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

Beenakker, E.B.

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Author: Beenakker, E.B.

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3.1 INTRODUCTION

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

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

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

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

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

3.2 TREATIES

3.2.1 Treaties as a source of law

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

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

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

148 ICJ Statute art 38, first paragraph.

149 VCLT art 2, first paragraph, sub a.

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

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

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

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

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

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

153 *Case concerning Certain German Interests in Polish Upper Silesia* (n 28) 29.

154 Lauterpacht, *General Works* (n 2) 58.

155 VCLT art 26 and VCLTIO art 26.

156 Also Crawford, *Brownlie's Principles of Public International Law* (n 74) 95.

157 Also Lauterpacht, *General Works* (n 2) 59.

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

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

160 Ibid, 95. The number of state parties is, however, not a distinctive element. Lauterpacht distinguishes between law-making treaties which contain *particular* international law due to a small number of parties, and law-making treaties which contain *general* international law due to a large number of parties. Lauterpacht, *Oppenheim's International Law* (n 78) 28.

161 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

162 Section 2.4.

163 Except for, as was discussed in section 2.4, acts of incorporation in dualist states.

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

3.2.2 Treaties as a source of obligation to adopt implementing measures

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

‘States Parties shall enact laws and adopt strategies to fight corruption through the establishment of independent anti-corruption institutions’;¹⁶⁶

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

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

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

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

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

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

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

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

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

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

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

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

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

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

170 FTC art 8.

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

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

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

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

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

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

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

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

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

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

176 *Ibid.*

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

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

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

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

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

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

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

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

180 Ibid, art 147.

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

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

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

'Each State Party shall adopt such measures as may be necessary:

- (a) To establish as criminal offences under its domestic law the offences set forth in article 2;
- (b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences [...].'¹⁸³

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

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

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

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

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

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

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

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

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

186 Ibid, 39-40.

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

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

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

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

3.3 CUSTOMARY LAW

3.3.1 Custom as a source of law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

opinion that international law requires them to behave as they do?²⁰³ Be that as it may, for the purpose of this study, a more urgent question than this 'chronological paradox'²⁰⁴ seems to be in what ways states can express *opinio iuris*. In general, it has to be deduced from a state's actions or statements, expressed by the same organs and officials that are also able to perform state practice. Important elements include the voting behaviour of states in the United Nations General Assembly (UNGA)²⁰⁵, military manuals and the adoption of conventions²⁰⁶, resolutions adopted by the Institute of International Law²⁰⁷, proposals of states submitted during the drafting of international conventions and adopted recommendations of drafting committees²⁰⁸, agreements between states and non-governmental

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- 203 Lauterpacht, *General Works* (n 2) 63; H. Thirlway, 'The sources of international law' in: M.D. Evans, *International law* (3rd edn OUP, Oxford 2010) 91-117, 98-99; Kammerhofer, 'Uncertainty in the formal sources of international law' (n 194) 534; Dahlman, 'The function of *opinio iuris*' (n 193) 330-335.
- 204 Byers, *Custom, power and the power of rules* (n 194) 130-133.
- 205 In *Case concerning Military and Paramilitary Activities in and against Nicaragua*, for example, the ICJ concluded that the prohibition on the use of force, enshrined in the UN Charter, was also part of customary international law. It looked into the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (UNGA Res 25/2625 (XXV) (25 October 1970)). *Case concerning Military and Paramilitary Activities in and against Nicaragua* (n 198) par. 188. Also *Prosecutor v Thomir Blaskic*, (Appeals Chamber judgment) IT-95-14-A (29 July 2004) par. 158; *Legality of the Threat or Use of Nuclear Weapons* (n 192) par. 70; *Western Sahara* (Advisory Opinion) (Separate Opinion of Judge Dillard) [1975] ICJ Rep 116, p. 121.
- 206 *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) (Dissenting Opinion of Judge Torres Bernárdez) [1998] ICJ Rep 582, par. 272; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Separate Opinion of Judge Khasawneh) [2004] ICJ Rep 235, par. 3; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation* (Advisory Opinion) (Dissenting Opinion of Judge Moreno Quintana) [1960] ICJ Rep 150, p. 177; *Prosecutor v Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Šantić, also known as "Vlado"* (Trial Chamber judgment) IT-95-16-T (14 January 2000) paras 531-533; *Prosecutor v Blagoje Simić, Miroslav Tadić and Simo Zarić* (Trial Chamber judgment) IT-95-9-T (17 October 2003) par. 121 and 153; *Prosecutor v Duško Tadić* (Appeals Chamber judgment), IT-94-1-A (15 July 1999) par.223; *Prosecutor v Milorad Knrojelac* (Appeals Chamber judgement) IT-97-25-A (17 September 2003) par. 221; *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (Trial Chamber judgment) IT-96-23-T & IT-96-23/1-T (22 February 2001) par. 495; *Prosecutor v Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić* (Trial Chamber ex parte confidential decision on the prosecution motion under Rule 73 for a ruling concerning the testimony of a witness) IT-95-9 (27 July 1999) par. 74; *Prosecutor v. Anto Furundžija* (n 54) par. 227.
- 207 *Prosecutor v Stanislav Galić* (Trial Chamber judgment) IT-98-29-T (5 December 2003) par. 45.
- 208 Also *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland)* (Merits) (Judgment) [1974] ICJ Rep 3, par.13; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Merits) [1974] ICJ Rep 175, par. 13; *Prosecutor v Pavle Strugar, Miodrag Jokic and others* (Trial Chamber decision on defence preliminary motion challenging jurisdiction) IT-01-42-PT (7 June 2002) par. 19; *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* (n 205) par. 503 and 541. *Prosecutor v Radislav Krstić* (Trial Chamber judgment) IT-98-33-T (2 August 2001) par. 541.

organisations²⁰⁹, *amicus curiae* letters submitted by states²¹⁰, resolutions adopted by the United Nations Security Council (UNSC)²¹¹ and official proclamations issued by states.²¹²

3.3.2 Custom as a source of obligation to adopt implementing measures

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

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

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

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

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

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

213 VCLT art 53.

214 Ibid, art 64.

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

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

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

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

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

217 *Ibid.*, par. 148.

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

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

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

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

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

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

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

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

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

222 *Ibid*, par. 148-157.

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

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

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

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

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

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

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

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

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

3.4 BINDING DECISIONS OF INTERNATIONAL ORGANISATIONS

3.4.1 Binding decisions of international organisations as a source of law

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

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

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

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

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

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

234 *Ibid.*, 40.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

252 ChUN art 39.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

268 Ibid, 357.

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

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

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

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

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

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

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

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

274 Ibid, 41-45.

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

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

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

Member states are called upon, it is stated, to implement fully the IHR in accordance with [...] the principles embodied in article 3.²⁷⁸ The term 'implementation' in article 3 does not necessarily refer to implementation through legislation; the diverse nature of the provisions contained in the IHR will often require other than legislative measures, such as the obligation for state authorities to communicate with the WHO in case of public health emergencies of international concern.²⁷⁹ In practice, however, the IHR seem to anticipate that states would resort to legislation in order to give effect to its norms. Strictly speaking, the IHR do not, however, prescribe the adoption of legislation; the modality of implementation, through legislation or other measures, is left for the domestic jurisdictions to decide. Against this background, article 59, third paragraph, speaks of full adjustment of 'domestic legislative and administrative arrangements' with the IHR.²⁸⁰

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

According to articles 37 and 54, sub 1, of the Chicago Convention, the Council of the ICAO has the task to 'adopt and amend, from time to time, as may be necessary, international standards and recommended practices and procedures [...] concerned with the safety, regularity and efficiency of air navigation as may from time to time appear appropriate'. Standards have been defined as 'any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety of international air navigation and to which Contracting States will conform in accordance with the Convention'. ICAO standards differ from 'recommended practices' in that the uniform application of the latter is recognised as merely 'desirable'; the member states will 'endeavour to conform'.²⁸² Furthermore, the Chicago Convention stipulates that '[e]ach contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organisation in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation'.²⁸³ A recent instrument adopted by the Council ('Annex 19') focuses on 'safety management' and includes provisions on personnel licensing, operation of aircraft, airworthiness of aircraft, air traffic services, aircraft accidents and incident investigation and aero-

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

279 IHR art 6, first paragraph.

280 The IHR will be further discussed in Chapter 7.

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

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

283 Chicago Convention art 37.

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

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

284 Ibid, art 90, sub a.

285 Ibid, art 38.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.5 CATEGORIES OF NORMS ADDRESSING THE NATIONAL LEGISLATURE

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

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

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

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

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

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

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

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

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

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

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

Furthermore, pursuant to article 13 ECHR,

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

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

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

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

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

302 FCTC art 5, first paragraph.

303 ICSFT art 5, third paragraph.

304 ECHR art 13.

305 Ibid, art 5.

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

3.6 CONCLUSION

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

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

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

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

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