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## **The implementation of international law in the national legal order : a legislative perspective**

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# 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.<sup>1</sup> 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.<sup>2</sup> 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'.<sup>3</sup> 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 indirectly, 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* (2<sup>nd</sup> edn OUP, Oxford 2005) 5-6. See also M.N. Shaw, *International law* (6<sup>th</sup> 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.<sup>4</sup>

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'.<sup>5</sup>

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'.<sup>6</sup> 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* (3<sup>rd</sup> 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<sup>7</sup>, 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.<sup>8</sup> 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.<sup>9</sup> Similarly, the adoption of federal laws in Germany often require the involvement of the federal government, the Bundestag and the Bundesrat.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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'.<sup>13</sup>

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.<sup>14</sup>

From an international legal perspective, the national legislature is a *de iure* organ of the state of which it is part.<sup>15</sup> 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.'<sup>16</sup>

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.<sup>17</sup> This idea is often referred to as the 'unity of the state' principle.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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'.<sup>21</sup>

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

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- 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.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup> 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'.<sup>25</sup> 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'.<sup>26</sup> 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] [...]'.<sup>27</sup> 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](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](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 14<sup>th</sup>, 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.’<sup>28</sup>

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.<sup>29</sup> 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”’.<sup>30</sup>

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<sup>31</sup>, 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.'<sup>32</sup>

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.<sup>33</sup> 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<sup>34</sup>, 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*

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33 *Fisheries Case (United Kingdom v. Norway)* (Judgment) [1951] ICJ Rep 116, p. 131. *Nottebohm Case (Liechtenstein v. Guatemala)* (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 iuris* 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 iuris* in that State. And even where national law requires the presence of the offender, this is not necessarily the expression of an *opinio iuris* 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.<sup>35</sup> 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.<sup>36</sup> 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’.<sup>37</sup> 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.<sup>38</sup> 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

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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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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'.<sup>43</sup> 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'.<sup>44</sup> Costa Rica propagated a broad interpretation of this provision and argued that it encompassed both the transport of goods and the transport of passengers.<sup>45</sup> The Court agreed and based its finding on an evolutive interpretation of the term 'commerce'.<sup>46</sup> 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.'<sup>47</sup>

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.<sup>48</sup> 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.<sup>49</sup>

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).<sup>50</sup> 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'.<sup>51</sup> 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'.<sup>52</sup>

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.<sup>53</sup> 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.<sup>54</sup> 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*

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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'.<sup>55</sup> 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'.<sup>56</sup> 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.<sup>57</sup>

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'.<sup>58</sup>

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'.<sup>59</sup>

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 Kingdom* (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 ‘implêre’, 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’.<sup>60</sup> The *Oxford Dictionary of Law* refers to ‘implementation’ as ‘the process of bringing any piece of legislation into force’.<sup>61</sup> According to Raustiala and Slaughter, implementation is ‘the process of putting international commitments into practice’.<sup>62</sup> 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.<sup>63</sup>

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* (3<sup>rd</sup> edn OUP, Oxford 2010).

61 J. Law and E.A. Martin (eds), *Oxford Dictionary of Law* (7<sup>th</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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'.<sup>66</sup> 'Effectiveness' in relation to implementation refers to the rationale behind (or: content of) the act performed by the competent actor.

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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 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*.'<sup>67</sup>

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<sup>67</sup> 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.<sup>68</sup> 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

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

as institutions which apply and develop international law in general<sup>69</sup>, or certain branches of international law in particular.<sup>70</sup> 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.<sup>71</sup> A third approach can be found in publications which

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- 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.<sup>72</sup> 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.<sup>73</sup>

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 jurisprudence 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.