposals that aim to implement EU instruments, the document adheres to the general rule that consultation with stakeholders must be performed. However, in some cases written consultation may not be proportionate.[1108]

11.2.3.3 Specific legislative standards applicable to legislation to implement non-EU international instruments

The implementation of non-EU instruments is hardly a specific topic in the United Kingdom's codified legislative policy. However, the fact that a legislative proposal serves to implement international legal obligations may be a reason to be treated as a priority and thus may be considered as an argument for its inclusion in the legislative programme.[1109] Contrary to what has been said above with regard to public consultation of legislation, legislative proposals that implement international commitments may not be suitable for publication in draft if 'there is little flexibility around implementation'.[1110] In this regard, the exception for legislative proposals implementing EU law to the general rule to engage in public consultation equally applies to the proposals that implement non-EU instruments.

1106 Ibid, 13.
1107 Ibid.
1108 Ibid, 16.
1109 Cabinet Office, *Guide to making legislation* (n 1092) 28.
1110 Ibid, 163.

11.2.4 Conclusion

Our discussion of legislative quality policy in the Netherlands and the United Kingdom has revealed that the legislative policies in the Netherlands and the United Kingdom share important elements. For instance, the need for accessible laws through the use of understandable and common language is firmly embedded in the legislative process in both countries. Similarly, with regard to the more substantive elements of legislative proposals, both countries acknowledge the importance of impact assessments, consultation of stakeholders and burden reduction when preparing new legislative proposals. The examination carried out in previous sections also suggests a consensus on quality standards pertaining to the decision making process *even before legislation is chosen as a means of government regulation*. Here legislative quality borders on regulatory quality. As we have seen, in the Netherlands the 'Integrated framework for the assessment of policy and legislation' demands a problem analysis, the formulation of a policy aim, the choice of the appropriate policy instrument and the expected consequences for affected persons, companies, the environment etc. Similar instructions are part of the 'Guide to making legislation' in the United Kingdom, which prescribes the performance of an impact assessment for all 'government interventions of a regulatory nature' that cover economic, social, environmental and equality impacts.[1111] This impact assessment should contain an identification of the problem, a statement of policy objectives, possible solutions, the impacts, costs and benefits of each solution. This similarity also makes clear that legislative quality and regulatory quality often coincide; the performance of impact assessments is considered to be part of both. As a consequence, such assessment should equally be carried for government intervention of a non-legislative nature.

From the foregoing we may also conclude that the legislative policies in the Netherlands and the United Kingdom do not include specific quality standards with regard to legislation aimed at the implementation of non-EU law. Thus, the quality of implementing legislation is evaluated on the basis of general legislative quality requirements.

These common features cannot conceal the fundamentally different ways in which both countries aim to ensure the quality of legislation. They may be explained by differences in legal or legislative culture, of which the centralised organisation of the legislative function in the OPC is merely one element. Another important difference concerns the codification of the legislative quality policy. While the Netherlands have used its main drafting manual, the Instructions for law-making, for several decades, such codification has been rejected in the United Kingdom until recently. As is often the case with matters regarding culture, it is difficult to precisely pinpoint the source of the established differences in the methods of ensuring legislative quality.

1111 Ibid, 125-129.

11.3 International approaches to the quality of implementing legislation

11.3.1 Introduction

As stated above, our discussion of the national approaches to legislative quality in general and implementing legislation in particular, must be complemented with an examination of two international approaches to legislative quality. Again, both approaches differ significantly. Whereas the OECD is primarily concerned with the quality of national legislation, the EU focuses on the quality of EU law, i.e. legislation adopted by the institutions of the EU. Despite this fundamental difference, both policies can be considered the most elaborate international attempts to ensure the quality of legislation and thus deserve attention in this chapter.

11.3.2 Organisation for Economic Cooperation and Development

On the international level, the OECD seeks to enhance domestic regulatory quality under the heading of 'regulatory reform'. Although the OECD uses the terms 'regulation' and 'regulatory', it is clear that it is intended to refer to what has been called 'legislation' elsewhere in the present study, as 'regulation' is defined as 'the diverse set of instruments by which governments set requirements on enterprises and citizens. Regulations include laws, formal and informal orders and subordinate rules issued by all levels of government, and rules issued by non-governmental or self-regulatory bodies to whom government has delegated regulatory powers'.[1112] 'Regulatory quality' encompasses 'performance, cost-effectiveness, or legal quality of regulations and related government formalities'.[1113] Although regulation and legislation often can be used synonymously, both terms have different origins and meanings, as will be further explained in section 11.4.2.[1114]

The organisation's dedication to the subject of legislative quality was codified in the 1995 Recommendation of the Council on improving the quality of government regulation, in which member states were called upon to 'take effective measures to ensure the quality and transparency of government regulations'.[1115] To succeed in its task, the Council proposed

1112 OECD, 'The OECD Report on regulatory reform. Synthesis' (OECD, Paris 1997) 6 <http://www.oecd.org/gov/regulatory-policy/2391768.pdf> (accessed 29 March 2018). For a further clarification of the distinction between legislation and regulation, see W.J.M. Voermans, 'Legislation and regulation' in: U. Karpen and H. Xanthaki (eds), *Legislation in Europe. A comprehensive guide for scholars and practitioners* (Hart Publishing; Oxford and Portland, Oregon, 2017) 17-32.

1113 OECD, 'Synthesis' (n 1112) 6.

1114 Voermans, 'Legislation and regulation' (n 1112) 18.

1115 OECD, 'Recommendation of the Council of the OECD on Improving the Quality of Government Regulation' (9 March 1995) C(95)21/final < http://www.oecd.org/regreform/> (accessed 29 March 2018).

a checklist for regulatory decision-making, which includes ten questions that reflect 'principles of good decision-making'. They include questions such as 'is the problem correctly defined?', 'is government action justified?' and 'do the benefits of regulation justify the costs?'.[1116] Other questions are more concerned with the text and structure of the regulation, such as 'is the regulation clear, consistent, comprehensible and accessible to users?'[1117]

Two years after the adoption of Recommendation C(95)21 the OECD published a report on regulatory reform in which it identified a 'real risk […], particularly in a time of profound and rapid change in economic and social conditions, that regulations […] become an obstacle to achieving the very economic and social well-being for which they are intended'.[1118] A lack of legislative quality was seen as a potential threat to the competitiveness of national economies. In order to remove this threat, seven policy measures were proposed, which included, *inter alia*, the systematic review of the effectiveness and efficiency of existing regulations and the transparent, non-discriminatory and efficient application of regulations. Other measures related to the strengthening of competition policy, the removal of trade and investment barriers, which emphasise the predominantly economic concern with regard to legislative quality.[1119] In 2005 the Council adopted the OECD Guiding principles for regulatory quality and performance, which were an elaboration of the principles adopted in 1997.[1120]

Several years later, in 2012, the Council adopted the Recommendation on regulatory policy and governance, which constituted an update of (and demonstrate considerable overlap with) the 'guiding principles' it had adopted in 2005. In its own words, the 2012 Recommendation:

> 'provides governments with clear and timely guidance on principles, mechanisms and institutions required to improve the design, enforcement and review of their regulatory framework to the highest standards'.[1121]

The 2012 Recommendation, which is still the leading OECD document, contains twelve principles, the most important of which will be highlighted here. Member states are urged to 'commit at the highest political level to

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1116 OECD, Recommendation C(95)21/final (n 1115) appendix.

1117 Ibid, question no. 8.

1118 OECD, 'Synthesis' (n 1112) 5.

1119 Ibid, 27-38. Also M. Mousmouti, 'Operationalising quality of legislation through the effectiveness test' 6 *Legisprudence* 2 (2012) 191-205, 196.

1120 OECD, 'Guiding principles for regulatory quality and performance' (OECD, Paris 2005) <http://www.oecd.org/fr/reformereg/34976533.pdf>. In addition to the 2005 Guiding principles, the 'Integrated checklist on regulatory reform. A policy instrument for regulatory quality, competition policy and market openness' (<http://www.oecd.org/regreform/34989455.pdf>) was published. This document was the product of the cooperation between OECD and Asian-Pacific Economic Cooperation (APEC).

1121 OECD, 'Recommendation of the Council on Regulatory Policy and Governance' (22 March 2012) foreword <http://www.oecd.org/governance/regulatory-policy/49990817.pdf> (accessed 29 March 2018).

an explicit whole-of-government policy for regulatory quality'.[1122] Such policy should 'define the process by which a government, when identifying a policy objective, decides whether to use regulation as a policy instrument, and proceeds to draft and adopt a regulation through evidence-based decision-making'.[1123] This policy is not in itself a quality criterion applicable to legislation, but emphasises the need to put in place an institutional framework within governments with a view of increasing legislative quality. Furthermore, governments are requested to promote stakeholder participation in the regulatory process and to ensure that regulations are comprehensible and clear and that parties can easily understand their rights and obligations.[1124] Another important principle concerns the performance of *ex ante* regulatory impact assessments in the early stages of the decision making process. This entails, *inter alia*, the identification of a specific policy aim, the exploration of the various ways of pursuing that aim; subsequently, the selection of the most appropriate instrument and an assessment of the economic, social and environmental impacts.[1125] Once legislation has been adopted, it must be reviewed retrospectively (*ex post)* against 'clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost-justified, cost-effective and consistent and delivers the intended policy objectives'.[1126] Finally, the 2012 Recommendation urges member states to ensure the availability of effective remedies in order to review the legality of the adopted legislation.[1127]

In 2014, the OECD published two additional documents on regulatory policy. One of them specifically focuses on inspections in OECD countries and provides 'best practices'. They consist of eleven principles, such as the need for evidence-based, risk-based and proportional enforcement, the need for a clear legal framework for the performance of inspections and enforcement and the importance of professional inspectors.[1128] It thus elaborates on the legislative standard of compliance monitoring and enforcement.

The other 2014 complementary document to the 2012 Recommendation concerns 'the governance of regulators'. It was intended to support member states in developing a policy on the 'role and functions of regulatory agencies'.[1129] Instead of focusing on the quality of laws themselves, this document looks primarily into the adequacy of the national bodies producing

1122 Ibid, section I, paragraph 1.
1123 Ibid, section I, paragraph 1, and section 1 of the Annex.
1124 Ibid, section I, paragraph 2, and section 2 of the Annex.
1125 Ibid, section I, paragraph 4, and section 4 of the Annex.
1126 Ibid, section I, paragraph 5, and section 5 of the Annex.
1127 Ibid, section I, paragraph 8, and section 5 of the Annex.
1128 OECD, *Regulatory enforcement and inspections* (OECD Best practice principles for regulatory policy, OECD Publishing, Paris 2014) <http://dx.doi.org/10.1787/9789264208117-en> (accessed 29 March 2018).
1129 OECD, *The governance of regulators,* OECD Best practice principles for regulatory policy, (OECD Publishing 2014) 3 <http://dx.doi.org/10.1787/9789264209015-en> (accessed 29 March 2018).

laws. Although it falls outside the scope of the present study to thoroughly examine such institutional aspects of legislative quality, the document illustrates that the regulatory quality policy developed by the OECD also concerns other aspects than legislative standards.

In sum, the OECD approach to legislative quality goes beyond the mere application of checklists by policy makers or legislative drafters; it also provides for guidelines for the adoption of a legislative policy, the attribution of responsibilities within the government apparatus and the role and functions of regulators. Several legislative standards are firmly embedded in the legislative quality policy propagated by the OECD, among them stakeholder participation, *ex ante* and *ex post* evaluation, comprehensibility and clarity of the anticipated laws and the availability of remedies. These elements of legislative quality apply to legislation in general, comprising both truly national legislation and national implementing legislation; up until now, the efforts of the OECD in this field have not included guidance with regard to implementing legislation in particular.

11.3.3 European Union

Another major player in the international quest for legislative quality is the EU. Whereas the OECD efforts aim at the improvement of *national* legislation, the activities instigated by the EU focus on the quality of *supranational* legislation: the legislative instruments adopted in the framework of the EU. The present study's main subject is national implementing legislation. As a consequence, it could be argued that the quality of legislation adopted beyond the national legal order, such as EU regulations and directives, should remain outside the scope of our analysis. On the contrary, it cannot be ignored that the EU's efforts to improve the quality of its legislative instruments have led to elaborate policies that, judged by its measure of detail, could easily compare to the policies developed under the auspices of the OECD. Moreover, from a more substantive viewpoint, the legislative policies propagated by the OECD and the EU reveal several common features, which may be an indication that the quality of national legislation and international legislation should be assessed by the same standards. Finally, discussions of the quality of EU legislation transcend the traditional distinction between civil law and common law, as it must accommodate both.[1130] For these reasons, a discussion of the efforts undertaken by the EU's institutions to improve the quality of EU legislation, should be part of the present study.

The EU's current policies aimed at the quality of legislation are known under the heading 'better law-making' and 'better regulation'. It is an agenda pursued by the EC, the body that is entrusted with the task to ensure

1130 H. Xanthaki, 'Emerging trends in legislation in Europe' in: U. Karpen and H. Xanthaki (eds), *Legislation in Europe. A comprehensive guide for scholars and practitioners* (Hart Publishing; Oxford and Portland, Oregon, 2017) 275-296, 275.

the application of the measures adopted by the institutions of the EU.[1131] Better law-making, better regulation and related policies have been on the EU agenda since the early 1990's.[1132] Some milestones in its development will be highlighted here. 1992 saw the publication of a report commonly known as the Sutherland report, which signalled a 'growing unease that, in practice, Community legislation may be too heavy-handed'.[1133] This and other reports triggered the adoption of Declaration no. 39 on the quality of drafting of Community legislation. In this statement, which was annexed to the Treaty of Amsterdam, it was agreed that 'the three institutions involved in the procedure for adopting Community legislation […] should lay down guidelines on the quality of drafting of the said legislation […]'.[1134] In 1998 this resulted in the adoption of the Interinstitutional agreement adopted by the three main legislative bodies of the EU, which contains several statements on the technical quality of EU legislation.[1135] The agreement provides, *inter alia*, that the legislative acts adopted by the EU should be drafted in a clear, simple and precise manner.[1136] Furthermore, the drafting of acts 'shall take account of the persons to whom they are intended to apply' and terminology used in a given act 'shall be consistent both internally and with acts already in force'.[1137]

Another milestone was the adoption of the Interinstitutional Agreement on Better Law-making in 2003.[1138] In this document the three legislative institutions pledged 'to observe general principles such as democratic legitimacy, subsidiarity and proportionality, and legal certainty and […] to

1131 Article 17, first paragraph, TEU.

1132 In the developments ever since, five 'layers' of policies can be discerned, each of which had its own focal point: technical quality, reduction and simplification, burden reduction, enforceability and legitimacy. See W.J.M. Voermans, 'Beating about the bush in 'Better regulation' in: B. Steunenberg, W. Voermans and S. van den Bogaert (eds), *Fit for the future? Reflections from Leiden on the functioning of the EU* (Eleven International Publishing, The Hague 2016) 69-88. Other publications which provide an overview of the EU's efforts with regard to legislative quality include Xanthaki, 'Emerging trends in legislation in Europe' (n 1130); W.J.M. Voermans, 'Concern about the quality of EU legislation. What kind of problem, by what kind of standards?' 2 *Erasmus Law Review* (2009) 59-95 and W. Robinson, 'Manuals for drafting of European Union legislation' 4 *Legisprudence* 2 (2010) 129-155.

1133 High Level Group on the Operation of the Internal Market, presided over by P. Sutherland, 'The internal market after 1992. Meeting the challenge' (report to the EEC Commission) (28 October 1992) <http://aei.pitt.edu/1025/1/Market_post_1992_Sutherland_1.pdf> (accessed 29 March 2018).

1134 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, annex, OJ 1997, C 340, 1.

1135 Interinstitutional agreement of 22 December 1998 of the European Parliament, the Council of the European Union and the Commission of the European Communities on common guidelines for the quality of drafting of Community legislation (OJ 1999, C 73).

1136 Ibid, section 1.

1137 Ibid, sections 3 and 6.

1138 Interinstitutional agreement of 16 December 2003 of the European Parliament, the Council of the European Union and the Commission of the European Communities on better law-making (OJ 2003, C321).

promote simplicity, clarity and consistency in the drafting of laws and the utmost transparency of the legislative process'.[1139] Compared to the 1998 Interinstitutional Agreement, the 2003 agreement had a broader scope, since it also entailed other aspects of legislative quality than the mere technical or formal. It emphasised the need for greater transparancy, improvement of the consultation process and for impact assessments and the observance of the principles of necessity, subsidiarity and proportionality.[1140] It also called for the simplification and reduction of the existing body of legislation.[1141]

The following years saw the transition from 'better law-making' to 'better regulation', which was announced by the EC in 2005.[1142] The EC asserted that the approach to regulation was to be developed 'to ensure that the defence of public interests is achieved in a way that supports and does not hinder the development of economic activity'.[1143] With 'better regulation', legislative quality acquired a more economic perspective. As part of better regulation, the EC stressed the need for impact assessments, consultation of stakeholders, the reduction of administrative burden and the simplification of legislation.[1144]

In 2010 the EC further developed its legislative quality policies under the heading of 'smart regulation', which must be seen against the background of the economic and financial crisis unfolding in those years.[1145] In this document the EC stated that stakeholder consultation and impact assesments were 'now essential parts of the policy making process'. However, the EC also concluded that 'better regulation must become smart regulation'.[1146] Many elements of this strategy can already be found in earlier policy documents, such as the need for simplification of legislation and the reduction of administrative burden.

An important new impulse to the debate on legislative quality was given during the EC presidency of Jean-Claude Juncker, when a communication was issued on 'Better regulation for better results – an EU agenda' in May 2015. In this document, 'better regulation' is described as a tool to provide a basis for timely and sound policy decisions. The application of the

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1139 Ibid, section 2.

1140 Ibid, sections 10, 16, 25-30.

1141 Ibid, section 35.

1142 EU (European Commission), 'Better regulation for growth and jobs in the European Union', Communication from the Commission to the Council and the European Parliament (16 March 2005) COM (2005) 97. Also EU (European Commission), 'A strategic review of better regulation in the European Union', Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions (14 November 2006) COM (2006) 689.

1143 European Commission, 'Better regulation for growth and jobs in the European Union' (n 1142) 1.

1144 Ibid, 5-8.

1145 EU (European Commission), 'Smart regulation in the European Union', Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions (8 October 2010) COM (2010) 543.

1146 Ibid, 2.

principles of better regulation will, it is stipulated, 'ensure that measures are evidence-based, well designed and deliver tangible and sustainable benefits for citizens, business and society as a whole'.[1147] In order to make these ambitions come true, the EC contended that EU legislation should be:

> '[…] fit for purpose, modern, effective, proportionate, operational and as simple as possible. Legislation should do what it is intended to do, it should be easy to implement, provide certainty and predictability and it should avoid any unnecessary burden. Sensible, realistic rules, properly implemented and enforced across the EU.'[1148]

The communication stresses the importance of several criteria applicable to legislation. For instance, the EC emphasises the importance of openness and transparency through the consultation of stakeholders. This enhances the availability of evidence, it is argued, which positively contributes to a law's effectiveness.[1149] Other topics that are addressed by the EC are the limitation of burdens, in particular for small and medium enterprises, the importance of effect monitoring and evaluation, and the need for accessible, comprehensible, consistent and clear laws.[1150] In 2016, the EC published another communication on better regulation under the title 'Better regulation: delivering better results for a stronger Union'.[1151] In this document the EC reaffirmed its commitment to better regulation policies and its elements. In addition, it stressed the need for effective application and redress for citizens.[1152]

While the 2015 and 2016 communications issued by the EC serve to present and explain its youngest priorities in the field of legislative policies, the Better Regulation Guidelines, which were published simultaneously with the 2015 communication, enumerate more systematically the quality criteria applicable to EU legislation.[1153] Together, they must lead to 'better regulation', which is described as 'designing EU policies and laws so that they achieve their objectives at minimum cost'.[1154]

The guidelines are divided in 6 categories, each of which corresponds to one phase in the policy cycle: planning; impact assessment; stakeholder

1147 EU (European Commission), 'Better regulation for better results- an EU agenda', Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions (19 May 2015) COM (2015) 215, 3.
1148 Ibid, 4.
1149 Ibid.
1150 Ibid, 6-9.
1151 EU (European Commission), 'Better regulation: Delivering better results for a stronger Union', Communication from the Commission to the European Parliament, the European Council and the Council (14 September 2016) COM (2016) 615.
1152 Ibid, 9.
1153 EU (European Commission), 'Better regulation guidelines', Commission staf working document (19 May 2015) SWD (2015) 111.
1154 Ibid, 5.

consultation; preparing proposals, implementation and transposition; monitoring; and evaluation and fitness checks.[1155]

The Better Regulation Guidelines[1156] start with the planning for a new policy proposal. In this phase, EC officials are required to, among other things, ensure that the anticipated proposal has received political validation at the appropriate level.[1157] If a policy proposal receives the political support needed for its continuation, the Guidelines require the performance of an impact assessment. This involves the formulation of 'logical reasoning' that explores possible solutions to the problem, which must include an analysis of the expected consequences of those policy options.[1158] This 'inception impact analysis' must be shared with stakeholders, in particular through a 12-week public consultation. Subsequently, EC officials must estimate the economic, social and environmental impacts of the formulated policy options, on the basis of quantitative data, if available. This leads to the drafting of the final impact assessment report, which includes not only a description of the economic, social and environmental impact and the consultation results, but also an analysis of the expected consequences for affected persons or entities, in particular for small and medium enterprises, and for competitiveness.[1159]

During the next stage, the proposal must be codified in a legal text. This text should be well drafted 'in order to ensure it adequately reflects the intention of the legislator and can achieve its regulatory aim'.[1160] To this end, a 'Joint practical guide' has been compiled, the first edition of which dates back to 2000.[1161] It provides for 22 principles which mainly concern the formal aspects of the drafting of EU legislation. It includes the requirement, already mentioned above, that the text must be 'clear, simple and precise'. Furthermore, the text must be concise as possible, the use of long articles and sentences must be avoided and the terminology used must be consistent within the instrument and with other legislation in force. Also, the legislative proposals should follow the same standard structure, where necessary, and references to other legal texts must be kept to a minimum.[1162]

Once the legislative proposal is adopted and has entered into force, the EC must examine whether member states comply with the legislative text

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1155 Ibid, chapters II-VII.

1156 The guidelines are complemented by the Better Regulation Toolbox. The Toolbox provides more detailed information on the instructions already codified in the Guidelines. Therefore, a separate discussion is not necessary for the purpose of this chapter.

1157 European Commission, *Better regulation guidelines* (n 1153) 11.

1158 Ibid, 16.

1159 Ibid, 16-18.

1160 Ibid, 35.

1161 The current edition was published in 2015. EU, *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation* (Publications Office of the European Union, Luxembourg 2015).

1162 Ibid, principles 1, 4, 6, 7, 16.

through implementation and transposition, if needed.[1163] The next phase of the policy cycle is concerned with monitoring. This means that it must be identified whether the regulatory intervention is functioning in practice as expected, which also entails the gathering of data in a systematic way in order to improve future interventions.[1164] Finally, the Better Regulation Guidelines prescribe the activities to be undertaken in the evaluation and fitness check phase. 'Evaluation' is defined is as an evidence-based judgment of the extent to which an intervention has been 'effective, efficient and […] relevant given the needs and its objectives, […] coherent internally and with other EU policy interventions and achieved 'EU added-value'.[1165] In addition to the evaluation instrument, which focuses on one policy intervention only, 'fitness checks' must be performed. These checks concern a *number of* related interventions for a larger policy area, which enables the EC to address the 'cumulative effects of the applicable framework'.[1166] The guidelines describe in great detail the manner in which both assessments must be carried out.[1167]

The guidelines are codified in a EC staff working document, which suggests its application to legislative proposals drafted by the EC. As a consequence, they may, in principle, not apply to the EU's co-legislating institutions: the Council and the European Parliament.[1168] On the other hand, these institutions have also committed themselves to the better regulation policies, most notably through a new Interinstitutional agreement that was concluded in April 2016.[1169] In this agreement, the institutions recognised their 'joint responsibility in delivering high-quality Union legislation'.[1170] This entails, the agreement reads, *inter alia*, the entrenchment of public and stakeholder consultation, ex-post evaluation of existing legislation, impact assessments of new initiatives, simplification and regulatory burden reduction in the EU's legislative products and processes.[1171]

1163 European Commission, *Better regulation guidelines* (n 1153) 41.
1164 Ibid, 42-43.
1165 Ibid, 49.
1166 Ibid, 50.
1167 Chapter VI.
1168 TFEU art 289.
1169 Interinstitutional agreement of 13 April 2016 between the European Parliament, the Council of the European Union and the European Commission on better law-making (OJ 2016, L 123).
1170 Ibid, second preambular section.
1171 Chapters III and VIII. Also sixth and eighth preambular sections. In the provisions on common objectives and commitment (Chapter I), it is stipulated that 'the three institutions […] agree to observe general principles of Union law, such as democratic legitimacy, subsidiarity and proportionality, and legal certainty. They further agree to promote simplicity, clarity and consistency in the drafting of Union legislation and to promote the utmost transparency of the legislative process [and] that Union legislation should be comprehensible and clear, allow citizens, administrations and businesses to easily understand their rights and obligations, include appropriate reporting, monitoring and evaluation requirements, avoid overregulation and administrative burdens, and be practical to implement'.

In sum, the 'better law-making' and 'better regulation' policies that have emerged in the framework of the EU contain many aspects which have attracted a varying degree of attention over the years. We can observe a significant overlap between the legislative standards formulated under the guidance of the OECD and the EU respectively. They apply to the EU's supranational legislation, however, and thus ignore the quality of *national* implementing legislation.

11.3.4 Conclusion

How can we assess this overview? From a distance, it could be described as an extensive enumeration of various standards which aim to enhance the quality of legislation adopted in the framework of the EU. This is certainly true, but not the whole story. Although the EU's efforts to increase legislative quality is concerned first and foremost with the quality of EU legislation instead of national legislation, it is difficult to ignore the similarities with the legislative standards formulated under the responsibility of the OECD. This may suggest a high degree of consensus on the value of those standards for legislative practice. For instance, both organisations stress the importance of the performance of impact assessments, evaluations and clear and accessible legal texts. They thus go beyond the mere application of checklists by legislative drafters. Moreover, both policies do not contain legislative standards for *implementing* legislation in particular. However, we can also observe differences between the approach adopted by the OECD and the EU. They can be partly explained by the specific features of the EU. For instance, the application of the principles of subsidiarity and proportionality to the exercise of authority by the institutions of the EU, including the adoption of legislation, are characteristic for the division of competences between the EU and its member states.[1172]

11.4 The quality of implementing legislation: common ground?

11.4.1 Introduction

In the previous section we discussed two national and two international policies which aim to enhance legislative quality. But what constitutes 'quality of legislation'? This question is both essential and difficult to answer. It is essential, since it forces us to clarify what we are seeking; we can only succeed in analysing attitudes towards the quality of implementing legislation if we can provide a sufficiently clear description of what is part of it, and what is not. At the same time, in the absence of a universally accepted definition of

1172 TEU art 5, third and fourth paragraphs. Also Protocol (no 2) on the Application of the Principles of Subsidiarity and Proportionality, OJ 2008, C 115, 201; Interinstitutional agreement of 13 April 2016 (n 1169), third preambular section.

the term, the delineation of 'quality of legislation' is a difficult task, since it may be viewed as 'an elusive and vague concept for many authors mainly due to the numerous perspectives through which the quality of a piece of legislation or the legislative process may be evaluated'.[1173] According to Mousmouti, legislative quality is a relative concept, as its meaning differs depending on various factors, among them historical, political and social contexts, the viewpoint of different actors and on different legal traditions.[1174] Wintgens states that a concrete definition of legislative quality does not exist.[1175] A possible explanation for this state of affairs lies in the perspectives that have been adopted in order to address the quality of legislation. To come to grips with this diversity, we need to understand the difference between regulation and legislation, and, as a corollary, between regulatory quality and legislative quality. Subsequently we discuss several standards which can be considered part and parcel of the notion of legislative quality.

11.4.2 Regulatory quality and legislative quality: a matter of perspective

'Regulation' refers to the exercise of public authority with the aim of bringing about change in the behaviour of societal actors. These actors encompass individuals and organisations (including companies). There are several ways for this behavioural change to be accomplished, for instance through financial incentives or through the imposition of penalties. 'Legislation' is a specific form in which the proposed regulation may be cast. If policy makers choose to discourage the consumption of sugary beverages for public health reasons, they may consider the imposition of an additional tax on these products (regulation). In a community committed to the rule of law, it must laid down in law and often this will be written law: legislation.[1176] The question may arise whether less direct interventions in society could be considered legislation. If a government chooses to establish a public body which is attributed by law with the task of providing advice to the government, can this be considered 'regulation'? Since this law only modifies the *internal* organisation of the government, it could be argued that this legislation does not amount to regulation. The point here is that legislation and regulation often, but not always, coincide.

Traditionally, the topic of regulation has been the domain of economists.[1177] They have been interested in efficiency (the flow of goods to the

1173 T. Drinóczi, 'Concept of quality in legislation revisited. Matter of perspective and a general overview' 36 *Statute Law Review* 3 (2015) 211-227, 212. Also Voermans, who describes legislative quality as an 'elusive buzzword'. Voermans, 'Concern about the quality of EU legislation' (n 1132) 64.

1174 Mousmouti, 'Operationalising quality of legislation' (n 1119) 192.

1175 Wintgens, 'Rationality in legislation' (n 67) 7.

1176 As stated earlier, the term 'legislation' should be understood in a broad manner, including both primary and secondary legislation.

1177 R. Baldwin, M. Cave and M. Lodge, 'Introduction: regulation- the field and the developing agenda' in: Idem (eds), *The Oxford Handbook of Regulation* (OUP, Oxford 2010) 3-16, 4.

place where they are valued the highest) and market failures (resulting from market power, the imposition of externalities on third parties, the need for public goods and information asymmetry) which prevent the achievement of efficiency, as a justification for government intervention.[1178] Furthermore, this economic view on regulation has concerned the drafting of cost-effective rules and the removal of inefficient outcomes of existing laws.[1179] It has led to, *inter alia*, the development of regulatory impact studies, an instrument to measure the effects of a particular intervention.[1180] Scholars and other contributors to the field of regulation have also raised the topic of 'better regulation': ways to improve regulatory interventions and, inevitably, debates on the meaning of 'good' regulation.[1181]

Nowadays, regulation theory has evolved into a multi-disciplinary field of research.[1182] It can be said to have merged partly with the field of legisprudence, which includes elements of, *inter alia*, juridical sciences, economics, social and political sciences, and philology. Whatever the perspective adopted by a scholar, it is important to emphasise that it is basically a different perception of the *same* phenomenon: legislation. The same can be said of our quest for quality, which has been aspired under both the heading of regulatory quality and of legislative quality; several characteristics of 'good regulation' have found their way into discussions on 'good legislation' as well. A case in point may the reduction of administrative burden. Whereas regulatory quality may demand the reduction of administrative burden imposed on societal actors, legislative quality may require that a legislative proposal is shaped in a way as to minimise its administrative burden.

But even with regard to legislative quality there seems to be no consensus on its meaning and scope. This may be the result of the different functions attributed to legislation. In the words of Voermans, '[l]egislation comes with different meanings in different contexts at different times'.[1183] In democracies governed by the rule of law, six functions can be attributed to legislation. First, legislation may serve as the basis and framework for the exercise of public authority (constitutional function). Second, the legal certainty function of legislation becomes visible whenever a law enshrines rights and obligations, which also imposes a limitation on government interference. Third, the instrumental function refers to the ability of legislation to attain certain policy objectives. Fourth, legislation may also

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1178 C. Veljanovski, 'Economic approaches to regulation' in: R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation* (OUP, Oxford 2010) 17-35, 19-22.

1179 Ibid, 27.

1180 C. Radaelli and F. de Francesco, 'Regulatory impact assessment' in: R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation* (OUP, Oxford 2010) 279-298, 279.

1181 For an overview of the discussion, see R. Baldwin, 'Better regulation: the search and the struggle' in: R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation* (OUP, Oxford 2010) 259-278.

1182 Baldwin, Cave and Lodge, 'Introduction' (n 1177) 4.

1183 Voermans, 'Legislation and regulation' (n 1112) 18.

facilitate the political process and reflect the outcome of the balancing of political actors' interests (political function). Fifth, the adoption of a law expresses popular support for it and serves to legitimise the exercise of public authority, which is called the democratic function of legislation. Sixth, the enactment of legislation may possess a symbolic function as well, as it reflects and reaffirms public morals and values.[1184] Of course, a piece of legislation will often perform several of the aforementioned functions simultaneously.

According to Voermans, the functions of legislation translate into different 'views' on legislation, including views with regard to quality.[1185] This means that the diversity of views on the meaning of the concept of legislative quality may be explained by the diversity of legal contexts; the notion of legislative quality is inseparable from its institutional environment. As an example, Voermans refers to the EU's better law-making initiative pursued in the years between 2002 and 2006. While this legislative policy seemed to emphasise the constitutional (including the bureaucratic function), democratic and instrumental functions of legislation adopted in the framework of the EU, the Better regulation activities of the years 2006-2014 seemed to address the instrumental and political functions.[1186] In other words, the institutional environments in which laws are developed may differ with regard to the function(s) attributed to legislation on a more structural level. This may depend on the legal tradition of a particular state or international organisation and even may evolve over time.

Although the stance adopted by Voermans may explain the existence of diverging views on the precise meaning of legislative quality, it may also be unsatisfactory if it prevents us from seeking common ground in the debate on legislative quality. This would be problematic for any attempt to formulate the elements of legislative quality which aspires to transcend individual state jurisdictions, such as the attempts codified in the international legal regimes we have explored in the previous part. Therefore, in the present section we aim the find common ground in the quality debate and, to a certain extent, reconcile the different views expressed by national governments, international organisations and scholars. In doing so, we will propose a definition that can serve as a basis for the assessment of internationally codified legislative standards, to be performed in Chapter 12.

1184 Ibid, 23-24. Voermans mentions a seventh function of legislation: the bureaucratic function. This function becomes apparent when a piece of legislation lays down the framework for action by a bureaucracy. As he correctly argues, this function must be seen as part of the constitutional function.

1185 Ibid, 25.

1186 Ibid, 30. Elsewhere, Xanthaki observes a 'transposition from legislation as an autonomous product to legislation as a regulatory tool'. Xanthaki, 'Emerging trends in legislation in Europe' (n 1130) 279.

11.4.3 Defining the quality of implementing legislation

How should 'quality of legislation' be defined? A functional approach to this question will provide the following answer: legislative quality can be defined as the extent to which a legislative act succeeds in achieving its aims. As Xanthaki puts it, 'good legislation is legislation that manages to achieve the desired regulatory results'.[1187] She explains:

> 'Since governments use legislation as a tool of successful governing, namely as a tool for putting into effect policies the desired regulatory results, the qualitative measure of successful legislation coincides with the prevalent measure of policy success, which is the extent of production of the desired results'.[1188]

In the view of Xanthaki, the ultimate goal for regulation is efficacy.[1189] Efficacy is described as the ability to produce a desired or intended result; efficacy is synonymous with regulatory quality.[1190] Regulation, in her view, is a broader concept than legislation; legislation is only one of the means of regulation used by governments.[1191] Similarly, legislative drafters are merely one of the many actors in the regulatory process; others include *inter alia* policy makers and enforcement authorities.[1192] Against this backdrop, 'efficacy' must be considered inadequate as a means to assess the quality of legislation. In Xanthaki's words:

> '[t]he achievement of a policy objective or purpose is not the sole task of the drafter. […] If one accepts the multiplicity of actors in the policy process […], efficacy cannot be a goal set for the drafter alone. As a result, despite acknowledging efficacy as the highest virtue in the policy process, efficacy cannot be viewed as the connecting function of drafters'.[1193]

Instead, in her view, the crucial test for legislative quality lies in the standard of effectiveness: legislative quality equals effectiveness.[1194] The latter term is described by Mader as 'the extent to which the observable

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1187 Xanthaki, 'Emerging trends in legislation in Europe' (n 1130) 284. Also Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 114.

1188 Xanthaki, 'Emerging trends in legislation in Europe' (n 1130) 284.

1189 Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 114.

1190 Xanthaki, 'Emerging trends in legislation in Europe' (n 1130) 285. Also H. Xanthaki, 'On transferability of legislative solutions: the functionality test' in: H. Xanthaki and C. Stefanou (eds), *Drafting legislation. A modern approach* (Routledge, London 2008) 12-24, 14. Elsewhere, she defines 'efficacy' as 'the extent to which regulators achieve their goal'. Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 114.

1191 This coincides with our view on the difference between regulation and legislation, as described in the previous section.

1192 Xanthaki, 'On transferability of legislative solutions' (n 1190) 14.

1193 Ibid.

1194 H. Xanthaki, 'Quality of legislation: an achievable universal concept or a utopian pursuit?' <http://sas-space.sas.ac.uk/4854/1/Nomos_book_Quality_of_legislation_a_utopian_pursuit.pdf> (accessed 29 March 2018) (Author's original manuscript. Also published in: M. Travares Almeida (ed), *Quality of Legislation* (Nomos, Baden-Baden 2011) 75-85) 81. Also Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 115.

attitudes of the target population […] correspond to […] the attitudes and behaviours prescribed by the legislator'.[1195] Efficacy and effectiveness are closely related, but must be clearly distinguished. Xanthaki argues that '[w]ithin the umbrella of *efficacy,* the drafter pursues *effectiveness* in legislation' (emphasis added).[1196] Elsewhere, she elaborates on the difference between efficacy and effectiveness in the following manner:

> '[E]ffectiveness seems to reflect the relationship between the effects produced by legislation and the purpose of the statute passed. It is different from efficacy in that it relates to the effect of the statute and not to the effect of the policy which the statute sets out to achieve. In other words, effectiveness can be described as the drafter's efficacy'.[1197]

In addition to this understanding of legislative quality, several authors consider other elements than effectiveness relevant as well. They adhere to a broader concept of legislative quality than the functional approach. For instance, in the view of Drinóczi, the 'quality of legislation' constitutes the law's ability to achieve 'short-, medium- and long-term social and economic goals in a planned way by an open and evidence-based preparation and adoption process of constitutional, efficient and implementable laws'.[1198] The definition of legislative quality preferred by Vanterpool comprises two elements: quality in the substance of the law and quality in the form of the law. Whereas the former requires that legislation is 'appropriate, adequate and precise in solving the problem it is intended to solve', the latter demands a 'language and structure that is readily understandable to those who are affected by it and those who must administer it'.[1199] Mousmouti distinguishes between quality of process, content, form and impact of the laws on the one hand (which she refers to as a 'rational process of applying legal principles in order to make democratic decisions'); she contends, on the other hand, that quality 'essentially refers to real world outcomes of legislation and the degree of achievement of its goals' (which she labels 'effectiveness'). Effectiveness, in her view, is the 'real' and 'ultimate' measure of legislative quality.[1200] Finally, Timmermans argues that quality of the legislative instruments adopted in the framework of the EU consists of several elements that can be placed under three headings: quality of drafting and presentation of texts, conformity with general principles, particularly of good and proper legislation, and requirements as to the effectiveness of rule-making. The three categories encompass more detailed standards, among them the easy accessibility of legislative texts, the obser-

1195 L. Mader, 'Evaluating the effects. A contribution to the quality of legislation' 22 *Statute Law Review* 2 (2001) 119-131, 126.
1196 Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 114.
1197 Xanthaki, 'On transferability of legislative solutions' (n 1190) 14.
1198 Drinóczi, 'Concept of quality in legislation revisited' (n 1173) 216.
1199 V, Vanterpool, 'A critical look at achieving quality in legislation' 9 *European Journal of law Reform* 2 (2007) 167-204, 170.
1200 Mousmouti, 'Operationalising quality of legislation' (n 1119) 197, 201 and 202.

vance of the principle of legal certainty and the requirement that rules must be capable of being enforced.[1201]

In view of the above, it may indeed be concluded that there is no generally accepted definition of 'legislative quality'. On a more positive note, however, authors seem to embrace the more essential (in the view of Xanthaki, for example) element of effectiveness. Thus, although there may be disagreement on the peripheral elements, there seems to be general consensus on its essence: effectiveness. Also Mousmouti, after stating that 'quality' is a vague and elusive term, agrees that 'effectiveness appears to be unanimously accepted as an essential expression of quality'.[1202] Given this state of affairs, it seems feasible to adhere to the approach of legislative quality which places 'quality of legislation' on the same footing with 'effectiveness of legislation'.

However, effectiveness itself is a multifaceted concept. Here, the various functions of legislation, already touched upon in section 11.4.2, come into play. It is submitted that effectiveness of legislation is narrowly entwined with the function of a specific piece of legislation. Thus, it is not limited to the instrumental function, or the ability of legislation to attain certain policy objectives. Also legislation which has merely a symbolic function can be considered effective if it succeeds in fulfilling its symbolic aim, for instance by expressing moral values. In the same vein, if a certain legislative proposal's aim is to adequately reflect political consensus (political function of legislation), the proposal can be considered effective if it is supported by the relevant political actors. Therefore, in the remainder of the present study legislative quality will be understood as the law's ability, taking into account its function or functions, to achieve the formulated aims. While the notion of 'effectiveness' is thus at the center of this definition ('achieve the formulated aims'), it must be stressed that effectiveness itself is a broader concept than merely effectiveness in an instrumental sense, i.e. the achievement of *policy* aims. In other words, in this definition effectiveness is a dynamic concept, which acquires its substance in a particular case only after the law at hand is analysed in the light of its function or functions. This state of affairs may be perfectly captured in Vanterpool's statement that '[o]verall, the pursuit of quality in legislation therefore advocates a certain balance arising from the foundation that legislation achieves its highest quality when it *has attained its true function*' (emphasis added).[1203]

Now we have clarified our understanding of the term 'legislative quality', the question may arise whether this definition could also be applied to *implementing* legislation without further adjustment. In other words, does implementing legislation possess specific features, distinct from 'non-implementing' legislation, which could justify or even force us

1201 Ch. Timmermans, 'How can one improve the quality of community legislation?' 34 *Common Market Law Review* (1997) 1229-1257, 1237 and 1254.

1202 Mousmouti, 'Operationalising quality of legislation' (n 1119) 205.

1203 Vanterpool, 'A critical look at achieving quality in legislation' (n 1199) 170.

to resort to a different concept of legislative quality? This question must be answered in the negative. It is true that, most notably, implementing legislation serves to attain aims that have been formulated on a different level and with different actors than legislation of a purely national origin. It follows that domestic implementing legislation must adequately reflect international agreement, i.e. comply with the applicable international instrument, whereas non-implementing legislation must reflect national agreement, i.e. the aims that are pursued by relevant national actors. As we have seen above, however, this factor is of no relevance from the perspective of legislative quality. Therefore, when assessing the quality of implementing legislation, there seems to be no reason to adhere to a different concept of legislative quality than the one we have explored above. Nevertheless, in one respect the definition requires amendment in order to clarify the level on which the aims have been formulated. This leads us to the following definition of the 'quality of implementing legislation':

> 'the national law's ability, taking into account its function or functions, to achieve the aim or aims embedded in the international legal instrument'.

In this definition, 'law' is synonymous to 'legislation' and must be interpreted in the widest possible sense; it is not limited to acts passed by a state's representative legislative body, but may also include secondary legislation.[1204] Again, it must be noted that the phrase 'taking into account its function or functions' in the definition serves to emphasise that the notion of effectiveness (achievement of aims) is a broader concept than the achievement of *policy* aims. In the end, a law's effectiveness cannot be considered distinct from a law's function.

11.4.4 Legislative quality and legislative standards

In Part II we discussed legislative standards that have been identified on the international level. Subsequently we have explored the concepts of 'quality of legislation' and 'quality of implementing legislation' in the previous section. The next question that deserves our attention is how the relation between legislative standards and legislative quality must be understood. As has become clear in the previous section, the notion of legislative quality and legislative standards are closely entwined; legislative standards are often, in contrast to our basic definition proposed in the previous section, considered to be part of the definition of legislative quality. As Mousmouti puts it, '[q]uality is a broad term, which applies in a variety of contexts and is usually judged by reference to specific predetermined standards'.[1205] A similar stance is adopted by Voermans, who maintains that 'legislative

1204 In this respect, this chapter adheres to the same concept of legislation as Karpen, 'Introduction' (n 13) 2.

1205 Mousmouti, 'Operationalising quality of legislation' (n 1119) 192.

quality is the degree to which legislative instruments and procedures live up to the legislative standards'.[1206] Radaelli and De Francesco simply state: '[q]uality is defined by principles'.[1207]

How can this reliance on legislative standards for the determination of a law's quality be justified? On the one hand, the concept of legislative quality remains rather ambiguous, perhaps too ambiguous to be effectively applied in practice. This situation is made more complex by the qualification, as proposed above, of effectiveness as a multifaceted concept; a law's effectiveness cannot be assessed except through the lense of the law's function. Against this backdrop, it could be argued that legislative standards are merely specific features that are believed to enhance a law's effectiveness. In this view, reliance on legislative standards offers us the instruments required to make an assessment of a law's quality in practice and to improve it whenever necessary.

On the other hand, the narrow focus on legislative standards may result in a distorted view of a law's quality. Xanthaki adopts a critical stance towards the acceptance or adherence to legislative standards as synonymous to legislative quality. Instead, she proposes a phronetic perspective:

> '[W]ithin the realm of legislative drafting as phronesis, rules and conventions only serve as a selection of tools which can be chosen by the subjective learned drafter in order to produce good laws. Since the rules and conventions of phronetic legislative drafting cannot possibly be applied with the rigidity and teleogenesis or inexorableness of rules of epistemic disciplines, promoting them to elements sine qua non of the concept of quality in legislation is an unfortunate logical faux pas. […] In phronetic legislative drafting repetition of application of the same rule can produce, by definition, variable results'.[1208]

Thus, the environment in which legislation is drafted is subject to continuous change. In this dynamic context, the repeated application of legislative standards (or 'rules and conventions', in the terminology used by Xanthaki) leads to varying results. As a result, their observance cannot be considered to suffice for the production of 'good laws' in every situation they are applied, which 'deprives them from credibility as elements of quality'.[1209]

Xanthaki's criticism is, however, not irreconcilable with the viewpoint, described above, that legislative standards are merely specific elements which make a positive contribution to a law's quality. Again, the real test for a law's quality lies in its ability, taking into account its function or functions, to achieve the formulated aims; the observance of one or more legislative standards can be no more than *an indication* that a particular piece of legislation will indeed pass the quality test. This assessment can, as Xanthaki convincingly argues, only be made on a case by case basis, taking into account that particular law's context. Therefore, in our view

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1206 Voermans, 'Concern about the quality of EU legislation' (n 1132) 64.
1207 Radaelli and De Francesco, *Regulatory quality in Europe* (n 1070) 32.
1208 Xanthaki, 'Quality of legislation' (n 1194) 76.
1209 Ibid.

the relation between legislative quality and legislative standards is one that is characterised by hierarchy: the observance of legislative standards positively contribute to a law's ability to achieve the formulated aims and thus to its quality.

Observance of legislative standards is, however, not a task that can be fulfilled in a binary manner; it is not a matter of *whether* a legislative standard is respected, but *to what extent*. This is important, since the observance of one legislative standard may produce tension with another. For instance, a law's formulation in conformity with other national (constitutional) and international provisions may result in a decrease of the law's effectiveness. Hence, the observance of legislative standards is a matter of degree. It follows that legislative quality is a matter of degree as well. As a consequence (and this may be both troublesome and reassuring), there is no such thing as a perfect law.[1210]

Moreover, similar to what has been pointed out with regard to a law's quality, the application of legislative standards depends on the law's function. Thus, in order to decide which standards should be applied and to what extent, it is crucial to understand the law's function. For example, the need for clear and accurate language may be less compelling in case of a legislative proposal which has a largely symbolic function, compared to a law with a mainly constitutional function. While the consultation of stakeholders seems to be highly relevant for a piece of legislation with an instrumental function, this may be much less so for legislative proposals with a largely bureaucratic function. This line of reasoning leads us to the conclusion that the various legislative standards which have been included in policy documents and academic scholarship, may tell us more about the propagator's stance adopted towards the functions of legislation. This may vary not only between different legislative proposals within a single jurisdiction, but also between multiple jurisdictions or legal cultures. Perhaps more importantly, it explains the broad spectre of available legislative standards.

Various authors have made attempts to (exhaustively) enumerate the standards they consider of paramount importance for the evaluation of legislative quality. For the purpose of the present study it is not necessary to separately analyse these attempts in depth. Nevertheless, in order to gain an impression of the proposed lists of legislative standards it is useful to discuss two approaches to legislative standards in more detail.

As we have seen in section 11.4.3, Xanthaki places the notion of 'quality of legislation' on the same footing as 'effectiveness of legislation'; both terms are synonyms. Subsequently, she argues that effectiveness can be obtained

1210 N.A. Florijn, 'Quality of legislation: a law and development project' in: J. Arnscheidt, B. van Rooij and J.M. Otto (eds), *Lawmaking for development. Exploration into the theory and practice of international legislative projects* (Leiden University Press, Leiden 2008) 75-89, 77. Also U. Karpen, 'Comparative law: perspectives of legislation' 6 *Legisprudence* 2 (2012) 149-189, 157.

in two ways: either through efficiency (which refers to the 'use of minimum costs for the achievement of optimum benefits of the legislative action') or, second, by clarity, precision and unambiguity.[1211] The legislative standard of clarity refers to the quality of being clear and easily perceived and the standard of precision must be understood as exactness of expression. Unambiguity is, in the meaning attributed to it by Xanthaki, 'certainty'. Together, through the use of plain language and gender neutral language, they ensure that the law's content can be understood by the legal subjects to which it is addressed.[1212] The aforementioned standards, Xanthaki contends, are the 'main principles of legislative drafting' that should be at the core of any drafting manual.[1213] More importantly, they possess relative universality: they are entrenched in legislative practice across Europe, in both countries with a common law or a civil law tradition.[1214]

Drinóczi proposes an alternative list. In her view, quality of legislation may be achieved if the legislature observes the following standards, which she labels 'principles': legality, effectiveness, intelligibility, transparency, accessibility, 'due' legislative process, rational policy making and enforceability. In order to honor these principles to the largest possible extent, she adds, states should safeguard the quality of the legislative process, since 'legislation cannot be seen as isolated from the legislative activities of the state'.[1215]

A quick comparison of the lists proposed by Xanthaki's and Drinóczi's respectively, set out above, reveals two different approaches. Whereas Xanthaki's list seems to be confined to standards with regard to the formal aspects of legislation, arguably Drinóczi's list has a wider scope, as it also encompasses standards with regard to the substance of a law, such as the law's enforceability. Admittedly, it may not be entirely fair to present the views of both authors as contradictory, as they contain similarities as well. Nevertheless, the comparison indicates that attempts to formulate standards in the quest for legislative quality, has produced various results which encompass procedural, formal and substantive aspects of legislative quality.

Finally, it must be emphasised that no legislative standards which are specifically aimed at the quality of *implementing* legislation have been advanced in the scholarly debate on legislative quality; arguably, legislative standards are believed apply to both legislation of truly domestic origin or to EU legislative instruments.

1211 Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 115. Vanterpool suggests an almost identical list which comprises 'clarity, unambiguousness, simplicity and precision'. Vanterpool, 'A critical look at achieving quality in legislation' (n 1199) 186-195.

1212 Xanthaki, 'Drafting manuals and quality in legislation' (n 1071) 115-117.

1213 Ibid, 117.

1214 Ibid, 120.

1215 Drinóczi, 'Concept of quality in legislation revisited' (n 1173) 216.

11.4.5 Conclusion

In this section we defended the thesis that legislative quality must be understood as the law's ability, taking into account its function or functions, to achieve the formulated aim or aims. In particular, it was argued that a law's effectiveness (achievement of aims) can only be assessed with the specific function of the anticipated law in mind. This may vary not only between different legislative proposals within a single jurisidiction, but also between multiple jurisdictions or legal cultures. If we apply this view to the context of implementing legislation, it is justified to advance the following definition of 'quality of implementing legislation': the national law's ability, taking into account its function or functions, to achieve the aim or aims embedded in the international legal instrument. In order to enhance legislative quality, authors have resorted to legislative standards. They must be viewed as hierarchical subordinate to the notion of effectiveness; the observance of legislative standards positively contribute to a law's effectiveness and thus to its quality. In other words, they constitute the means to an end: quality. Similar to the notion of effectiveness itself, the application of legislative standards to a specific legislative proposal is dependent on the law's function or functions. This explains why in a particular case the one standard should have prevalence over the other.

11.5 Conclusion

In this chapter we have explored the concept of legislative quality. As part of this endeavour, we have first explored two international (OECD and EU) and two national policies (the United Kingdom and the Netherlands) with regard to legislative quality. This analysis has revealed a certain degree of diversity in the approaches towards the questions how legislative quality must be understood and how it should be achieved. This diversity may be explained by the specific features of legal orders and their development over the course of time. For instance, the legislative quality policy in the Netherlands has taken the shape of the codified Instructions for law-making, whereas in the United Kingdom legislative quality has been pursued by specialised lawyers working for the OPC.

In an attempt to seek common ground in the various approaches, we have distinguished between several perspectives on two levels: first, the distinction between regulation and legislation and, as a corollary, between regulatory quality and legislative quality. We have also seen how both perspectives have been prominent in different stages of legislative policies in the past. Second, we have also submitted that the meaning attributed to the notion 'legislative quality' depends on the function of a particular piece of legislation, which equally applies to implementing legislation: constitutional, legal certainty, instrumental, political, democratic and symbolic. This has led us to the following definition of 'quality of implementing legisla-

tion': the national law's ability, taking into account its function or functions, to achieve the aim or aims embedded in the international legal instrument. The various standards that have been suggested in literature and which serve to operationalise the notion of legislative quality can be divided into three categories: standards with regard to legislative procedure, standards with regard to legislative substance and standards with regard to legislative form. This is where we can observe common ground; most legislative standards emerge under all of the legislative quality policies, such as the need for *ex ante* and *ex post* impact assessments, the need for legislation that is enforceable and the need for clear and accessible legal texts.

Under the four policies that we have discussed, legislative standards tend to apply to legislation in general; there is no reason to assume that *other* legislative standards come into play when states adopt legislation in order to fulfil their obligations under international law.

12 Quality standards pertaining to implementing legislation and international legal practice: a gap to bridge?

12.1 Introduction

In the present chapter we bring together our examination of international legal practice and our findings with regard to legislative quality. It enables us to establish whether the international legal regulation of implementing legislation can be considered adequate, which, as we have already explained, coincides with the question to what extent the regulation of implementing legislation ensures legislative quality. Thus, the purpose of the present chapter is, first and foremost, to assess whether the features of national implementing legislation, which are prescribed under international law, live up to the legislative standards which can be considered part and parcel of the notion of legislative quality. This question will be answered in section 12.2.

Our assessment of the international regulation of implementing legislation requires a systematic approach, which means that the objects of comparison should be *relevant* from the perspective of the regulation of implementing legislation and of the policies aimed at legislative quality. Furthermore, given the fact that the international legal regimes discussed in Part II do not perfectly reflect international legal practice in its entirety, but are merely an indication of that practice, we propose to look beyond the detailed features of one particular legal regime. Therefore, in section 12.2 we focus on three elements of the regulation of implementing legislation: its scope, character and substance. 'Scope' points to the scope of application, i.e. to the norms to which the regulation of implementing legislation applies. 'Character' refers to the extent to which a legislative standard can be considered binding on the national legislature, which is closely related to the question whether a legislative standard is codified and if so, in what form or instrument. The 'substance' of the regulation of implementing legislation covers the various features of national implementing legislation and legislative standards respectively. The three elements combined will provide us with a clear indication of the adequacy of international legal regulation of implementing legislation.

At the other end of the balance we need a yardstick that could be used to conduct our comparative analysis. To this end, we will resort to the OECD's policy with regard to legislative quality. The selection of the policy with regard to the quality of national legislation developed under the guidance of the OECD could be justified with the argument that it is the single *global* regime on the topic, although it is acknowledged that the OECD membership has a 'western' bias; of the 35 member countries, 29 are located in Europe, North-America and Oceania. In this respect, it differs

from the legislative quality policies developed in the framework of the EU, the United Kingdom and the Netherlands. The policy developed by the EU's institutions does not apply to national legislation, but to supranational legislation, i.e. the EU's legislative instruments. The British and Dutch policies to increase legislative quality are *national* regimes which apply to one state only. Therefore, they may be less suitable to serve as the yardstick that we are seeking. For these reasons, the OECD's policy with regard to the quality of national implementing legislation is best suited to serve as the normative framework for our assessment.

Finally, on the basis of our assessment, in section 12.3 we suggest a possible way to enhance the quality of national implementing legislation.

12.2 Quality standards pertaining to implementing legislation and international legal practice: a comparison

12.2.1 Scope of the regulation of national implementing legislation

A comparison of current international legal practice with regard to the regulation of national implementing legislation and the OECD legislative policy, reveals two fundamental differences and one similarity with regard to their respective scope.

First of all, in the absence of rules under general international law, the international regulation of implementing legislation has a rather narrow scope; it exclusively applies to national legislation which serves to implement the legal instrument at hand, very often a treaty. Overall, as we have seen in Chapter 10, this has resulted in a highly fragmented regulation of national implementing legislation, *between* regimes and *within* regimes. Of course, this state of affairs is a direct consequence of the absence, under general international law, of legislative standards governing national implementing legislation. In contrast, the legislative quality policy developed under the guidance of the OECD aspires to govern an unlimited number of laws to be adopted by the national legislature in the future.[1216] In our view, the aforementioned fragmentation is the most problematic aspect of current international legal practice from a legislative quality viewpoint, since it prevents international policy makers to systematically take into account the elements which determine the effectiveness of national implementing legislation.

1216 More accurately, the OECD's policy to enhance regulatory quality applies to 'policies, institutions and tools' (OECD Guiding principles p. 3). Since our comparison is limited to legislative standards, as we have discussed in the introduction to Part II, other aspects of the OECD's legislative policy, such as the recommendation that 'regulatory policy should be carried out at the highest level by the office of the President or Prime Minister', are left out of the equation.

Second, contrary to the current international legal practice with regard to the regulation of national implementing legislation, the OECD legislative quality policy concerns national legislation in general; it does not particularly focus on national *implementing* legislation.

We can also discern a similarity. Often, legislative standards that are part of the regulation of national implementing legislation under international legal regimes are not limited to implementing legislation only; instead, they apply to the broader category of national implementing *measures.* Similarly, the OECD's 'regulatory reform' policy in principle concerns any form of government intervention in society, not only those laid down in legislation.

12.2.2 Character of the regulation of national implementing legislation

With regard to the character of the regulation of national implementing legislation, there is one principal difference, which on a more positive note may also be considered a partial similarity: whereas the legislative policy propagated by the OECD has a non-binding character, the legislative standards which we have identified under the international legal regimes discussed in Part II have a partially binding and partially non-binding nature.

The 2012 Recommendation on regulatory policy and governance has been adopted pursuant to article 5, sub b, of the Convention on the OECD, which provides the OECD with the power to make recommendations to its members with a view of achieving its aims. The chosen wording and legal basis thus imply a non-binding character. As we have seen in Part II on current international legal practice, some legislative standards have been included in binding legal instruments, most notably treaties. As such, those legislative standards possess the force of law. Other standards have been codified in supplementary documents such as guidelines for implementation and handbooks. They must be labelled 'soft law' instruments which lack formal legal power.

However, the distinction between binding and non-binding legislative standards may not be as relevant in practice as one might think. Whereas, of course, a standard's legal force is stronger if it is included in a binding legal instrument, the precise legal consequences it produces may not be clear from the outset. Thus, the formulation of binding legislative standards in open terms may still provide a considerable measure of latitude to the national legislature in drafting the national implementing law.

12.2.3 Substance of the regulation of national implementing legislation

To what extent do the legislative standards under current international legal practice and the OECD legislative policy coincide? Above we have made a distinction between three categories of legislative standards: standards with regard to legislative procedure, standards with regard to legislative substance and standards with regard to legislative form. Although this

distinction is not expressly made in the 2012 Recommendation, all three categories come to the fore.

With regard to legislative form, the 2012 Recommendation provides that regulations should be 'comprehensible and clear'. To this end, states are called upon to use 'plain language', which enables legal subjects to understand their rights and obligations.[1217] In Chapter 10 we have identified similar requirements under the current international legal practice, in particular under the heading of legal certainty. In the context of the ECHR's positive obligations, as we have seen, the ECtHR has treated the observance of legal certainty as a crucial condition for the provision of 'effective protection'. Formal requirements can also be derived from the conditions under which the ECHR's rights may be restricted. However, the observance of formal criteria in the adoption of national implementing legislation may be most firmly established under EU law, which demands 'specificity, precision and clarity'.

On matters regarding legislative procedure, the 2012 Recommendation stipulates that states should:

> '[a]dhere to principles of open government, including transparency and participation in the regulatory process […] This includes providing meaningful opportunities (including online) for the public to contribute to the process of preparing draft regulatory proposals and to the quality of the supporting analysis'.[1218]

Furthermore, it is recommended that states conduct regulatory impact assessments for the development of new legislative proposals. It entails, *inter alia,* the clear formulation of policy objectives and the various options to achieve them, including options which do not require the adoption of legislation.[1219] It also stipulates that states continue to review their existing body of legislation to make sure that 'regulations remain up to date, cost justified, cost effective and efficient, and deliver the intended policy objectives'.[1220] In short, states should consult relevant organisations and should perform *ex ante* and *ex post* impact assessments. To what extent do these requirements emerge under international legal practice?

As we have seen in section 10.3.3.3, the legislative standard of consultation can be found under the CDWDW, the FCTC and the ICESCR. Under those regimes, consultation serves the purpose of creating support for the adopted legislation and to improve the quality of legislation. We have also seen that the requirement of *ex post* evaluation of legislation can be identified under the ICESCR and the FCTC. Compared to truly autonomous national legislation, one legislative standard that is part of the OECD's regu-

1217 OECD, 'Recommendation of the Council on Regulatory Policy and Governance' (n 1122) section I, sub 2, and section 2.6 of the annex.

1218 Ibid, section I, sub 2.

1219 Ibid, section I, sub 4.

1220 Ibid, section I, sub 5.

latory quality policy may be less relevant for implementing legislation: the clear formulation of policy aims and the consideration of various options to achieve those aims, i.e. an *ex ante* impact assessment. Very often, once an international legal regime has been established, that ship will have sailed. Whether a state party is at liberty to consider multiple options to obtain the policy objectives agreed upon in the international instrument, will depend largely on the level of specificity of the applicable international norm. The same point could be made with regard to the standard of consultation. Since at this stage the state has already contracted an international legal obligation to adopt implementing legislation, consultation partners can merely attempt to improve national implementing legislation; their advice cannot, however, lead to the conclusion that the national legislature should refrain from the adoption of legislation altogether.

The 2012 Recommendation also provides guidance on matters of legislative substance. A law's legality and procedural fairness should be subject to effective systems of review, which means that citizens should have access to remedies against sanctions imposed upon them. As we have seen, the provision of 'effective' remedies to challenge national implementing legislation is firmly established in article 13 the ECHR. Also in the context of the CDWDW, MLC and ICESCR the need for domestic remedies has been emphasised, which under the latter regime should meet the criteria of 'availability, accessibility and quality'. Without doubt the most elaborate requirements with regard to domestic remedies can be found in EU law, which in several respects has circumscribed the national procedural autonomy of member states.

Furthermore, the OECD regulatory quality policy demands that legislators consider 'how regulations will be given effect and should design responsive implementation and enforcement strategies'. In sections 10.3.2, 10.3.3.5 and 10.3.3.6 we have seen that the standards of effectiveness, of compliance monitoring and of enforcement could be derived from current international legal practice. Together, they can be said to meet the standard formulated by the OECD.

The 2012 Recommendation also emphasises the importance of 'regulatory coherence' between the various levels of government, which means that duplication and conflicts between regulations should be avoided.[1221] As such, this particular standard cannot be identified in international legal practice. However, we have seen that several international regimes stipulate that national implementing legislation should be adopted in accordance with other domestic legal provisions of higher rank in order to ensure its effectiveness.

Also, according to the OECD, national legislatures should observe 'all relevant international standards' in order to foster 'global coherence'.[1222] The annex to the Recommendation emphasises the need to act in accordance

1221 Ibid, section I, sub 10.

1222 Ibid, section I, sub 12, and section 12.2 of the annex.

with treaty obligations. It particularly stresses the obligation to treat foreign products and services no less favorable than domestic products and services, which once again reveals the economic perspective engrained in the OECD's regulatory policy.[1223] Under the international legal regimes that we have discussed in Part II, similar requirements can be found. Examples include, *inter alia,* the CITES, the ICSFT and the CTOC which in brief prescribe that states' national implementing legislation should comply with other relevant, existing international legal norms. In doing so, this standard's codification stresses the importance of 'global coherence'.

In view of the above, there seems to be a discrepancy between current international legal practice with regard to the regulation of national implementing legislation and theories and practices which aim at the achievement of legislative quality. However, this discrepancy is related primarily to the scope and, to a lesser extent, character of the legislative standards which govern national implementing legislation. With regard to the legislative standards' substance, on the other hand, the similarities are striking; every single requirement applicable to legislation under the OECD legislative policy, can be found under at least one of the international legal regimes discussed in Part II. It does not mean, however, that they are perfectly identical. It warrants the conclusion that international policy makers seem to be aware of the legislative standards that could be included in any special international legal regime that requires implementation through legislation on the national level. It has, however, not resulted in a consistent entrenchment of those standards in international legal practice.

12.3 A gap to bridge?

In the previous section we have identified a discrepancy between current international legal practice with regard to the regulation of national implementing legislation and theories and practices which aim at the achievement of legislative quality. It begs the question: is there a gap to bridge? In other words, does the quest for legislative quality demand a change in attitudes in international legal practice? If so, what should this change in attitudes entail? In the present section we explore the fundamental considerations which determine the answers to these questions.

First of all, the question arises whether there is a problem that needs to be solved. Some may argue that the discrepancy between current international legal practice with regard to the regulation of national implementing legislation and theories and practices which aim at the achievement of legislative quality, to which we have referred above, may justify an affirmative answer. Proponents of this standpoint may argue that we are confronted with the problem that the regulation of national implementing legislation

1223 Ibid, section 12.3 of the annex.

under international law is, from a legislative quality viewpoint, not as good *as it could be*. Therefore, they would add, current international legal practice needs improvement. Others may adhere to the view that the regulation of legislation in whatever form in order to improve legislative quality is a policy aim not worth pursuing. They may submit, for instance, that the absence of such regulation is not perceived as a problem in a specific political community or they may assert that legislative quality may be achieved in other ways than through the formulation of mandatory standards applicable to legislation. In both cases, the identified problem is considered as purely theoretical, which may not justify an allocation of public resources. In other words, to supporters of this line of reasoning the fact that the regulation of national implementing legislation under international law demonstrates some flaws may not be problematic at all.

Let us assume that the discrepancy between current international legal practice with regard to the regulation of national implementing legislation and theories and practices which aim at the achievement of legislative quality constitutes a problem that needs to be solved. Should the solution be found on the international level?

One may argue that international cooperation between states should be reserved for problems which have a transboundary character (such as transnational crime, international trade in wildlife and the international spread of infectious diseases, to mention only a few examples that we have discussed in Part II). Only in those cases the watering down of the democratic legitimacy of state policy could be justified. Why should a policy to remedy an alleged lack of quality of national (implementing) legislation possess international dimensions? Even under international law, it could be argued, the power to adopt legislation is considered to be inherently linked to the notion of state sovereignty. This fact is neither altered by the finding that legislative quality is aspired in several or even many countries around the globe, nor by the fact that some legislation serves to implement international legal obligations of the state. As a corollary, any attempt to enhance legislative quality should be undertaken first and foremost at the national level. Perhaps even more importantly, legislation must be seen in the light of its context, which consists of the national legal culture in its broadest sense. Therefore, a policy which aims at the improvement of legislation could only be successful if it pays heed to the particular context of the national legal order in which it is to be applied. For this, a national legislative policy is much more suited. It follows that any legislative policy has better odds at obtaining its objectives if it is formulated at the national, instead of the international, level. In sum, we may conclude, the statement that the improvement of legislation, including national implementing legislation, should be pursued primarily at the national level, is not without merit.

Others may defend the position that the divergence between international legal practice in respect of the regulation of implementing legislation and theories and practices which seek to enhance legislative quality, is a

problem that should be solved at the international level. They may point to the fact that national implementing legislation finds its origin in an international regime to which the state has committed itself on the international level. All the state parties involved have an interest in making the regime work in practice, of which high quality national implementing measures constitute an indispensable element. In this view, legislative quality is closely related to the regime's effectiveness, a standpoint which, as we have seen in Chapter 11, is widely supported. Therefore, they may submit, the quality of national implementing legislation is a matter of international concern, which justifies the codification of standards for domestic implementing legislation on the international level.

Both viewpoints contain elements of truth and both are part of the solution. In our view, it basically consists of a balancing act between the protection of state sovereignty on the one hand and the international legal regime's effectiveness on the other hand. In particular, it entails the codification of the requirements pertaining to the quality of implementing legislation in the meaning we have attributed to this concept in Chapter 11: the national law's ability, taking into account its function or functions, to achieve the aim or aims embedded in the international legal instrument. As we have explained, the notion of quality essentially coincides with the regime's effectiveness, provided that we adhere to a broader notion of effectiveness than effectiveness purely in an instrumental sense; a law's quality can only be established in the light of its function or functions. The solution that we envisage is based on the assumption that our definition of legislative quality is one that should be encouraged by any state seeking compliance with the regime, as it makes a truly effective international legal regime more likely.

The codification of legislative standards could only be succesful if it respects the broad variety in national legal systems and national legal practices with regard to the adoption of implementing legislation. In other words, it is of paramount importance that the international codification of quality requirements for implementing legislation is *flexible*. This flexibility could be strived for in two ways.

First, the quality requirements should be laid down in an authoritative and non-binding instrument. Or, more accurately, they should *not* be laid down in a *binding* instrument. The adoption of a non-binding instrument could not only be reconciled more easily with the protection of the national legislature's powers, which derive from the state's sovereignty. Also, ironically, the non-binding character of legislative standards pertaining to implementing legislation may increase the document's potential to significantly influence international legal practice. Were it codified in an international treaty, for instance, the document runs the risk of becoming subject to fierce negotiations, which may result in the codification of a hollow and meaningless collection of legislative standards. Ideally, therefore, the quality of national implementing legislation should be discussed and elaborated by

the ILC, the authoritative UN body entrusted with the task of 'encouraging the progressive development of international law and its codification'.[1224]

Second, the quality requirements should be formulated in a way that leaves room for the national legislature to consider their correct application when preparing a specific legislative proposal that serves to implement an international legal regime to which the state is bound. Again, it is a safeguard for the protection of a state's sovereignty. Thus, the legislative standards should be formulated in a sufficiently broad manner. For the same reason, they should be formulated as recommendations instead of mandatory instructions.

What should such a document look like? As we have seen, the discrepancy between current international legal practice with regard to the regulation of national implementing legislation on the one hand, and theories and practices which aim at the achievement of legislative quality, as codified in the framework of the OECD, on the other hand, largely concerns the legislative standards' scope. Thus, the solution that we envisage should primarily address the fact that international policy makers do not systematically take into account the elements which determine the effectiveness of national implementing legislation, thereby also jeopardising the international regime's effectiveness. This could be achieved by making clear that the legislative standards which, albeit irregularly, have already emerged in international legal practice, should be applied by the national legislature whenever it adopts national implementing legislation.

It raises the question how the international non-binding codification of legislative standards relates to the inclusion of legislative standards in the various binding international legal regimes, for instance those discussed in Part II, which require implemention on the national level. While the former should be taken into account by *national* policy makers involved in the preparation of national implementing legislation, the latter are the product of decision making by *international* policy makers involved in the preparation of the international legal regime. In our view, there seems to be no reason why the international non-binding codification of legislative standards applicable to national implementing legislation should be reserved for national policy makers; indeed, it may provide assistance to international policy makers as well, who may consider their inclusion in the international legal regimes at hand. In short, it may not only increase international policy makers' interest in the quality of national implementing legislation, but may also provide them with practical instructions to achieve it.

In theory, our international codification of legislative standards may be accepted by decision makers to a varying degree. Each reference to our document, whatever its nature, contributes to the spread of knowledge on the quality of national implementing legislation. At the one end of the spectre, our document may serve as an *inspiration* for international and

1224 ChUN art 13, first paragraph, sub a; UNGA res 174(II) (21 November 1947).

national policy makers. At the other extreme, decision makers may choose to codify our solution in a binding legal instrument, thus completely *harmonising* the international legal regulation of national implementing legislation. In between, policy makers of specific international legal regimes may refer to our document or may prescribe it as mandatory.

If legislative standards applicable to national implementing legislation could be internationally codified along the lines described above, this may increase the quality of implementing legislation to the advantage of political communities across the globe, while at the same time respecting the democratic underpinnings of national decision making.

12.4 Conclusion

In this chapter we have formulated an answer to the question whether the features of national implementing legislation, as prescribed under international law, live up to the legislative standards which can be considered part and parcel of the notion of legislative quality. This analysis has drawn upon our findings included in Chapters 10 and 11 and has looked particularly into the scope, character and substance of the legislative standards that we have identified under international law and as part of theories and practices with regard to legislative quality respectively.

In short, there seems to be a discrepancy between between current international legal practice with regard to the regulation of national implementing legislation and theories and practices which aim at the achievement of legislative quality. It mainly concerns the scope and, to a lesser extent, character of the legislative standards which govern national implementing legislation. With regard to the legislative standards' substance, we have found a large measure of overlap with the standards codified in the framework of the OECD. These findings justify the conclusion that current international legal practice, as represented by the regimes that we have discussed in Part II, is only partly adequate in ensuring the quality of national implementing legislation.

In section 12.3 we have analysed whether the established inadequacy or partial adequacy is a problem that should be addressed on the international level. We have argued that there is a gap to bridge, for which the codification of legislative standards on the international level, preferably in a non-binding instrument, may be an appropriate solution.

13 Conclusions

13.1 The research questions revisited

In the present study we have analysed the national legislature's contribution to the realisation of international law. In particular, we have analysed its role in the implementation of international law in the national legal system in order to formulate an answer to the following research question:

> To what extent is domestic implementing legislation regulated by international law and to what extent is this regulation adequate?

In our attempt to formulate an answer to this question we have adopted an international and institution-oriented approach which has specifically focused on the national legislature's role as an institution in the implementation of international law in the domestic legal order. It also means that we have looked beyond the particular characteristics of individual national legal orders and their legislatures. Neither have we discussed how specific international legal instruments have been implemented in one or more national legal orders. Instead, we have analysed several international legal regimes in order to determine to what extent they provide for standards which should be observed by state parties in the adoption of implementing legislation in their respective domestic legal orders.

Our findings can be summarised as follows. As a point of departure we have formulated an answer to the question why implementing legislation is an essential precondition for the realisation of international law. As we have seen in Part I, even though there are some indications that their shared border is becoming increasingly permeable, the international and national legal orders can still be largely seen as distinct systems; 'law' of the international legal order often does not possess the quality of law in national legal orders. As a consequence, it is not capable of regulating the conduct of legal subjects *directly*. It means that an act of implementation is indispensable if international policy makers intend to realise the formulated policy objectives. Subsequently we have explored the sources of international law which may give rise to national implementing legislation, as opposed to implementation through the executive or judicial branch of government. In quantitative terms, it seems justified to conclude that the lion's share of obligations to adopt implementing legislation derives from treaty law. However, those obligations could also be derived from binding decisions of international organisations and, in exceptional circumstances, from customary international law.

The obligation to adopt the necessary legislative measures to implement a binding international legal instrument is firmly engrained in international law. Nevertheless, in Part II we have established that there is no rule of *general* international law which prescribes how such implementation should be performed. Our analysis of various *special* international legal regimes, however, has revealed a diverse practice with regard to the regulation of implementing legislation: whereas some regimes stipulate in much detail the standards that national legislatures should comply with, other regimes provide hardly any guidance in this regard. Whenever international policy makers have considered it feasible to include legislative standards in the regime at hand, they tend to refer to the same standards. In other words: although there may not be a uniform practice with regard to the question *whether* legislative standards should be included in the regime, there seems to be consensus on *which* legislative standards should be included in case the regulation of implementation is deemed desirable.

Most regimes seem to adhere to the standard of effectiveness, which essentially prescribes that national implementing legislation should be able to bring about a desired change in behaviour. It is complemented with what we have labelled 'subsidiary elements of effectiveness'. They are separate legislative standards, but are often treated as necessary preconditions for effectiveness. Under the ECHR, for instance, observance of the requirement of legal certainty was considered a *sine qua non* for 'effective protection'. Therefore, it seems justified to describe the relation between the overarching standard of effectiveness and its subsidiary elements as hierarchical.

As we have derived from the international legal regimes we have discussed in Part II, the subsidiary elements of effectiveness include the following eight standards: consistency with other applicable national and international law, including the prohibition of non-discrimination; consultation with stakeholders; provision of information to the public; monitoring of compliance; enforcement; remedies; evaluation; and legal certainty.

The standard of consistency with applicable law demands that national implementing legislation is consistent with other norms applicable to the same subject matter, of national and international origin. In some cases, the international legal regime allows national legislatures to 'fill in' parts themselves. As we have seen under the CCTMW, for example, national legislatures are at liberty to label certain categories of waste as 'hazardous', thus bringing them under the treaty's scope of application. In other cases, the international legal regime prescribes that national implementing legislation should not infringe on national laws of higher rank in order to prevent a national law to remain without effect. We have found similar references to applicable *inter*national law. Again, there are regimes which rely on other international norms (in a more or less compulsory manner) to fill in aspects of national implementing legislation. As we have seen in section 4.2.3.4, national legislatures which perform their implementing obligations under article 12 ICESCR on sexual and reproductive health, should observe 'international guidelines and protocols established by UN agencies'. In

other cases, international law prescribes that national legislatures have to ensure that implementing legislation respects certain established norms of international law, such as the principles of territorial integrity of states or the principle of non-intervention. We have also found a legislative standard to perform consultation with relevant stakeholders. Which stakeholders are considered relevant, depends on the substance of the regime at hand. On the basis of our examination we may conclude that the purpose of consultation is to improve the substance of national implementing legislation and to facilitate support after its entry into force. Furthermore, we have identified a legislative standard which demands that governments provide information on the newly adopted implementing legislation. This information should be aimed at groups which are particularly affected by the legislation. The legislative standard to monitor compliance with national implementing legislation requires states to establish mechanisms for compliance monitoring and ensure that state bodies entrusted with compliance monitoring are competent and independent. Once a violation of national implementing legislation has been established, another legislative standards comes into play: enforcement. It requires the appointment of national enforcement authorities and the adoption of a legal framework for the imposition of effective and proportionate penalties or other enforcement measures in response to violation of domestic implementing legislation. In addition to these regulatory matters, this legislative standard also requires enforcement *in practice*. Another legislative standard requires states to provide for remedies available to individuals or entities affected. Such remedies provide them with the tools to challenge national implementing legislation and to enforce their rights. Furthermore, after its entry into force, states should engage in a periodic *ex post* evaluation of national implementing legislation. This enables them not only to assess whether national implementing legislation is in conformity with the applicable international legal regime, but also how it could be improved. Finally, we have discerned the legislative standard of legal certainty. It requires national legislatures to draft national implementing legislation in sufficiently clear and precise terms and to ensure its accessibility and foreseeability.

Our analysis has demonstrated that the regimes explored in Part II do not consistently refer to every single one of the aforementioned legislative standards; those standards differ in scope of application. Even within a specified international legal regime, a legislative standard's scope of application may differ from one provision to the other. Moreover, the standards' substance is not identical under the various regimes of which they are part; it would be inaccurate to state that 'effective protection' under the ECHR has the same substance as the principle of effectiveness under EU law. As a consequence, it would go too far to claim that the enumeration of the legislative standards mentioned above and the meaning attributed to them are *in its entirety* part of positive law to which the national legislature is bound. On the other hand, it would be equally inaccurate to ignore their common features. We have seen that the legislative standards do emerge

under several regimes, which may indicate that international policy makers somehow consider them relevant elements of domestic implementing legislation or legislative procedure. If we are aware of their limitations, our overview of the legislative standards inferred from international legal practice provides us with valuable insight in the way international law regulates national implementing legislation, as we have seen in Chapter 10.

Subsequently we have asked to what extent observance of the legislative standards discussed above will lead to 'good legislation' as part of an assessment of the legislative standards identified under international law. What constitutes 'good legislation' is highly contested. In Chapter 11 we have explored the various perspectives on this controversial subject. To this end we have analysed the legislative quality policies of the OECD, the EU, the United Kingdom and the Netherlands in more detail, in particular with regard to legislative standards. They represent four approaches to what legislative quality entails and how it should be achieved. In some respects they differ. Whereas some policies have been codified in documents widely used by national policy makers, other policies rely on the specialisation of highly trained legislative lawyers. And while some policies apply to regulation in general, other policies concern a specific form of regulation: legislation. We can also discern similarities, in particular with regard to the legislative standards which are considered indispensable elements of legislative quality.

We have seen that the notion of 'effectiveness', or the extent to which a piece of implementing legislation is able to bring about a desired change in behaviour, is central not only to many international legal regimes (which we have already argued above), but also to policies on legislative quality. It can be viewed as the overarching objective, the realisation of which is supported by observance of legislative standards of a subsidiary nature. However, this state of affairs does not warrant the conclusion that 'legislative quality' and 'effectiveness' are synonyms. As we have seen in Chapter 11, this understanding of legislative quality is too narrow, because it exclusively addresses the instrumental function of legislation, while ignoring other functions which could be attributed to legislation. For this reason, we have proposed the following definition of 'quality of implementing legislation': the national law's ability, taking into account its function or functions, to achieve the aim or aims embedded in the international legal instrument. Subsequently we have established the relevance of legislative standards for the assessment of a law's quality. Three categories of legislative standards can be distinguished: standards with regard to legislative substance, standards with regard to legislative form and standards with regard to legislative procedure.

As the next step in our assessment of the regulation of domestic implementing legislation under international law, we have relied on the OECD's legislative quality policy. This choice can be justified by the fact that it constitutes the only coherent policy on legislative quality with truly global aspirations, even though 'western' states are over-represented in the OECD

membership. In order to operationalise our comparison of the OECD's legislative quality policy on the one hand, and our overview of international legal practice with regard to the regulation of national implementing legislation on the other hand, we have looked at three aspects in particular: the scope, substance and binding character of the legislative standards.

What are the results of our endeavour? With regard to the legislative standards' *substance*, international legal practice largely coincides with the OECD's legislative quality policy: the legislative standards that we have identified under the international legal regimes discussed in Part II also emerge in the legislative quality policy of the OECD. They are not identical, however. For instance, while we have identified obligations to observe other relevant international legal norms in the adoption of national implementing legislation, the OECD emphasises the need for 'global coherence', i.e. consistency between various international regimes, in the regulation of the same subject matter. Other legislative standards may be less relevant in the adoption of national implementing legislation and, as a result, receive far less attention under the international legal regimes discussed in Part II than under the OECD's legislative quality policy. Examples are the standard to perform *ex ante* impact assessments and the standard to perform a consultation process. Aside from these differences, the picture that emerges is one of consensus on the quality criteria that should be observed in the adoption of national (implementing) legislation; standards on the law's clarity, *ex post* evaluation, compliance monitoring, enforcement and remedies, are part of both the international legal regimes discussed in Part II and of the OECD's legislative quality policy.

Our comparison of the legislative standards' *character* warrants the conclusion that legislative standards often possess a non-binding character, since they are laid down in soft law documents, such as implementing guidelines, legislative guides etc. In this respect, their character resembles the OECD's legislative policy character, which is laid down in a non-binding recommendation. Nevertheless, other legislative standards are firmly established in binding legal instruments, very often the international legal instrument that needs to be implemented on the national level.

Finally, with regard to the legislative standards' *scope*, we have demonstrated that international legal practice is highly fragmented. This fragmentation has two dimensions. First, legislative standards which are part of international legal regimes, often do not apply to the regime in its entirety, but only to specific provisions. For instance, we have seen that the Guidelines for Implementation under the FCTC stipulate that domestic implementing measures 'should identify the authority or authorities responsible for enforcement, and should include a system both for monitoring compliance and for prosecuting violators'.[1225] This requirement, however, is limited to articles 9 and 10 FCTC on the regulation of the content of tobacco

1225 WHO, *Guidelines for implementation* (n 177) 45. The Guidelines contain an identical statement with regard to article 8 of the Convention. Ibid, 26.

products, including the publication of information about their content. It may lead to a situation in which legislative standards should be observed by the national legislature with regard to specific parts of national implementing legislation only. This state of affairs cannot be justified from a legislative quality perspective. Second, no codification of legislative standards applicable to implementing legislation exists under general international law. As a result, policy makers involved in the formulation and negotiation of a new international legal regime should 'invent' the legislative standards which they consider useful and include them in the regime at hand. This has led to the situation, as we have seen clearly in Part II, in which international legal regimes differ significantly in the way they prescribe the standards that should be met in the adoption of national implementing legislation. In contrast, the legislative quality policy adopted in the framework of the OECD applies to an unlimited number of regulations or laws in their entirety (even though they do not apply to implementing legislation in particular).

In sum, whereas international legal practice with regard to national implementing legislation is highly fragmented, the legislative quality policy developed under the auspices of the OECD can be said to improve, or at least seek to improve, coherence between member states' legislative quality. This discrepancy is a gap to bridge, as we have argued in Chapter 12, if we accept that state parties not only have an interest in making the international regime to which they have committed themselves work in practice, but also that the pursuit of legislative quality has an important role in ensuring the regime's effectiveness.

13.2 The gap to bridge

Given this state of affairs, we have proposed to codify legislative standards applicable to national legislation which is adopted in order to implement international legal obligations. This document should not be applied rigidly, however, in the sense that it should prescribe a 'one size fits all' path to legislative quality. On the contrary, it should respect differences between national legal systems and the legislation they produce. In other words, our international codification of legislative standards should leave room for the national legislature to make the legislative choices which suits it the most (provided, of course, that those choices are in conformity with the state's international commitments). This flexibility could be achieved by the adoption of a non-binding document in which the various legislative standards are formulated in a sufficiently broad manner, which would make compliance by a large number of states more likely. This ambition could be realised in a relatively short period of time, if this task is taken up by a group of experts (such as the ILC). In this way, we can contribute to the improvement of national implementing legislation, and thus to the effectiveness of international law, without eroding the democratic underpinnings of national decision making.

13.3 The international pursuit of high quality implementing legislation

Now we are approaching the end of the present study, it may be useful to briefly reflect on the pursuit of legislative quality on a more abstract level. As we have seen in Chapter 11, national, regional and international political communities have endeavoured to improve the quality of legislation or implementing legislation in particular, each of which has specific prioirities and features.

The question arises how these various developments relate to each other. Can we observe a convergence? Of the regimes discussed in Part II, one regime stands out because of its seniority: the EU. Its origins can be traced back to the 1950's, which makes it significantly older than most of the other international legal regimes that we have discussed in Part II. Its development has been overseen on the basis of compulsory jurisdiction of the CJEU. Most importantly, the EU has proved to be able to produce a vast body of legislation which affects many aspects of the EU citizens' lives. Arguably, the sheer size of the body of EU legislation and of its interpretation by the CJEU has made the quality of implementing legislation more pressing within the framework of the EU than under the other regimes that have been discussed in Part II. It may therefore not be a coincidence that the development of EU law is accompanied by a continuous elaboration of EU policies on the quality of legislation, as we have seen in Chapter 11. In this respect, it could be argued, the EU is 'ahead' of other international legal orders.

Is this point of view correct? Perhaps. On the one hand, national and international actors that are involved in the development of new ideas and policies aimed at the improvement of the quality of national implementing legislation, may wish to inform themselves about existing ideas and policies on the subject. To this end, they may turn to the EU's or OECD's legislative quality policy. In Chapter 12 we have made exactly that assumption, when we proposed the formulation of a non-binding policy document on the topic, with a view to enabling national and international policy makers across the globe to ensure legislative quality in their national or regional legal orders. On the other hand, there are reasons to believe that the quest for legislative quality does not necessarily point in one single direction. As we have seen in Chapter 11, controversy exists with regard to the question how the concept of legislative quality must be understood, and which legislative standards should play a role in its achievement. Arguably, as long as nation states remain the most prominent political entities in the international environment, theories and practices with regard to the quality of (implementing) legislation will be tailored to their particular needs. This also means that a legislative quality policy developed in a national legal order may not necessarily serve the needs of another legal order in which it is bluntly duplicated. Against this background, we find it difficult to imagine that one day, all legal communities will agree on one single binding

and highly detailed policy to enhance the quality of national implementing legislation. Until that day comes, if ever, national and international policy makers may prefer to borrow ideas and policies developed across their legal orders' boundaries and attempt to reconcile them with their legal orders' characteristics. The importance of this has been underlined by Karpen, who has stated that:

> '[i]f we understand why and how, in applying common standards, others legislate differently than we do, we are encouraged to compare and learn, and to improve our methods or retain our own legislative style'.[1226]

To this process, the present study may be a modest contribution.

1226 Karpen, 'Introduction' (n 13) 2.

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Summary in Dutch

De implementatie van internationaal recht in de nationale rechtsorde: een wetgevingsperspectief

Samenvatting

Het vertrekpunt van dit proefschrift, getiteld 'De implementatie van internationaal recht in de nationale rechtsorde: een wetgevingsperspectief', is dat internationaal recht voor zijn verwezenlijking in belangrijke mate afhankelijk is van de organen van afzonderlijke staten en dat de rol van de wetgevende organen, zeker in vergelijking met de rol van rechters, weinig aandacht heeft gekregen in de literatuur. Het proefschrift richt zich daarom specifiek op de rol van de nationale wetgever bij de implementatie van internationaal recht en geeft antwoord op de vraag hoe implementatiewetgeving onder internationaal recht is gereguleerd en in hoeverre die regulering adequaat is. 'Implementatie' wordt in deze studie begrepen als de handeling waarmee een internationaalrechtelijke norm wordt geëffectueerd in de nationale rechtsorde. Met 'nationale wetgever' wordt gedoeld op het orgaan van de staat dat krachtens nationaal recht de bevoegdheid heeft om wetgeving vast te stellen.

Het antwoord op de hoofdvraag valt uiteen in twee onderdelen: een beschrijvende analyse van het bestaande, toepasselijke internationaal recht in deel II en een normatieve analyse van dat recht in deel III.

Deel I, getiteld 'De implementatie van internationaal recht in de nationale rechtsorde', gaat in op de vraag waarom nationale wetgeving ter uitvoering van internationaal recht nodig is en uit welke rechtsbronnen verplichtingen voor staten voortvloeien om in de nationale rechtsorde dergelijke wetgeving vast te stellen. De eerste vraag, die centraal staat in hoofdstuk 2, raakt aan de verhouding tussen de internationale rechtsorde en de nationale rechtsorde. Deze verhouding moet naar de huidige stand van het recht bovenal als 'dualistisch' worden aangemerkt. Dat betekent dat de internationale rechtsorde en de nationale rechtsorde(s) als aparte rechtssferen moeten worden beschouwd.

Voor dit proefschrift is dat relevant in twee situaties. Ten eerste kan de situatie zich voordoen waarin een internationaalrechtelijk regime de staat een verplichting oplegt om op nationaal niveau wetgeving vast te stellen teneinde de in het regime geformuleerde doelen te verwezenlijken. Een voorbeeld hiervan is de verplichting, opgenomen in artikel 12, eerste lid, van het Afrikaans Handvest over de Waarden en Beginselen voor Openbare Dienst en Openbaar Bestuur, om wetgeving vast te stellen waarmee nationale anticorruptieautoriteiten worden opgericht. Dergelijke wetgeving wordt in het proefschrift 'implementatiewetgeving in enge zin' genoemd.

Ten tweede kan de situatie zich voordoen dat een internationale rechtsnorm niet doorwerkt in een nationale rechtsorde, ook al is zij zodanig geformuleerd dat zij in theorie geschikt zou zijn voor rechtstreekse toepassing in die rechtsorde. Een voorbeeld hiervan is het recht op leven, verankerd in artikel 2 van het Europees Verdrag tot bescherming van de Rechten van de Mens en de Fundamentele Vrijheden (EVRM), dat aan een individu wordt toegekend. De mate waarin internationaal recht doorwerkt in de nationale rechtsorde, hangt namelijk af van nationaal constitutioneel recht. Dit blijkt onder andere uit het feit dat een internationale rechtsnorm niet als 'recht' in de zin van een nationale rechtsorde kan worden aangemerkt totdat die norm op grond van nationaal recht die status verwerft, hetgeen op uiteenlopende manieren en onder verschillende voorwaarden gebeurt. Dergelijke wetgeving wordt in het proefschrift 'incorporatiewetgeving' genoemd.

Deze stand van zaken verklaart waarom implementatiewetgeving in ruime zin (hetgeen de hierboven omschreven implementatiewetgeving in enge zin en incorporatiewetgeving omvat) nodig is: internationaal recht is niet bij machte om eigenstandig, dus zonder dat nationaal constitutioneel recht hierin voorziet, rechtsposities binnen nationale rechtsordes te bepalen. Overigens is het vervolg van het proefschrift beperkt tot implementatiewetgeving in enge zin; incorporatiewetgeving blijft verder buiten beschouwing.

In hoofdstuk 3 wordt geïnventariseerd uit welke internationale rechtsbronnen verplichtingen voor staten kunnen voortvloeien om op nationaal niveau implementatiewetgeving te kunnen vaststellen. Daarbij is gekeken naar drie rechtsbronnen in het bijzonder: verdragsrecht, gewoonterecht en bindende besluiten van internationale organisaties. Verplichtingen voor staten om implementatiewetgeving vast te stellen, zijn meestal onderdeel van verdragen. Dergelijke verdragen kunnen betrekking hebben op zeer uiteenlopende onderwerpen. Er zijn ook aanwijzingen dat in zeer uitzonderlijke situaties gewoonterecht een verplichting kan bevatten om op nationaal niveau wetgeving aan te nemen. Het (enige bekende) voorbeeld dat in hoofdstuk 3 is besproken, heeft betrekking op het verbod op foltering en het verbod op genocide. Deze verboden omvatten ook, zo lijkt het Joegoslaviëtribunaal te suggereren, een verplichting voor staten om wetgeving aan te nemen ter bestraffing van foltering en genocide. Daarnaast kunnen bindende besluiten van internationale organisaties de plicht opleggen aan staten om op nationaal niveau wetgeving vast te stellen. Voorbeelden zijn enkele resoluties van de VN-Veiligheidsraad over terrorisme en over massavernietigingswapens, de Internationale Gezondheidsregeling van de Wereldgezondheidsorganisatie (ook al bestaat er een mogelijkheid tot een *opt out*), de 'technische standaarden' van de Internationale Organisatie voor Burgerluchtvaart en de Wereldmeteorologieorganisatie en de richtlijnen en verordeningen die worden vastgesteld in het kader van de Europese Unie (EU).

Internationaalrechtelijke normen kunnen als volgt worden ingedeeld. Er zijn normen die implementatie in de nationale rechtsorde behoeven en normen die niet hoeven te worden geïmplementeerd in de nationale

rechtsorde (zoals een verdrag tot vorming van een bondgenootschap tussen staten). De eerste categorie kan in drie groepen worden onderverdeeld: normen die moeten worden geïmplementeerd door de uitvoerende macht, normen die moeten worden geïmplementeerd door de rechtsprekende macht en normen die moeten worden geïmplementeerd door de wetgevende macht.

In dit proefschrift staat de laatstgenoemde categorie centraal, die op zijn beurt kan worden onderverdeeld in normen die een uitdrukkelijke verplichting tot de vaststelling van implementatiewetgeving bevatten en normen die dat impliciet doen. Het verschil tussen deze twee (sub)categorieën is dat uit de tekst van een norm die onder de laatstgenoemde subcategorie valt, niet uitdrukkelijk wordt verwezen naar het vaststellen van wetgeving, maar naar aanverwante begrippen, zoals 'maatregelen' of 'strategieën'. Indien de redactie van de internationaalrechtelijke norm de mogelijkheid openlaat dat ook de uitvoerende macht of de rechtsprekende macht zorg draagt voor de implementatie ervan op het nationale niveau, zal nationaal recht doorslaggevend zijn. Met andere woorden, dan bepaalt nationaal (constitutioneel) recht welke van de staatsorganen uitvoering moet geven aan de implementatieverplichting.

In deel II wordt geïnventariseerd hoe implementatiewetgeving onder huidig internationaal recht is gereguleerd, in het bijzonder in hoeverre dat recht wetgevingsstandaarden bevat. Met 'wetgevingsstandaard' wordt gedoeld op elk voorgeschreven materiële of formele kenmerk van nationale implementatiewetgeving of van de nationale implementatiewetgevingsprocedure**.** In dit deel wordt betoogd dat er geen wetgevingsstandaarden bestaan onder *algemeen* internationaal recht. Onder algemeen internationaal recht geldt als uitgangspunt dat staten verplicht zijn om op nationaal niveau de nodige maatregelen te nemen om te voldoen aan hun internationaalrechtelijke verplichtingen; hoe zij echter aan die verplichting voldoen, is aan de betreffende staat zelf om te bepalen. Wetgevingsstandaarden kunnen daarentegen wel worden waargenomen onder *bijzondere* internationaalrechtelijke regimes. In deel II worden daartoe twee regimes uit elk van de volgende rechtsgebieden geanalyseerd: internationale mensenrechten, het recht van de EU, internationaal strafrecht, internationaal gezondheidsrecht, internationaal milieurecht en internationaal arbeidsrecht (hoofdstukken 4 tot en met 9).

Op basis van de in deel II opgenomen inventarisatie kan de wetgevingsstandaard 'doeltreffendheid' als meest voorkomende wetgevingsstandaard worden aangemerkt. Andere wetgevingsstandaarden met een meer specifiek karakter hebben betrekking op de consistentie met ander toepasselijk recht (waaronder het verbod op discriminatie), het vereiste om belanghebbenden te consulteren bij het opstellen van implementatiewetgeving, het verstrekken van informatie over de vast te stellen implementatiewetgeving aan de doelgroep, het toezicht op de naleving van de implementatiewetgeving, de handhaving, rechtsbescherming en evaluatie van de implementatiewetgeving. Daarnaast zijn er wetgevingsstandaarden die betrekking

hebben op formele aspecten van nationale implementatiewetgeving ter bescherming van de rechtszekerheid.

De in deel II opgenomen analyse laat zien dat de praktijk ten aanzien van de opneming van wetgevingsstandaarden in internationaalrechtelijke regimes gefragmenteerd is: waar sommige regimes in grote mate de kenmerken voorschrijven waaraan nationale implementatiewetgeving moet voldoen, laten andere regimes veel ruimte aan de wetgevende organen van staten om de nationale implementatiewetgeving en het daarbij horende wetgevingsproces vorm te geven. Ook *binnen* regimes bestaan verschillen tussen de toepassing van wetgevingsstandaarden bij de vaststelling van implementatiewetgeving ter uitvoering van dat regime; wetgevingsstandaarden worden niet altijd van toepassing geacht op het betreffende regime als geheel, maar soms ook slechts op bepaalde delen van dat regime. Bovendien bestaat er ook een uiteenlopende praktijk met betrekking tot het bindende karakter van de wetgevingsstandaarden: terwijl sommige wetgevingsstandaarden een duidelijke basis hebben in het bindende juridische instrument, zijn andere opgenomen in niet-bindende documenten zoals implementatierichtlijnen, implementatiehandboeken etc.

In deel III worden de inhoud en reikwijdte van deze gemeenschappelijke kenmerken van implementatiewetgeving, oftewel de waargenomen wetgevingsstandaarden, verder uitgewerkt. Daarbij blijkt onder meer dat de wetgevingsstandaard 'doeltreffendheid' zich onder internationaal recht in verschillende formuleringen manifesteert. Daarnaast moet niet alleen de implementatiewetgeving zelf doeltreffend zijn, maar ook de toepassing ervan in de praktijk, althans onder het EVRM en het recht van de EU. Om te bepalen hoe de nationale wetgever op 'doeltreffende' wijze uitvoering kan geven aan een internationale verplichting tot de vaststelling van implementatiewetgeving, zal de wetgever de onderliggende verplichting moeten interpreteren. Ook daarbij speelt het vereiste van 'doeltreffendheid' een rol; het moet worden beschouwd als integraal onderdeel van de interpretatie van verdragsbepalingen 'in het licht van het voorwerp en het doel' van internationale verplichtingen, zoals is voorgeschreven in het Weens Verdrag inzake Verdragenrecht en de relevante jurisprudentie van het Internationaal Gerechtshof.

'Doeltreffendheid' is niet alleen de meest voorkomende wetgevingsstandaard, maar ook de overkoepelende wetgevingsstandaard. Er is met andere woorden sprake van een zekere hiërarchie tussen wetgevingsstandaarden. Deze hiërarchie kan worden opgemaakt uit de internationaalrechtelijke praktijk, waarbij de naleving van de 'ondergeschikte' wetgevingsstandaarden niet zelden als middel wordt gezien om de doeltreffendheid van het regime als geheel te bewerkstelligen.

Eén van die wetgevingsstandaarden is de standaard van rechtszekerheid, die van toepassing kan worden geacht op nationale implementatiewetgeving ter uitvoering van het recht van de EU en van de positieve verplichtingen onder het EVRM. Deze wetgevingsstandaard houdt in dat nationale implementatiewetgeving duidelijk en nauwkeurig moet zijn

geformuleerd. Daarnaast moet de betreffende wetgeving toegankelijk en voorzienbaar zijn, zodat individuen zich kunnen informeren over de regels die op hen van toepassing zijn en over de juridische gevolgen van hun handelen. Een andere wetgevingsstandaard die kan worden afgeleid uit de in deel II besproken internationaalrechtelijke regimes is het vereiste van consistentie met toepasselijk nationaal of internationaal recht. Dit vereiste houdt in dat nationale implementatiewetgeving niet strijdig mag zijn met reeds bestaande wet- en regelgeving, waaronder ook het verbod op discriminatie kan worden begrepen. Hiermee wordt enerzijds de doeltreffendheid van het regime beschermd, omdat naleving van dit vereiste voorkomt dat nationale implementatiewetgeving kan worden vernietigd wegens strijd met nationaal recht van een hogere rangorde. Anderzijds kan deze wetgevingsstandaard worden beschouwd als een bescherming van de soevereiniteit van staten, omdat het tot gevolg heeft dat het internationaalrechtelijke regime geen gevolgen heeft voor reeds bestaande nationale wet- en regelgeving. Soms bevatten internationaalrechtelijke regimes ook verplichtingen om bij de vaststelling van nationale implementatiewetgeving reeds bestaande *internationale* normen in acht te nemen. Voorts kan een wetgevingsstandaard worden waargenomen die de nationale wetgever verplicht om belanghebbenden te consulteren bij de opstelling van nationale implementatiewetgeving. Dit heeft tot doel het bevorderen van de steun voor en de kwaliteit van de betreffende wet. Weer een andere wetgevingsstandaard benadrukt het belang van de verstrekking van informatie over de vast te stellen of vastgestelde nationale implementatiewetgeving. De informatie moet in het bijzonder worden verstrekt aan de doelgroepen van deze wetgeving. De wetgevingsstandaard die verplicht tot het houden van toezicht op de naleving van nationale implementatiewetgeving, die onder enkele van de in deel II besproken regimes kan worden gevonden, omvat de instelling van een toezichtsmechanisme op nationaal niveau. Onder het Maritiem Arbeidsverdrag houdt deze wetgevingsstandaard onder meer in dat inspectie-organisaties de nodige expertise moeten bezitten en onafhankelijk moeten zijn. Bovendien moeten de inspecteurs bekleed zijn met de benodigde bevoegdheden om hun toezichttaak goed te kunnen uitoefenen. Wanneer wordt vastgesteld dat de toepasselijke nationale implementatiewetgeving is overtreden, schrijven meerdere internationaalrechtelijke regimes voor dat sancties moeten worden opgelegd. Dit omvat de verplichting voor staten om de bevoegde autoriteiten aan te wijzen en te voorzien in de nodige wettelijke grondslagen voor de oplegging van handhavingsmaatregelen. Vervolgens moeten staten de mogelijke handhavingsmaatregelen ook daadwerkelijk gebruiken. Ook kan onder enkele internationaalrechtelijke regimes een wetgevingsstandaard worden waargenomen die staten verplicht om rechtsmiddelen open te stellen voor individuen, zodat zij hun op grond van nationale implementatiewetgeving verkregen rechten ook daadwerkelijk kunnen afdwingen. Als laatste wetgevingsstandaard kan een verplichting voor staten om nationale implementatiewetgeving *ex post* te evalueren worden genoemd. Hiermee kan niet alleen worden nagegaan

of de implementatiewetgeving in de betreffende staat overeenstemt met de vereisten van het internationaalrechtelijke regime, maar ook worden vastgesteld of de nationale implementatiewetgeving kan worden verbeterd.

Vervolgens wordt beoordeeld in hoeverre die gemeenschappelijke kenmerken leiden tot een regulering van implementatiewetgeving die als 'adequaat' kan worden aangemerkt. Om dit begrip te operationaliseren, wordt het begrepen als 'in overeenstemming met de vereisten van goede wetgeving'. Daartoe bevat hoofdstuk 11 een bespreking van het wetgevingskwaliteitsbeleid in Nederland, het Verenigd Koninkrijk, de EU en de Organisatie voor Economische Samenwerking en Ontwikkeling (OESO). Hoewel hun wetgevingskwaliteitsbeleid van elkaar verschilt, bestaat duidelijke overeenstemming in de wetgevingsstandaarden die ervan deel uit maken en die als vereisten voor goede wetgeving worden beschouwd.

Voortbouwend op de vier besproken voorbeelden van wetgevingskwaliteitsbeleid wordt in hoofdstuk 11 een definitie voorgesteld van 'goede implementatiewetgeving', waarbij het vertrekpunt is dat de kwaliteit van een specifieke wet uitsluitend kan worden beoordeeld in het licht van de *functie* van die wet: het vermogen van een nationale wet om, met het oog op de functie of functies van die wet, de doelstelling of doelstellingen die zijn neergelegd in het internationale instrument te behalen. De toepassing en de naleving van wetgevingsstandaarden worden gebruikt om vast te stellen in hoeverre sprake is van een 'goede' implementatiewet. Deze standaarden kunnen kunnen betrekking hebben op de gevolgde procedure, of op de vorm of inhoud van de betreffende wet.

Ten slotte wordt in hoofdstuk 12 de vraag beantwoord in hoeverre de internationaalrechtelijke regulering van implementatiewetgeving voldoet aan de in hoofdstuk 11 besproken vereisten van goede wetgeving. Daarbij worden in het bijzonder de in het kader van de Organisatie voor Economische Samenwerking en Ontwikkeling (OESO) geformuleerde wetgevingsstandaarden als maatstaf genomen, omdat zij, anders dan de standaarden die deel uit maken van het Nederlandse of Britse wetgevingskwaliteitsbeleid of het wetgevingskwaliteitsbeleid van de EU, het enige regime is met een internationaal perpectief. Deze vergelijking vindt plaats aan de hand van de reikwijdte, de aard en de inhoud van de wetgevingsstandaarden. Ten aanzien van de reikwijdte is een belangrijk verschil dat de wetgevingsstandaarden die zijn geformuleerd in het kader van de OESO van toepassing zijn op een in beginsel onbeperkt aantal wetten die door de nationale wetgever worden voorbereid en vastgesteld. Bij afwezigheid van een regulering van nationale implementatiewetgeving onder algemeen internationaal recht zijn de wetgevingsstandaarden die zijn verankerd in een internationaalrechtelijk regime uitsluitend van toepassing op de nationale implementatiewet die ter uitvoering van dat specifieke regime wordt vastgesteld. Een ander belangrijk verschil is dat de onder de auspiciën van de OESO ontwikkelde wetgevingsstandaarden van toepassing zijn op wetgeving in het algemeen, en niet in het bijzonder op implementatiewetgeving. Ten aanzien van de aard van de wetgevingsstandaarden is er ook

een duidelijk verschil tussen het OESO-regime de internationaalrechtelijke praktijk: waar de wetgevingsstandaarden van de OESO zijn neergelegd in een niet-bindende 'aanbeveling' aan de OESO-staten, zijn de wetgevingsstandaarden die we onder de in deel II besproken regimes hebben waargenomen deels neergelegd in juridisch bindende documenten en deels in juridisch niet-bindende documenten. Ten aanzien van de inhoud van de wetgevingsstandaarden valt vooral de grote overeenkomst op: de wetgevingsstandaarden die deel uitmaken van de internationaalrechtelijke praktijk komen ook terug in de aanbeveling van de OESO. Op basis van deze vergelijking kan worden vastgesteld dat internationale beleidsmakers zich bewust zijn van de standaarden die kunnen bijdragen aan goede implementatiewetgeving; dit bewustzijn heeft echter niet geleid tot een coherente verankering of toepassing van die wetgevingsstandaarden onder internationaal recht.

Deze stand van zaken zou kunnen en moeten worden verbeterd door te voorzien in een codificatie in internationaal verband van wetgevingsstandaarden voor nationale implementatiewetgeving. Die codificatie moet wel voldoende flexibel zijn om de bestaande verschillen tussen rechtssystemen en wetgevingspraktijken van staten te accommoderen. Die flexibiliteit kan op twee manieren worden bereikt: door te kiezen voor codificatie in een niet-bindend document en door de formulering van de betreffende wetgevingsstandaarden in bewoordingen die ze geschikt maken voor gebruik door uiteenlopende rechtssystemen en wetgevingspraktijken. Een dergelijk document zal behulpzaam zijn voor zowel nationale als internationale beleidsmakers en komt de kwaliteit van nationale implementatiewetgeving ten goede, zonder op onaanvaardbare wijze afbreuk te doen aan het democratische gehalte van besluitvorming op nationaal niveau.

Curriculum vitae

Emile Beenakker (1985) obtained degrees in History (BA, MA), Dutch law (LL.B), International law (LL.M) and Legislation (LL.Mleg) from Leiden University, University of Amsterdam and the Academy for Legislation in The Hague. As part of the ERASMUS exchange programme, he studied German language and culture and German contemporary history at the Freie Universität Berlin and the Humboldt-Universität zu Berlin in 2006. In 2008 he took an internship at the Dutch Embassy in Berlin, Germany. For several months in 2010, he was employed as a legal researcher at the Swedish National Defence College in Stockholm, Sweden, on the legal responsibility of states for acts of *cyber* warfare and on *cyber* aspects of the law of belligerent occupation. Between autumn 2011 and spring 2018 he has worked as a legislative lawyer in the Legal department of the Dutch Ministry of Health, Welfare and Sports, on various legislative projects in the field of public health and medical ethics. Since 2014 he has been affiliated to Leiden University's Faculty of Law as an external PhD-candidate. In April 2018 Emile joined the Financial Markets Directorate of the Dutch Ministry of Finance.

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