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

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## 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.<sup>74</sup>

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74 Also J. Crawford, *Brownlie's Principles of Public International Law* (8<sup>th</sup> 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.<sup>75</sup> 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.<sup>76</sup> 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).<sup>77</sup>

Both jurists have asserted that there are two fundamental differences between international law and national law.<sup>78</sup> 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.<sup>79</sup> Anzilotti has made a similar argument, but locates the source of international law in the principle of *pacta sunt servanda*.<sup>80</sup>

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.<sup>81</sup> International law, on the other hand, governs relations between states.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup>

As a result of these distinct features, international law does not qualify as law in the national legal order,<sup>85</sup> unless international law has been incorporated as part of national law by custom or statute.<sup>86</sup> 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.<sup>87</sup>

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

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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.<sup>89</sup> 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.<sup>90</sup> 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.<sup>91</sup> 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'.<sup>92</sup>

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.<sup>93</sup> 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'.<sup>94</sup> Ultimately the basic norm (in a relative sense) of national legal orders, namely the principle of effectiveness<sup>95</sup>, leads back to this basic norm of international law:

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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* (2<sup>nd</sup> 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.'<sup>96</sup>

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.<sup>97</sup>

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.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup> 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.'<sup>101</sup>

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.

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.<sup>102</sup> 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.<sup>103</sup> 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'.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup> 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'.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> 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 21<sup>st</sup> 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.<sup>111</sup> 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.<sup>112</sup>

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.<sup>113</sup> Individuals are thus no longer exclusive legal subjects of the domestic legal order.<sup>114</sup> 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'.<sup>115</sup> In addition, there is some evidence that business enterprises have a responsibility to respect human rights.<sup>116</sup> 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'.<sup>117</sup> 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.’<sup>118</sup> 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 20<sup>th</sup> century and up to the present time.’<sup>119</sup> 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.<sup>120</sup>

#### 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.<sup>121</sup> 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’.<sup>122</sup> 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.<sup>123</sup> 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'.<sup>124</sup> 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'.<sup>125</sup> 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.

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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.<sup>126</sup>

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.<sup>127</sup> 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.<sup>128</sup> 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.<sup>129</sup> This practice is commonly referred to as *ad hoc* statutory incorporation, as it requires every treaty to be expressly

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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.<sup>130</sup> 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.<sup>131</sup> In contrast to treaties, customary international law is automatically incorporated into British law.<sup>132</sup> 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.<sup>133</sup> 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'.<sup>134</sup> In accordance with the case law of the Federal Constitutional Court, this sentence must be understood as to refer to customary international law.<sup>135</sup>

'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.<sup>136</sup> 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*.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup> Pursuant to article 55 of the French Constitution, treaty provisions prevail over French statutory acts.<sup>140</sup>

International law possesses 'direct effect' when individuals can invoke a norm of international law before national courts.<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup>

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 (Sporwegstaking).

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.