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

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10.1 INTRODUCTION

The findings presented below further clarify the various features of domestic implementing legislation which are prescribed under several international regimes, as we have established in Part II. They are important, as they shed light on the means and methods of implementation that are deemed relevant by international policy makers in the fulfilment of their objectives. As we will see, the various international legal regimes reveal several common features. Together, these components constitute what may be called a legislative framework that will be further elaborated in this chapter.

Admittedly, the term 'legislative framework' is somewhat misleading, as it seems to suggest the existence of *one coherent* legal framework that is applicable to domestic implementing legislation. As we have seen, this does not reflect current international legal practice; the framework presented below is not part of positive law. Rather it must be seen as an abstract concept which is *inferred from* international legal practice. Practice itself with regard to legislative standards is, as we have also established, highly fragmented. First and foremost, this is the consequence of the lack of an authoritative international codification of such principles similar to the role played by, for instance, the VCLT and the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, in the fields of the law of treaties and the law of state responsibility respectively.⁸⁴⁶

This fragmentation is, however, also present *within* international legal regimes. This is the result of a varying scope of application of a particular legislative standard: whereas in some cases a legislative standard's scope of application is confined to one particular aspect of the required implementing legislation, in other cases a legislative standard may be applicable to the whole body of implementing legislation that is required on the basis of the specified international legal regime. An example of the former category can be found in article 13, fourth paragraph, sub a, FCTC, which provides that misleading or false tobacco advertising and which is just one of many topics covered by that Convention, must be prohibited in accordance with the constitutional principles of the state party. On the most general level, a legislative standard may be applicable to implementing measures in general, not only those of legislative nature. In those cases, of course, the term 'legislative standard' is not entirely adequate, since the

846 (n 36) and (n 15).

standard's scope of application is not limited to 'legislation'. An example of such legislative standard is the prohibition of discrimination, entrenched in article 14 ECHR. This provision stipulates that the 'enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination [...]'. As was discussed in section 4.1.3.2, this phrase also applies to domestic implementing legislation that is adopted in order to perform the positive obligations under the ECHR.

Prior to the analysis of the legislative framework, section 10.2 explores the various methods of harmonisation that may be derived from the international legal regimes discussed in Part II. Although methods of harmonisation do not have particular relevance for our understanding of *the legislative standards* included in the aforementioned legal regimes, they are closely related to the regimes' implementation on the national level, as they determine the extent to which an international regime leaves room for national considerations in the implementation. With a view to providing a complete picture of the subject matter, the methods of harmonisation will be addressed below.

10.2 METHODS OF HARMONISATION UNDER INTERNATIONAL LAW

10.2.1 Harmonisation

Let us assume, somewhat simplistically, that states enter into international agreements in order to solve common problems. Such agreements produce legal regimes which prescribe specified conduct in a specified policy field. As we have seen, they often require implementation on the domestic level. As a consequence, national laws in that particular field will converge.

Carbonara and Parisi distinguish between three methods to diminish the differences between legal systems. 'Legal transplantation' is a process in which states transplant laws present in foreign domestic legal orders into their own legal order. This concept, however, is controversial, as some authors argue that legal transplantation is impossible given the close relationship between 'law' and the culture or society in which it emerges. The migration or borrowing of law from other societies neglects this close bond, it is contended, and thus cannot exist.⁸⁴⁷ This point of view was defended by Pierre Legrand, who asserted that:

'At best, what can be displaced from one jurisdiction to another is, literally, a *meaningless* form of words. [...] In any *meaningful* sense of the term, 'legal transplants' cannot happen.

847 V. Perju, 'Constitutional transplants, borrowing and migrations' in: M. Rosenfeld and A. Sajó (eds), *The Oxford handbook of comparative constitutional law* (1st edn OUP, Oxford 2012) 1304-1327, 1309-1310. Also S. Choudhry, 'Migration as a new metaphor in comparative constitutional law' in: Idem (ed), *The migration of constitutional ideas* (CUP, Cambridge 2006) 1-35, 17.

No rule in the borrowing jurisdiction can have any significance as regards the rule in the jurisdiction from which it is borrowed. This is because, as it crossed boundaries, the original rule necessarily undergoes a change that affects it *qua* rule. The disjunction between the bare propositional statement and its meaning thus prevents the displacement of the *rule* itself.⁸⁴⁸

Alan Watson, who has adopted a diametrically opposed stance in this debate, has conceded that 'a transplanted rule is not the same thing as it was in its previous home'.⁸⁴⁹ However, in Watson's view legal borrowing or legal transplanting (which he seems to treat as synonyms) are the main cause of similarities between legal systems.⁸⁵⁰ Contrary to what Legrand has considered impossible, Watson observes that 'massive successful borrowing is commonplace in law'.⁸⁵¹ In our view, this could hardly be denied.

'Legal harmonisation' refers to a common approach in which states agree on a shared set of policy aims. Each state subsequently makes the modifications to its domestic legislation it deems necessary to meet the formulated policy aims. Finally, the concept of 'legal unification' means that the applicable domestic laws are *replaced* with a single set of rules agreed upon on the intergovernmental or supranational level.⁸⁵²

In this view, legal unification may be seen as an extreme version of legal harmonisation.⁸⁵³ Legal unification in the international legal sphere is not without problems, however, as it presupposes the existence of a unified legal order. As we have seen in Part I, this does not reflect the current state of international law, under which international law is not *per se* valid in the domestic legal order. As a consequence, the crucial element of legal unification, the replacement of domestic legal rules by a common set of international norms, cannot materialise until all state parties have accepted the norms' legal validity in the domestic legal order and have repealed concurring domestic laws. This cannot be easily achieved. For this reason, Wilets has argued that:

'[t]he globalization of norms that result from the process of [transnational legal harmonisation] frequently consists of harmonisation of rules rather than direct vertical application of international norms from a supranational body'.⁸⁵⁴

848 P. Legrand, 'The impossibility of legal transplants' 4 *Maastricht Journal of European and Comparative Law* 2 (1997) 111-124, 120.

849 A. Watson, *Legal transplants and European private law* (Ius Commune lectures on European private law, Ius Commune Research School, Maastricht 2000) 2.

850 *Ibid.*, 4.

851 *Ibid.*, 12.

852 E. Carbonara and F. Parisi, E., 'The paradox of legal harmonisation' 132 *Public Choice* 3-4 (2007) 367-400, 368.

853 N. Garoupa and A. Ogus, 'A strategic interpretation of legal transplants' 35 *Journal of Legal Studies* (2006) 339-363, 343.

854 J.D. Wilets, 'A unified theory of international law, the state, and the individual: transnational legal harmonisation in the context of economic and legal globalization' 31 *University of Pennsylvania Journal of International Law* 3 (2014) 753-825, 756.

In this respect, the nature of the legal order of the European Union seems to provide for better conditions for legal unification, which implies 'the wholesale integration of domestic legal orders, effectively replacing national law with Union legislation'.⁸⁵⁵ In particular, regulations of the EU reflect a process of legal unification, which, as we have seen, are *qua* EU law directly applicable in the legal orders of EU member states. In addition, EU law prohibits the existence of domestic laws that regulate subject matter covered by the EU legislation. In practice, this amounts to the direct application of a common set of norms: legal unification. The example of EU regulations also makes clear that in practice, harmonisation and unification often go hand in hand; while a regulation may provide for a unified legal framework which is directly applicable in the legal orders of the member states, they often contain provisions that require additional implementing measures as well.

Furthermore, whereas legal transplantation is a unilateral process, harmonisation and unification require multilateral action. As we have seen in the previous part, such multilateral conduct often consists of treaty negotiations between state representatives. On other occasions, international legal regimes have been developed in the framework of an international organisation, such as the IHR of the WHO. In both situations, however, the multilateral nature of the convergence process is evident. This is not to say that the *implementation* of the said harmonised international legal regimes is a multilateral process. That is certainly not the case, as the adoption of domestic implementing measures, including legislation, falls within the domain of the state.

It follows that the international legal regimes examined in the previous part, with the exception of regulations of the European Union, are manifestations of 'legal harmonisation' in the meaning attributed to this term by Carbonara and Parisi. Legal harmonisation itself is, however, an ambiguous term. This may be explained by the fact that policy aims on the one hand, and the legislative means to achieve these ends on the other hand, cannot always be easily distinguished. To clarify this point, it is necessary to explore the various forms or methods through which harmonisation has taken shape under the international legal regimes discussed in Part II. This will be the subject of the following sections.

10.2.2 Harmonisation through minimum requirements

The international legal regimes discussed in the previous part have been developed in order to protect certain interests, both of the individual and of the community. They include, *inter alia*, as we have seen, the 'freedom from fear and want' of individuals, the combat against terrorism, the protection of public health against the international spread of disease, the protection of species of wild flora and fauna and decent labour conditions for seafarers.

855 M. Dougan, 'Approximation of laws in the EU' in: P. Cane and J. Conaghan (eds), *The New Oxford Companion to Law* (OUP, Oxford 2009).

Most of the regimes discussed in the previous part aim to protect the identified policy aims through the imposition of minimum requirements on state parties. This can be derived from, for instance, article 34, third paragraph, CTOC, which reads:

‘Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime’.⁸⁵⁶

Under this and similar provisions, states may adopt measures that go beyond what is required as a minimum under the relevant international regime. In other words, the instrument may be said to reflect the lowest common denominator that state parties can agree upon in a particular policy area. It raises the question about the nature of the domestic laws beyond this threshold. With regard to the above-cited provision of the CTOC, for instance, what does ‘more strict’ or ‘more severe’ mean? Given the purpose of the CTOC, these phrases may be loosely translated as ‘harsher’ on crime; in other words, they may refer to more severe sanctions.⁸⁵⁷ Similarly, under article 2, first paragraph, FCTC, states may impose stricter requirements ‘in order to better protect human health’. It means that additional domestic measures are permitted if they further restrict the use of tobacco products. Thus, the meaning of the term ‘strict’ in these examples is closely related to and dependent upon the objective(s) of the applicable legal regime. Arguably, under the international legal regimes discussed in Part II, this will not constitute a problem, as the objective(s) are formulated in a rather clear manner.

Also in the case of directives of the EU, it is often necessary to determine the nature and purpose of the regime and, as a result, whether specific additional measures are permitted. The imposition of minimum requirements in directives is commonly known as ‘minimum harmonisation’, whereby a minimum standard is set in the EU directive, but which also allows states to put in place norms that exceed the minimum standard.⁸⁵⁸

An example from the CJEU’s case law may clarify the concept of minimum harmonisation as laid down in EU directives. Mr. Zeman, a Slovakian national, was in possession of a firearms licence which allowed him to carry a weapon for a specific aim: the protection of his person and his property in Slovakia. He applied for a European firearms pass, on the basis of directive 91/477/EEC on control of the acquisition and possession of weapons, which would enable him to move freely with his weapon within

856 CTOC art 34, third paragraph. Similarly, see IHR art 43, first paragraph; FCTC art 2, first paragraph; CITES art XIV, first paragraph, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal art 4, eleventh paragraph. The ‘minimum’ character of the Maritime Labour Convention and the Convention concerning Decent Work for Domestic Workers follows from article 19, eighth paragraph, of the Constitution of the ILO.

857 UNODC, *Legislative Guides* (n 554) par. 41.

858 Craig and De Búrca, *EU Law* (n 525) 84 and 600.

the European Union.⁸⁵⁹ In particular, Mr. Zeman relied on article 1, fourth paragraph, of the directive, which stipulates that ‘a European firearms pass shall be issued on request by the authorities of a Member State to a person lawfully entering into possession of and using a firearm’. However, pursuant to Slovakian implementing legislation, a European firearms pass could only be issued for hunting and targeted shooting purposes; not for the aim for which Mr. Zeman had acquired his licence. Accordingly, the Slovakian authorities had refused his request. The question which was submitted to the CJEU was whether directive 91/477/EEC permitted the adoption of national legislation which authorised the issue of a European firearms pass *only* to holders of weapons used for hunting and target shooting purposes.⁸⁶⁰ In order to provide an answer to this question, the CJEU first analysed the directive’s objectives, which included establishing the internal market and the abolition of controls on the safety of objects transported and on persons. This has resulted in the approximation of weapons legislation.⁸⁶¹ In particular, the Court derived from several of the directive’s recitals that:

‘one of the objectives of Directive 91/477 is the prohibition, in principle, of cross-border transport within the European Union of firearms which are not used for hunting or target shooting purposes [...]’.⁸⁶²

Subsequently, the CJEU established that the directive entailed minimum harmonisation, since article 3 of the directive stipulates that ‘Member States may adopt in their legislation provisions which are more stringent than those provided for in [the] directive, subject to the rights conferred on residents of the member states by [article 12, second paragraph, of the directive]’.⁸⁶³ The latter provision stipulates that, put briefly, hunters and marksmen may freely travel across the EU’s internal border with their weapons upon presentation of a European firearms pass. On the basis of a textual analysis of the directive, the CJEU found that the obligation of member states to issue a European firearms pass is limited to hunters and sport shooters.⁸⁶⁴ The right of member states to impose more stringent requirements than those included in directive 91/477/EEC, as embodied in article 3, cited above, is thus restricted by the obligation to ensure the rights of hunters and sport shooters. As a consequence, member states are not required to issue a European firearms pass to *other* holders of weapons.⁸⁶⁵

859 Council Directive 91/477 of 18 June 1991 on control of the acquisition and possession of weapons as amended by Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 (OJ 1991, L 256).

860 CJEU, *Zeman*, case C-543/12, judgment of 4 September 2014, ECLI:EU:C:2014:2143, par. 40.

861 *Ibid.*, par. 41-42.

862 *Ibid.*, par. 46.

863 Art 3.

864 CJEU, *Zeman* (n 860) par. 53.

865 *Ibid.*, par. 54.

Thus, in this case, the Slovak authorities had chosen to adhere to the minimum standard entrenched in the directive. In doing so, the CJEU concluded, the Slovakian legislature had acted in accordance with the directive. This example makes clear that the precise consequences of minimum harmonisation in the context of a particular EU directive may not be as obvious as the implications of minimum requirements under other international legal regimes discussed in Part II.⁸⁶⁶

It is important to note that the domestic measures which go beyond the minimum standard laid down in the directive, must meet the standards laid down in the TFEU. In practice, this means that additional domestic restrictions on the 'four freedoms' (i.e. the free movement of goods, persons, services and capital) have to serve a legitimate aim and have to be proportional etc.⁸⁶⁷ This, of course, is an important difference with the other international legal regimes discussed in Part II, which can be explained by the (regulation of the) EU internal market. An additional limitation on more stringent domestic measures can be found in the condition that those measures 'are not liable seriously to compromise achievement of the result prescribed by the directive in question'.⁸⁶⁸

From the foregoing it may be concluded that under the international legal regimes discussed in Part II, harmonisation of national legislation often is cast in the form of minimum harmonisation. Also in the framework of the EU minimum harmonisation is a widely used method of harmonisation.⁸⁶⁹ In addition to the minimum norm, national legislators are free to impose *additional* norms to protect the common interest.

10.2.3 Other methods of harmonisation

10.2.3.1 *Optional provisions*

In addition to the imposition of minimum standards, harmonisation may occur through the inclusion of optional provisions. As appears from our discussion of several international legal regimes, this method of harmonisa-

866 Admittedly, the cases brought before the CJEU can be presumed to be the more controversial ones. Were it clear from the outset to what extent directive 91/477/EEC provided for the harmonisation of laws in the field of weapons control, the Slovakian national court would not have found it necessary to make a request for a preliminary ruling by the CJEU under article 267 TFEU.

867 L. Woods and Ph. Watson, *EU Law* (12th edn OUP, Oxford 2014) 349.

868 CJEU, *Muladi*, case C-447/15, judgment of 7 July 2016, ECLI:EU:C:2016:533, par. 43.

869 It is important to note, however, that many EU directives prescribe 'complete' harmonisation. In contrast to EU directives which contain minimum harmonisation, complete harmonisation does not allow states to adopt additional domestic norms which go beyond the minimum standard. In other words, the EU directive *exhaustively* prescribes the content of domestic implementing legislation. This particular form of harmonisation is characteristic for the EU's legislative instruments and cannot be found under the other regimes discussed in Part II. Therefore, it will not be further explored in the present study.

tion has been used, although not very often. One of the few examples of optional provisions that may give rise to implementing measures on the domestic level is article 12, fourth paragraph, ICSFT, which stipulates that:

‘[e]ach State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability’.

Similarly, as we have seen in Part II, article 17 CTOC, reads:

‘States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by this Convention, in order that they may complete their sentences there’.

Such provisions contain a suggestion and perhaps a recommendation to undertake the described conduct, but the establishment of the said mechanisms and the conclusion of agreements respectively are by no means mandatory. Other regimes, as we have seen, distinguish between mandatory provisions and non-mandatory provisions on a more structural basis. The Code annexed to the MLC, for instance, contains regulations and standards contained in Part A on the one hand, and guidelines contained in Part B on the other hand. The implementation of the latter category ‘should be given due consideration’, a clear indication of its optional character.⁸⁷⁰

Under EU law, ‘optional harmonisation’ is a more common phenomenon and thus widely present in the legislative instruments of the EU. By way of example, we could refer to directive 2014/60/EU on the return of cultural objects, article 3 of which stipulates that cultural objects that have been unlawfully removed from the territory of a member state, should be returned in accordance with the procedure laid down in that directive.⁸⁷¹ While the directive contains binding provisions with regard to cultural objects removed from a member state’s territory after 1992, it is added that:

‘[e]ach Member State may apply the arrangements provided for in this Directive to requests for the return of cultural objects unlawfully removed from the territory of other Member States prior to 1 January 1993.’⁸⁷²

Thus, extension of the directive’s temporal scope is optional and, as a consequence, so is this particular aspect of the implementation of the directive.

It may seem contradictory to consider the inclusion of optional provisions in an international regime beneficial to the harmonisation of laws.

870 Art VI, second paragraph.

871 Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (OJ 2014, L 159).

872 Artt 14 and 15, second paragraph.

If state parties are not required to comply with a certain provision as its character is merely optional, how could this positively contribute to the convergence of national laws? In this regard, it must be recalled that international legal regimes are the products of negotiations of several, or even many, (state) representatives. Whenever they cannot reach consensus on the codification of a certain agreement as a mandatory requirement, inclusion as an optional provision may prove to be the best possible result to its proponents. Therefore, the inclusion of non-mandatory provisions in an international legal regime should not be seen as an alternative to the inclusion of mandatory provisions, but as an alternative to *not* including norms on a particular topic at all.⁸⁷³ This perspective justifies the conclusion that optional provisions, in fact, have a positive impact on the harmonisation of domestic legislation. This size of this impact is, of course, dependent on the number of states that chooses to implement the particular provision within their respective national legal orders, despite its optional character.

10.2.3.2 Language

Another interesting aspect of the implementation of international legal regimes consists of the use of language. Strictly speaking, the use of language is not in itself a method of harmonisation. Rather it may be viewed as an element of a certain 'style of legislation'.⁸⁷⁴ However, since the use of domestic legal terms and concepts differs among domestic legal systems, the imposition of limitations on this variety may prove beneficial to harmonisation. For this section, therefore, it is particularly relevant to what extent harmonisation of *language* has been deemed feasible. This question came to the fore in the framework of the CTOC and the MLC, but is inherent to any international regime that pursues legal harmonisation.

With regard to the CTOC, in section 6.1.3.1 it was argued on the one hand that it was considered desirable to achieve uniformity in language as much as possible. To this end, terminology used in domestic legislation should correspond to the language used in the treaty. This would, it was stated in the Legislative Guide, simplify extradition proceedings between states. On the other hand, legislative drafters were encouraged to ensure consistency with domestic legal terms and definitions, which would often imply a deviation from the CTOC's terminology, in order to avoid conflicts

873 Moreover, in the framework of EU law, the inclusion of a provision as 'optional' may be a *necessity* if the directive at hand constitutes complete harmonisation, i.e. the member states are not allowed to apply additional laws to the subject matter under regulation. In that situation, an exception to the general (mandatory) regime laid down in the directive could only be applied by member states if it is expressly acknowledged in that directive as an 'option'.

874 W.J.M. Voermans, 'Styles of legislation and their effects' 32 *Statute Law Review* 1 (2013) 38-53, 41-42.

and uncertainty about the judicial application of the new provisions in practice.⁸⁷⁵

The latter element, discretion of states with regard to the use of terminology in domestic implementing legislation, emerged under the MLC as well. However, the motivation for its inclusion was a different one; as we have seen in section 9.1.3.1, the drafters of the MLC had opted for a formulation of the mandatory provisions in a more general way, since this would leave 'a wider scope for discretion as to the precise action to be provided for at the national level'.⁸⁷⁶ Thus, whereas terminological discretion for state parties under the CTOC would serve the purpose of legal certainty on the domestic level, under the MLC it would enhance flexibility with regard to the choice of implementing measures.

On a more abstract level, the issue raised under the CTOC and the MLC embodies the tension between the advantage of convergence of domestic laws on the hand, and discretion granted to states in the implementation of the applicable international legal regime. How these interests are balanced, will vary from one regime to the other.

10.2.3.3 *Equivalent measures*

A final method of harmonisation may be found in the possibility to adopt measures that are equivalent to the measures prescribed by a particular regime. Article VI, third paragraph, MLC, provides:

'A Member which is not in a position to implement the rights and principles in the manner set out in Part A of the Code may, unless expressly provided otherwise in this Convention, implement Part A through provisions in its laws and regulations or other measures which are *substantially equivalent* to the provisions of Part A'.

In order to determine whether domestic laws meet the standard of substantial equivalence, a state party must satisfy itself that the applicable piece of legislation 'is conducive to the full achievement of the general object and purpose' of the applicable Convention provisions and that it 'gives effect' to them.⁸⁷⁷

Also in the field of international labour law, article 2, second paragraph, sub a, CDWDW, stipulates that:

'A Member which ratifies this Convention may, after consulting with the most representative organisations of employers and workers and, where they exist, with organisations representative of domestic workers and those representative of employers of domestic workers, exclude wholly or partly from its scope [...] categories of workers who are otherwise provided with *at least equivalent protection*'.

875 Section 6.1.3.1.

876 (n 791).

877 MLC art VI, fourth paragraph.

Under EU law the implementation of legal instruments of the EU may only be performed through the adoption of 'equivalent measures' if it is expressly stipulated in the applicable instrument. An example can be found in directive 2010/31/EU on the energy performance of buildings, which provides, *inter alia*, that member states 'shall lay down the necessary measures to establish a regular inspection of the accessible parts of systems used for heating buildings [...]. That inspection shall include an assessment of the boiler efficiency and the boiler sizing compared with the heating requirements of the building.'⁸⁷⁸ It is added that:

'As an alternative to [the provision cited above] Member States may opt to take measures to ensure the provision of advice to users concerning the replacement of boilers, other modifications to the heating system and alternative solutions to assess the efficiency and appropriate size of the boiler. The overall impact of this approach shall be *equivalent* [emphasis added] [...]'⁸⁷⁹

When no harmonisation in the form of specific EU legislation has been undertaken, convergence of legal systems is influenced by the principle of 'mutual recognition' in the context of the internal market. In practice, this principle may demonstrate great similarity with harmonisation through equivalent measures. It originates from the CJEU's judgment in *Cassis de Dijon*. This case concerned the legality of German requirements on the minimum alcohol content of beverages. The question arose whether the German authorities could legally prohibit the market entry of a French fruit liqueur, *Cassis de Dijon*, which contained less alcohol. Since there was no EU legislation on alcohol levels in beverages, the CJEU had to investigate whether the German national legislation amounted to a 'measure having equivalent effect' in the sense of article 34 TFEU.⁸⁸⁰ The CJEU held:

'Obstacles to movement within the community resulting from disparities between national laws relating to the marketing of the products in question must be accepted insofar as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. [...] It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community'.⁸⁸¹

878 Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (OJ 2010, L 153) art 14, first paragraph.

879 Art 14, fourth paragraph.

880 Article 34 TFEU provides: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.'

881 CJEU, *Cassis de Dijon*, case C-120/78, judgment of 20 February 1979, ECLI:EU:C:1979:42, par. 8 and 14.

The CJEU thus ruled that the German authorities were obliged to admit the import of French fruit liqueur in Germany, even though it contained a lower alcohol percentage than prescribed by German law.⁸⁸² Put differently, the CJEU held that whenever a product was lawfully placed on the market in one of the member states, it should also be accepted in other member states; 'the foreign must be recognised as functionally equivalent, at least in all really important aspects, to the domestic'.⁸⁸³ Of course, mutual recognition benefits economic actors that sell their products across the internal borders of the EU, since they have to comply with one regulatory regime only. From this point of view, the principle of mutual recognition, as entrenched in article 34 TFEU, should be considered as a particular manifestation of harmonisation through equivalent measures. In sum, in the framework of the EU, harmonisation through equivalent measures could be based on a specific legislative instrument or, in the absence thereof, on article 34 TFEU (although in the latter case, its scope is limited to the internal market).

It can be argued that the possibility to adopt 'equivalent measures' may have a negative impact on the convergence of domestic laws in a particular area, and perhaps even promote divergence, as it provides states with a certain measure of discretion with regard to the choice of means to achieve the identified policy aims. This statement may be true, but it ignores the fact that the possibility to adopt equivalent measures provides an additional manner to obtain the aims which are pursued under an international legal regime. In this regard, it may be useful to emphasise the distinction between a specified policy aim and the means to achieve that aim; while the provision for the adoption of equivalent measures under an international legal regime may promote convergence between national legal orders with regard to the achievement of a specified policy aim, it may promote divergence with regard to the choice of means on the domestic level. Moreover, similar to what has been argued above in respect of the inclusion of optional provisions, the permission of 'equivalent measures' may be a prerequisite for consensus among state representatives; if states cannot reach consensus on the choice of means to attain a certain policy aim, the permission of 'equivalent measures' may be a price worth paying to attain international agreement.

10.3 LEGISLATIVE STANDARDS

10.3.1 Introduction

Now we have analysed the various ways in which international legal regimes encourage the convergence of laws in specific policy fields and, as a corollary, the extent to which an international regime leaves room for national considerations in its implementation, it is time to resume our

882 CJEU, *Cassis de Dijon* (n 881).

883 Chalmers, Davies and Monti, *European Union law* (n 468) 775.

analysis of the legislative standards in Part II. In this section, therefore, we will examine the substance and scope of those standards. This enquiry is a prerequisite for their assessment in the light of theory and practice with regard to legislative quality.

The outline of this section reflects a certain hierarchy between legislative standards. In this hierarchy, the standard of effectiveness is considered the supreme, overarching legislative standard. Several other legislative standards are presented as subsidiary to the standard of effectiveness. How can this distinction be justified? The answer to that question is that the legislative standards of a subsidiary nature ultimately serve the purpose of ensuring the regime's effectiveness. In other words, they are not an end in itself, but only a means to achieve a 'higher' objective: effectiveness. The standard of effectiveness and its subsidiary elements thus fundamentally differ in the purpose they serve.

Indications for the existence of such hierarchy between effectiveness and other legislative standards can also be derived from the grounds that led to the inclusion of the subsidiary legislative standards under the regimes discussed in the previous part. For instance, in the context of our discussion of the CTOC, it was argued that consistency with fundamental principles of domestic law serves to 'ensure the *effectiveness* of the Convention itself as it dissuades state parties from adopting national implementing legislation that, as a result of contravention of domestic laws or principles of higher rank, will remain without legal force'.⁸⁸⁴ A similar point can be made with regard to the relation between the legislative standards of legal certainty and effectiveness under the ECHR, as we will see below. Having said that, let us now turn to the legislative standards that constitute the legislative framework referred to in section 10.1.

10.3.2 Effectiveness

10.3.2.1 *Effectiveness under the selected international legal regimes*

The examination of the international legal regimes, as conducted in Part II, reveals that the notion of effectiveness has a prominent place as a legislative standard. It demands that domestic implementing legislation is adopted and applied in such a way that a specified international legal regime is effective within the domestic legal order. Its place is, however, not identical under the various international legal regimes. In this section it is argued that 'effectiveness' as a legislative standard, according to which state parties must adopt domestic legislation that puts into effect the objectives formulated in the legal instrument, is present on two distinct levels. These levels differ in scope. On both levels, however, express reference to 'effectiveness' or its equivalent is not required. This will be clarified below.

884 Section 6.1.3.2.

First of all, the adoption of effective implementing measures may be required with regard to the international legal regime in its entirety. As we have seen, the way in which it is codified may vary from regime to regime. In the context of the ICESCR, for instance, the notion of effectiveness is termed 'realisation'; the core obligation of that treaty imposes the obligation to take measures 'with a view to achieving progressively the full realization of the rights' embedded in it.⁸⁸⁵ Apart from the exact meaning of the notion of progression, which was discussed in Part II, it is difficult to see how 'realisation' and 'effectiveness' can be distinguished in the legal context of this regime. In the same vein, the legislative standard of effectiveness is firmly embedded in the ECHR. Whereas the ICESCR contains the term 'realisation', the ECHR provides that the rights and freedoms embedded in it, must be 'secured to everyone'.⁸⁸⁶ The prominence of the notion of effectiveness was also recalled by the ECtHR when it famously stated that 'the Convention is intended to guarantee not rights that are theoretical and illusory but rights that are practical and effective'.⁸⁸⁷ For this reason, Rietiker asserts that the principle of effectiveness has become a fundamental cornerstone for the protection of Convention rights and freedoms'.⁸⁸⁸

Outside the context of the protection of human rights, effectiveness as a legislative standard which is applicable to an international regime in its entirety, can be identified under several of the regimes discussed in Part II. Again, the absence of the term 'effectiveness' does not justify the conclusion that this legislative standard does not apply. Article 4, fourth paragraph, CCTMW, stipulates that state parties are under the obligation to take 'appropriate legal, administrative and other measures to implement and enforce' its provisions. Similarly, article 3 FCTC states that its provisions are 'to be implemented by the Parties'. While under the MLC state parties are required to 'give complete effect' to its provisions, parties to the CTOC have a duty to take 'necessary measures [...] to ensure the implementation of its provisions'.⁸⁸⁹ In sum, the legislative standard of effectiveness which applies to the relevant regime as a whole, can be found under several of the regimes discussed in Part II. The exact terms in which this standard is phrased, however, are not identical.

Second, 'effectiveness' may be required with regard to a specified policy aim embodied in the international instrument. Here, the scope of the standard of effectiveness is usually limited to a specified and detailed policy aim, in contrast to the notion of effectiveness which applies to the regime

885 Art 2, first paragraph.

886 Art 1.

887 *Airey v Ireland* (n 347) par. 24.

888 D. Rietiker, 'The principle of "effectiveness" in the recent jurisprudence of the European Court of Human Rights: its different dimensions and its consistency with public international law - no need for the concept of treaty *sui generis*', 79 *Nordic Journal of International Law* 2 (2010) 245-277, 256.

889 MLC art I and CTOC art 34, first paragraph.

as a whole. In principle, this standard of effectiveness with a narrow scope is inherent to any international legal provision that requires the adoption of implementing legislation on the domestic level. Thus, it can be argued that effectiveness and implementation overlap. Exactly this point was made in section 1.2 when it was argued that there is no such thing as implementation which is not effective.

A few examples may be sufficient to emphasise the diversity of the norms that contain this narrow application of the standard of effectiveness. Often, in its most general sense, it is present in the obligation to 'ensure' the attainment of a specified policy aim, which leaves the means to achieve that objective entirely to the state party. For instance, in order to combat the spread of infectious diseases, states 'shall ensure [...] that container loading areas are kept free from sources of infection or contamination, including vectors and reservoirs'.⁸⁹⁰ If, under the CCTMW, hazardous waste is object of illegal traffic, the state of export 'shall ensure that the wastes in question are taken by the exporter [...]'.⁸⁹¹ Moreover, in the field of the prevention of the financing of terrorism, states 'shall ensure [...] that legal entities liable [for transgressions of the treaty] are subject to *effective*, proportionate and dissuasive criminal, civil or administrative sanctions'.⁸⁹²

Sometimes express reference is made to the means through which a specified policy aim must be pursued, even though these means are often formulated in general terms. Examples include obligations to 'institute domestic regulatory and supervisory regimes for banks [...] in order to deter and detect all forms of money-laundering';⁸⁹³ to 'adopt and implement effective legislative, executive, administrative or other measures requiring manufacturers and importers of tobacco products to disclose to governmental authorities information about the contents and emissions of tobacco products';⁸⁹⁴ to 'take appropriate measures to prohibit trade in specimens in violation [of the Convention]'.⁸⁹⁵

This overview also begs the question to what extent the legislative instruments of the EU, most notably directives and regulations, fit within the categorisation presented in this section. It is important to note that they are *instruments* (similar to treaties or other sources of international law) instead of *regimes* in the meaning attributed to this term in the present study.⁸⁹⁶ As a consequence, directives and even regulations which have been adopted by the institutions of the EU contain provisions that are similar to all the aforementioned manifestations of the standard of effectiveness, just as treaties and other binding decisions of international organisa-

890 IHR art 34, second paragraph.

891 Art 9, second paragraph, sub a.

892 ICSFT art 5, third paragraph.

893 CTOC art 7, first paragraph, sub a.

894 FCTC art 10.

895 CITES art VIII, first paragraph.

896 Section 5.1.1.

tions do.⁸⁹⁷ Moreover, as was already discussed in section 3.4.2, EU law contains a general principle of effectiveness, closely related to the principle of loyalty as embodied in article 4, third paragraph, TEU, which requires that '[t]he measures taken by the Member States must be such as to ensure that a directive is fully effective, in accordance with the objective which it pursues'.⁸⁹⁸ In other words, also in the implementation of legislation adopted in the framework of the EU, the legislative standard of effectiveness must be observed.

Perhaps the most important step following the adoption of implementing legislation is its application in practice. This requirement makes clear that the mere existence of implementing legislation is not sufficient for a state to respect its international obligations; it must be applied in practice as well. Put differently, the implementation of international law within the domestic legal order must go beyond the drafting or modification of legal texts. It is reflected in the statement of the ECtHR, already cited in section 4.1.3.1, that the ECHR intends to guarantee rights that are 'practical and effective', instead of 'theoretical and illusory'.⁸⁹⁹ This requirement cannot be considered a separate legislative standard, however, since it does apply neither to the substance or form of legislation, nor to legislative procedure. Nevertheless, it has received special attention in the case law of the CJEU, which has stated that domestic implementing legislation should be 'effectively applied and enforced in practice'. This responsibility rests upon all state authorities or private entities which are attributed with public powers under the relevant legislation.⁹⁰⁰

In view of the above, it is safe to conclude that the legislative standard of effectiveness has a prominent place within the legal regimes discussed in Part II. What is more, it has become clear that this standard may vary in scope and manifests itself in various formulations. Furthermore, it does not only apply to the legislation itself, but also, under EU law and the ECHR at least, to its application in practice. This notwithstanding, the standard of effectiveness acquires practical relevance only after the national legislature has engaged in the *interpretation* of the applicable international legal provision with a view of establishing its substance, since the act of interpretation provides an answer to the question which national legislation is required in order to ensure the effectiveness of the applicable international legal provision that has to be implemented. The act of interpretation itself is also subject to norms of international law, in particular the law of treaties, under which the notion of effectiveness emerges once again.

⁸⁹⁷ It must be recalled that the directives and regulations are different in nature. See (n 461).

⁸⁹⁸ CJEU, *Von Colson* (n 297) par. 15.

⁸⁹⁹ *Airey v Ireland* (n 347) par. 24.

⁹⁰⁰ Sections 5.1.2.4 (with regard to EU directives) and 5.2 (with regard to EU regulations).

10.3.2.2 Effectiveness in the context of treaty interpretation under general international law

In addition to the importance of the notion of effectiveness under the international legal regimes discussed in Part II, we can also discern a principle of effectiveness under general international law. The principle of effectiveness emerges in different international legal contexts, among them the context of treaty interpretation.⁹⁰¹ Since most international legal regimes that we have examined derive from treaty law, this principle of interpretation deserves our attention. The notion of effectiveness is reflected in the maxim *ut res magis valeat quam pereat*, which can be translated as ‘that the matter may have effect rather than fail’.⁹⁰² Put briefly, it requires that a treaty provision is interpreted in a manner that renders the applicable norm ‘effective’.

To what extent can it be considered part of international law? Lauterpacht, writing in 1949, argued that the principle of effectiveness is firmly rooted in both national law and international law.⁹⁰³ In particular, he has demonstrated that international case law, most notably of the PCIJ, has ‘constantly acted upon the principle of effectiveness as the governing canon of interpretation’.⁹⁰⁴ In 1961, Lord McNair took a rather skeptical stance when he stated:

‘[...] we doubt whether this so-called rule means more than to say that the contracting parties obviously must have had some purpose in making a treaty, and that it is the duty of a tribunal to ascertain that purpose and do its best to give effect to it, unless there is something in the language used by the parties which precluded the tribunal from doing so’.⁹⁰⁵

The case law of the ICJ has made clear that the attribution of effectiveness to a treaty provision is neither the only, nor the most important rule of treaty interpretation. This was emphasised in the *South West Africa Cases*, in which the ICJ was confronted with the question whether it was entitled to apply the teleological principle of interpretation according to which ‘instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes’.⁹⁰⁶ The ICJ had to decide whether Ethiopia and Liberia, as former members of the League of Nations (LoN, which ceased to exist after the Second World War), could be considered to have a legal right or interest with regard to the governance of the Mandate of South West

901 For an overview of the various meanings given to the principle of effectiveness under international law, see H. Taki, ‘Effectiveness’ in: R. Wolfrum (ed), *Max Planck Encyclopedia of public international law* (online edn OUP, Oxford).

902 Ibid, par. 1 and 17.

903 H. Lauterpacht, ‘Restrictive interpretation and the principle of effectiveness in the interpretation of treaties’ 26 *British Yearbook of International Law* (1949) 48-85, 68.

904 Ibid.

905 Lord McNair, *The law of treaties* (Clarendon Press, Oxford 1961) 385.

906 *South West Africa Cases (Ethiopia v South Africa and Liberia v South Africa)* [1966] ICJ Rep 6, par. 91.

Africa.⁹⁰⁷ The Mandate of South West Africa had been established after the First World War and constituted the international administration on behalf of the LoN, under which the former colony German South West Africa was placed. The ICJ dismissed the claim advanced by Ethiopia and Liberia. On the basis of interpretation of the applicable instruments, most notably article 22 of the Covenant of the LoN, the ICJ asserted that the power to intervene in the governance of the Mandate was vested in the LoN institutions, not in its individual members.⁹⁰⁸ A reference to the principle of effectiveness could not alter this conclusion, as the ICJ stated that:

[t]he principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.⁹⁰⁹

The principle of effectiveness is not mentioned as such in the VCLT, the authoritative 1969 (which was only 3 years after the ICJ delivered judgment in the *South West Africa Cases*) codification of the law of treaties. However, it must be regarded as the teleological principle of interpretation underlying article 31, first paragraph, VCLT, which contains the obligation to interpret treaty provisions in the light of their object and purpose. In this view, '[c]onsideration of a treaty's object and purpose together with good faith will ensure the effectiveness of its terms'.⁹¹⁰

In view of the foregoing, the principle of effectiveness is relevant for the interpretation of treaty provisions in conformity with article 31 VCLT. This was reaffirmed in the *Fisheries Jurisdiction Case*, in which the ICJ stated that the principle of effectiveness 'has an important role in the law of treaties and in the jurisprudence of this Court'.⁹¹¹ The references to this principle in international case law seem to justify the conclusion that the principle of effectiveness is part and parcel of the obligation to interpret treaty provisions in the light of their object and purpose. This applies equally to treaty provisions that call for the enactment of implementing legislation in the domestic legal order.

907 Ibid, par. 14.

908 Ibid, par. 34-35.

909 Ibid, par. 91. The Court referred to *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second phase)* (Advisory Opinion) [1950] ICJ Rep 221, p. 229.

910 M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, Leiden 2009) 428. Similarly Aust, *Modern treaty law and practice* (n 165) 208-209; R. K. Gardiner, *Treaty interpretation* (2nd edn OUP, Oxford 2015) 179; Sorel and Boré Eveno maintain the view that effectiveness is a 'mixture of the criteria of the object and purpose and of the principle of good faith'. Sorel and Boré Eveno (n 38) 817. Also Rietiker, 'The principle of "effectiveness"' (n 888) 256.

911 *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) (Judgment) [1998] ICJ Rep 432, par. 52.

10.3.3 Subsidiary elements of effectiveness

10.3.3.1 Legal certainty

Now we have explored the prominence of ‘effectiveness’ under international legal norms that require the adoption of implementing legislation on the domestic level, let us proceed to its subsidiary legislative standards, among them the requirement of legal certainty. Legal certainty is a multifaceted concept which is considered an essential component of the rule of law. This is not the place to engage in a thorough discussion of the various meanings attributed to the notion of legal certainty.⁹¹² Nevertheless, for the purpose of the present study, we should clarify how this notion has been referred to under the regimes discussed in Part II. It may be surprising that, out of the regimes explored in Part II, the notion of legal certainty arises only under the ECHR, the CESCR and under the law of the EU. From this we might derive a general reluctance to include the standard of legal certainty in the regulation of implementing legislation beyond the community of European states.

In section 4.1 we have seen that the standards of legal certainty and of effectiveness are closely related. In this view, legal certainty is an indispensable element of effective protection to which individuals are entitled under the ECHR. In *A., B. and C. v Ireland*, the ECtHR considered that article 8 ECHR requires the adoption of domestic legislation which contains an ‘accessible and effective procedure’ according to which women could establish whether they qualify for a lawful abortion. The ECtHR held that the applicable Irish constitutional provision contributed to substantial uncertainty, which constituted ‘a significant chilling factor for both women and doctors in the medical consultation process’. After all, they ran the risk of criminal prosecution.⁹¹³

As we have seen in section 4.2, the CESCR has made an almost identical argument with regard to the uncertainty surrounding the Irish legislation on abortion. On a more general level the CESCR demands national legislation which is clear and unambiguous, especially when the application of vague norms may constitute impediments to the enjoyment of economic, social and cultural rights embedded in the ICESCR.⁹¹⁴

Furthermore, as we have seen, on the basis of the ECtHR’s case law it can be argued that the standard of legal certainty demands that domestic implementing legislation is formulated in sufficiently clear terms in order to ensure its deterrent effect. This can be derived from *Siliadin v France*, in which a Togolese woman had come to France as a minor and was held in servitude and was subjected to forced labour for several years.⁹¹⁵ The

912 Such as the relevance of ‘legitimate expectations’.

913 *A., B. & C. v Ireland* (App no 25579/05) ECHR 2010-VI 185, par. 254.

914 Section 4.2.3.8.

915 Section 4.1.2.2.

French Criminal Code covers the acts of 'exploitation through labour and subjection to working and living conditions that are incompatible with human dignity'. In the view of the ECtHR, however, these provisions did not afford the applicant practical and effective protection, as appears from the fact that they had been open to 'very different interpretations from one court to the next'.⁹¹⁶ In other words, the ECtHR suggested, the French criminal legal provisions lacked an effective deterrent character.⁹¹⁷

Both cases have in common that they involve formal requirements pertaining to the domestic implementing legislation. In the view of the ECtHR they follow from the standard of legal certainty and are expressly related to the notion of 'effective protection' of the individual. What is more, in both cases the ECtHR emphasised the need to clearly circumscribe acts threatened with criminal punishment; it is thus relied on in a criminal legal context. This latter similarity may suggest that the notion of legal certainty has, in the context of domestic legislation which implements the (positive) obligations under the ECHR, a rather narrow scope. This raises the question whether the ECtHR has referred to the notion of legal certainty in other areas, including outside the context of legislation that gives effect to the positive obligations under the ECHR.

The answer is: yes, the ECtHR has, in particular in the field of the implementation of limitations of ECHR rights. The most important human rights treaties allow for the limitation of the rights entrenched in the conventions (with the exception of the so-called 'absolute rights', from which no derogation is permitted), under the condition that the imposed limitations meet the requirements that have been established under the applicable convention. These specific requirements may vary from one convention to the other. Nevertheless, they have at least one common denominator: the limitation imposed upon the individual's rights must be provided for by the domestic law of the state. This criterion may be considered an aspect of the concept of legal certainty, which stipulates that the state could not infringe upon its citizens' liberty except with a legal basis, and should prevent arbitrariness on the part of state authorities. As a result of this common feature, domestic legislation which provides for a limitation on the enjoyment of specified human rights by the state's citizens (or, more accurately: domestic legislation which, in order to achieve the formulated policy aims, also imposes restrictions on the enjoyment of some specified human rights), to a large extent resembles what has been previously called domestic 'implementing legislation'. Admittedly, domestic limitations on human rights differ from other categories, because, contrary to other international legal norms that give rise to implementing legislation on the domestic level, the limitation of human rights is not prescribed by international law. Indeed, from the perspective of international law, as may become clear from a human rights treaty's object and purpose, such limitations must be discouraged.

916 *Siliadin v France* (n 327) par. 142-149.

917 *Ibid.*, par. 144.

It remains true, nonetheless, that if a state prefers to impose limitations on the rights incorporated in a human rights treaty, such restrictions should meet criteria *established by international law*. In this sense, they must be viewed as subject to normative frameworks that are applicable to domestic implementing legislation.

How has this particular manifestation of the standard of legal certainty been applied by the ECtHR? The notion of legal certainty can be said to be referred to by the ECHR with the phrases ‘prescribed by law’ or ‘in accordance with the law’.⁹¹⁸ In *Sunday Times v the United Kingdom*, the ECtHR observed that the requirement of a basis in law does not necessarily demand legislation or norms of lower rank, including regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by the legislature, but may also encompass unwritten law.⁹¹⁹ Thus, the finding of established case law in national courts may suffice to fulfil the requirement of legal certainty.⁹²⁰

The ECtHR has adhered to a substantive standard, which comprises two elements: accessibility and foreseeability. Accessibility refers to the requirement that ‘the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case’.⁹²¹ This condition will be fulfilled if the relevant legislation has been published in the official gazette.⁹²² The criterion of foreseeability demands that the domestic law which imposes the restriction upon the ECHR rights is sufficiently precise in order to enable citizens to ‘foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail’.⁹²³ Those consequences include the formalities, conditions, restrictions or penalties which may be attached to such conduct if it is established that the conduct constitutes a breach of the applicable national law.⁹²⁴ As the ECtHR has

918 Articles 5, first paragraph (right to liberty), 8, second paragraph (right to respect for private and family life) 9, second paragraph (freedom to manifest one’s religion or beliefs), 10, second paragraph (freedom of expression), and 11, second paragraph (right to freedom of peaceful assembly and to freedom of association with others).

919 *Sunday Times v the United Kingdom* (App no 6538/74) ECHR 26 April 1979, par. 47; *Cantoni v France* (App no 17862/91) ECHR 11 November 1996, par. 35; *Başkaya and Okçuoğlu v Turkey* (App no 23536/94 and 24408/94) ECHR 1999-IV 261, par. 36; *Špaček s.r.o. v Czech Republic* (App no 26449/95) ECHR 9 November 1999, par. 54; *Association Ekin v France* (App no 39288/98) ECHR 2001-VIII 323, par. 46; *Sanoma Uitgevers B.V. v the Netherlands* (App no 38224/03) ECHR 14 September 2010, par. 83.

920 *Couderc and Hachette Filipacchi Associés v France* (App no 40454/07) ECHR 14 June 2007, par. 33.

921 *Sunday Times v United Kingdom* (n 919) par. 49. Also *Silver and others v the United Kingdom* (App no 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75) ECHR 25 March 1983, par. 85-88.

922 *Piroğlu and Karakaya v Turkey* (App no 36370/02 and 37581/02) ECHR 18 March 2008, par. 53; *Rotaru v Romania* (App no 28341/95) ECHR 2000-V 109, par. 54.

923 *Sunday Times v United Kingdom* (n 919) par. 49. Also *Silver and others v United Kingdom* (n 921) par. 85-88.

924 *Kazakov v Russia* (App no 1758/02) ECHR 18 December 2008, par. 23; *Siryk v Ukraine* (App no 6428/07) ECHR 31 March 2011, par. 35.

submitted on various occasions, this condition serves to protect individuals against arbitrary interferences by the public authorities. To this end, the law must 'indicate with sufficient clarity the scope of any such discretion and the manner of its exercise'.⁹²⁵ The interpretation of the criterion of foreseeability in an individual case depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed.⁹²⁶ It may give rise to specific responsibilities for the persons involved, which may include the task to take appropriate legal advice.⁹²⁷ In particular, this applies to persons who are engaged in professional activities. As may be derived from the ECtHR's case law, they cannot easily claim that legal provisions that have been relied upon to their detriment, lack the foreseeability that is required under the ECHR.⁹²⁸ It means, for example, that it could be expected from a business company that wishes to broadcast across the border to inform itself fully about the telecom regulations in force in that country, if necessary with the help of advisers.⁹²⁹ Moreover, a manager of a supermarket who claimed to be under the impression that he had engaged in the lawful sale of medicinal products, should have taken steps to inform himself about the possible consequences of what turned out to be the unlawful sale of medicinal products.⁹³⁰

In addition to the element of precision, the criterion of foreseeability requires that 'the applicable law must provide minimum procedural safeguards commensurate with the importance of the principle at stake'.⁹³¹ Such principle may include press freedom and the journalistic privilege of source protection. In *Sanoma Uitgevers B.V. v the Netherlands* the ECtHR investigated the forcing of journalists to disclose the identity of journalistic sources, or information that could lead to the identification of the sources, which allegedly contravened article 10 ECHR. Journalists who had attended an illegal street race, had made photographs of the participants. One of the cars that participated, it was suspected by the police and the prosecuting authorities, had been used as a getaway car following a ram raid. Therefore, the authorities had summoned the journalists to hand over the photographs

925 *Soyato-Mykhaylivska Parafiya v Ukraine* (App no 77703/01) ECHR 14 June 2007, par. 127-128; *Koretskyi and others v Ukraine* (App no 40269/02) ECHR 3 April 2008, par. 47; *Munjaz v the United Kingdom* (App no 2913/06) ECHR 17 July 2012, par. 88.

926 *Cantoni v France* (n 919) par. 44.

927 *Tolstoy Miloslavsky v the United Kingdom* (App no 18139/91) ECHR 13 July 1995, par. 37; *Grigoriades v Greece* (App no 24348/94) ECHR 25 November 1997, par. 37.

928 *July and SARL Libération v France* (App no 20893/03) ECHR 14 February 2008, par. 52; *Cantoni v France* (n 919) par. 35; *Chauvy and Others v France* (App no, judgment of 29 June 2004, par. 43-45; *Delfi AS v Estonia* (App no 64569/09) ECHR 16 June 2015, par. 128-129; *Varvara v Italy* (App no 17475/09) ECHR 29 October 2013, par. 34.

929 *Groppera Radio AG and others v Switzerland* (App no 10890/84) ECHR 28 March 1990, par. 68.

930 *Cantoni v France* (n 919) par. 35.

931 *N.K.M. v Hungary* (App no 66529/11) ECHR 14 May 2013, par. 48; *Gáll v Hungary* (App no 49570/11) ECHR 25 June 2013, par. 47; *R.Sz. v Hungary* (App no 41838/11) ECHR 2 July 2013, par. 37; *Sanoma Uitgevers B.V. v the Netherlands* (n 919) par. 88.

of the street race. After their initial refusal to cooperate, the journalists, put under pressure by the authorities, had complied with the request. Before the ECtHR, the journalists' employer, applicant in the present case, argued that the domestic legal basis for the seizure of the photographs, an interference with its right to receive and impart information, as protected by article 10 ECHR, lacked foreseeability. The ECtHR agreed and stressed the 'vital importance' of press freedom and the protection of journalistic sources. In those circumstances, it maintained, the required minimal procedural safeguards should have included the guarantee of review by a judge or other independent and impartial decision-making body to make an assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources.⁹³²

Thus, in addition to the standard of legal certainty as applied by the ECtHR to domestic legislation which implements the positive obligations of the ECHR, the ECtHR has turned to the requirement of legal certainty in the assessment of domestic legislation that imposes limitations on the ECHR rights. In both cases, legal certainty relates to formal aspects of domestic law, such as clarity, accessibility and foreseeability.

The legislative standard of what we have termed 'legal certainty' also emerges in the case law of the CJEU. As we have seen in Chapter 5 on the implementation of the EU's legislative instruments, this entails, *inter alia*, that national implementing measures should have 'unquestionably binding force'. Contrary to implementation through mere administrative practices, implementation through binding law ensures appropriate publicity.⁹³³ The underlying premise is that individuals should be able to inform themselves on the law currently in force. Moreover, domestic implementing legislation should meet the requirements 'specificity, precision and clarity necessary to satisfy the requirements of legal certainty'. In the view of the CJEU, they enable individuals to 'ascertain the full extent of their rights and obligations'.⁹³⁴ These elements from the CJEU's case law show a striking similarity to the case law of the ECtHR: both institutions have formulated requirements to the formal aspects of implementing legislation, which encompasses criteria pertaining to the text of the law and criteria pertaining to its accessibility and foreseeability. Apparently, both courts consider these elements part and parcel of the notion of legal certainty and a legislative standard to be observed by states that adopt national implementing measures.

Nevertheless, under the ECHR and EU law the application of the notion of legal certainty is not restricted to formal aspects of domestic implementing legislation. On several occasions the ECtHR has stated that the notion of legal certainty is an underlying value of the ECHR, thus suggesting a very broad application of this standard.⁹³⁵ It is 'implicit in all the Articles

932 *Sanoma Uitgevers B.V. v the Netherlands* (n 919) par. 90.

933 Section 5.1.2.2.

934 Section 5.1.2.3.

935 *Fabris v France* (App no 16574/08) ECHR 2013-I 425, par. 66.

of the Convention and constitutes one of the basic elements of the rule of law'.⁹³⁶ In the view of the ECtHR, it requires, *inter alia*, that where the courts have finally determined an issue, their ruling should not be called into question.⁹³⁷ Also under EU law, the notion of legal certainty, often referred to as the 'principle' of legal certainty, has a broader application than merely encompassing formal elements of domestic implementing legislation.⁹³⁸ In *Heinrich*, the CJEU stated:

[...] the principle of legal certainty requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.⁹³⁹

In addition to the requirement of clarity, to which we referred above, the principle of legal certainty prevents a measure from taking effect prior to its publication (retroactivity). It may apply to legal situations which have been concluded at the time of publication of the relevant measure, or to situations which continue to exist after the publication. It cannot be deviated from when imposing penalties.⁹⁴⁰

In view of the discussion of the various manifestations of the standard of legal certainty under the ECHR, the ICESCR and the law of the EU, as presented above, can we make some general statements about the standard's scope and application? In the context of a discussion of the features of domestic implementing legislation, the foregoing has made clear that the notion of legal certainty demands that implementing legislation is drafted in clear and precise terms. Moreover, the law must be accessible and foreseeable, requirements that are intended to ensure that individuals can inform themselves about the laws in force.

10.3.3.2 Observance of applicable international and national law

Another legislative standard that may be derived from our examination of international legal practice in Part II is 'consistency with applicable law'. This requirement provides that domestic implementing legislation should be in conformity with other laws in force. As we have seen, they may have international or national origins. In Part II we described the relation

936 *Beian v Romania* (no. 1) (App no 30658/05) ECHR 2007-V 193, par. 39.

937 *Brumărescu v Romania* (App no 28342/95) ECHR 1999-VII 201, par. 61.

938 T.C. Hartley, *The foundations of European Union law. An introduction of the constitutional and administrative law of the European Union* (8th edn OUP, Oxford 2014) 162-164. Also Chalmers, Davies and Monti, *European Union law* (n 468) 441.

939 CJEU, *Heinrich*, case C-345/06, judgment of 10 March 2009, ECLI:EU:C:2009:140, par. 44.

940 Hartley, *The foundations of European Union law* (n 938) 162-164. Also Chalmers, Davies and Monti, *European Union law* (n 468) 441. For a thorough analysis of the principle of legal certainty and the related concept of legitimate expectations, see P. Craig, *EU Administrative law* (Collected courses of the Academy of European Law, 2nd edn OUP, Oxford 2012) 549-589.

between domestic implementing legislation and other laws applicable to the same subject matter with the metaphor of a double-edged sword. It makes clear that references to national and international norms in an international legal instrument serve to ensure the effectiveness of that instrument and, at the same time, to protect the sovereignty of states.

We have seen that many international legal regimes refer to national laws.⁹⁴¹ Such references can be divided into two categories. On the one hand, domestic implementing legislation should not contravene domestic laws of higher rank, as it would render the implementing legislation ineffective.⁹⁴² This standard of observance of applicable law is thus closely linked to the standard of effectiveness. On the other hand, international legal regimes may expressly grant states the freedom to 'fill in' parts of it on the national level. Examples include, as we have seen, the liberty to adopt immunity or leniency provisions and to provide for conditions for extradition under the CTOC⁹⁴³, to determine the meaning of the terms 'temporary' and 'permanent' residence under the IHR⁹⁴⁴, to extend the scope of the CCTMW to categories of waste that are labelled 'hazardous' under national law⁹⁴⁵ and to specify during which nocturnal hours seafarers under 18 are allowed to work.⁹⁴⁶ Such references indicate that international policy makers considered it unnecessary or undesirable to harmonise these particular elements. From a different angle, the inclusion of such references in international legal regimes may be said to serve the protection of state sovereignty.

In addition, our analysis has made clear that international legal regimes often refer to other international norms.⁹⁴⁷ Again, these references serve two distinct purposes, both of which are relevant for the drafting of domestic implementing legislation. On the one hand, they make clear that domestic implementing legislation should respect certain legal limits. They consist of, *inter alia*, the principles of sovereign equality and territorial integrity of states and the principle of non-intervention in the affairs of other states under the CTOC⁹⁴⁸ and the ICSFT⁹⁴⁹ and obligations under international treaties establishing transnational trade areas or customs unions under the CITES⁹⁵⁰. On the other hand, a reference to other, existing international norms may clarify that the regime is intended to build on, instead of deviate from, those existing norms. As a consequence, domestic implementing legislation should equally rely on those norms. Examples include, as we have seen, the

941 CTOC, ICSFT, IHR, FCTC, CITES, CCTMW, MLC and CDWDW.

942 This point has been expressly made with regard to CTOC and ICSFT. Section 6.1.3.2 with regard to CTOC and section 6.2.3.2 with regard to ICSFT.

943 Section 6.1.3.2.

944 Section 7.1.3.3.

945 Section 8.2.3.2.

946 Section 9.1.3.3.

947 ICESCR, CTOC, ICSFT, IHR, FCTC, CITES, CCTMW, MLC and CDWDW.

948 Section 6.1.3.2

949 Section 6.2.3.2.

950 Section 8.1.3.3.

reliance on 'international guidelines and protocols established by UN agencies' in the interpretation of article 12 ICESCR on the rights to sexual and reproductive health⁹⁵¹, on 'relevant initiatives of regional, interregional and multilateral organisations against money laundering' under the CTOC⁹⁵², on the packaging and labeling of hazardous waste in accordance with 'generally accepted and recognized international rules and standards' under the CCTMW⁹⁵³ and on the regulation of penalties under the MLC in accordance with the UNCLOS⁹⁵⁴. Despite their distinct purposes, references to other international norms in international legal regimes have in common that they aim to ensure that the national legislature takes into account other relevant international norms when it is adopting domestic implementing legislation.

Such references thus also have some harmonising effects, as they contribute to the convergence of domestic legislation of the policy fields covered by the international legal norms to which is referred. The references' normative force differs, however. In some instances, they make clear that observance of a specific international legal norm is compulsory. In other situations, references are formulated in looser terms. In order to perform their obligations to implement article 12 ICESCR, states 'should be guided by contemporary human rights instruments and jurisprudence, as well as the most current international guidelines and protocols established by United Nations agencies, in particular WHO and the United Nations Population Fund (UNFPA)'.⁹⁵⁵

The distinction between references to national law and references to international law may prove not entirely accurate if we try to fit in national legislation which serves to implement legislation adopted in the framework of the EU. However, the same mechanism applies: the enforcement of domestic implementing legislation should not contravene 'EU law and its general principles', which includes human rights principles, as we have elaborately discussed in section 5.1.2.4.

This raises the question whether compliance with human rights should be considered as an autonomous legislative standard to be distinguished from the observance of (other) national and international law. Practice with regard to the regulation of implementing legislation suggests a negative answer to this question, since we have established that only the IHR stress the importance of 'dignity, human rights and fundamental freedoms' in the context of the imposition of health measures on travelers.⁹⁵⁶ Admittedly, the MLC also contains references to human rights and fundamental freedoms, but these are *internal* references, as they point to the rights codified in the MLC itself.

951 Section 4.2.3.4.

952 Section 6.1.3.2.

953 Section 8.2.3.3.

954 Section 9.1.3.3.

955 Section 4.2.3.4.

956 Section 7.1.3.2.

In contrast, the principle of non-discrimination seems to be more firmly embedded as an important legislative standard to be observed in the adoption of domestic implementing legislation. Similar to the aforementioned general principles of EU law, the standard of non-discrimination may be difficult to categorise, as it may apply on the basis of both international law and national law. The legislative standard of non-discrimination has been recognised under the ECHR⁹⁵⁷, the ICESCR⁹⁵⁸, the IHR⁹⁵⁹ and the CDWDW⁹⁶⁰. It demands that preferential treatment of persons in domestic implementing legislation is allowed only if that distinction could be, in the phrase used by the ECtHR, 'objectively and reasonably justified'.⁹⁶¹

In sum, from international practice we can derive a legislative standard that prescribes the observance of international and national law in the adoption of domestic implementing legislation. It may be considered to encompass the principle of non-discrimination as well. In the context of EU law, references to 'EU law and its general principles' fulfil a similar role.

10.3.3.3 Consultation with stakeholders

The next legislative standard that could be inferred from the international legal regimes discussed in Part II entails the requirement to enter into consultation with relevant parties in the process of the adoption of national implementing legislation.⁹⁶² Three questions arise: with whom, why and when?

Which parties are deemed relevant? The CDWDW expressly refers to representative organisations of workers and employers.⁹⁶³ As we have seen in section 4.2.3.3, under the ICESCR, stakeholders may include workers' and employers' organisations, partners that may be considered particularly relevant for the adoption of domestic implementing legislation on labour rights. Other interest groups encompass organisations that represent minority groups.⁹⁶⁴ Of the regimes that have been part of our examination, the FCTC has the most extensive enumeration of actors that should be involved in the consultation process: businesses, restaurant and hospitality associations, employer groups, trade unions, the media, health profes-

957 Section 4.1.3.2.

958 Section 4.2.3.2.

959 Section 7.1.3.2.

960 Section 9.2.3.4.

961 *Marckx v Belgium* (n 50) par. 43.

962 Under EU law, however, there is no obligation for member states to organise a consultation process whenever they adopt domestic implementing legislation. On the contrary, consultation is part of the EU's legislative process. On this subject, see J. Mendes, *Participation in EU-Rulemaking. A rights-based approach* (Oxford Studies in European Law, OUP, Oxford 2011).

963 Section 9.2.3.5.

964 CESCR, 'General Comment no. 23' (n 397) par. 56 and 65, sub c. Also paragraphs 35 and 40 on exceptions to limitation on daily hours of work or weekly rest periods respectively.

sionals, organisations representing children and young people, institutions of learning or faith, the research community and the general public.⁹⁶⁵ In short, stakeholders include groups and organisations whom are particularly affected by the envisaged implementing legislation.

What purpose does consultation with stakeholders serve? The CESCR has argued that, in relation to the domestic legislation that gives effect to the right to take part in cultural life, as embedded in the ICESCR, consultation with stakeholders ensures that domestic implementing legislation is 'acceptable to the individuals and communities involved'.⁹⁶⁶ Similarly, under the FCTC, consultation serves to 'facilitate support for legislation after its enactment'.⁹⁶⁷ One motivation for the involvement of stakeholders thus seems to consist of public support for domestic implementing measures.

Consultation with stakeholders is closely related to, and may considerably overlap with, the participation of civil society. Under the FCTC, civil society seems to encompass academic institutions and non-governmental organisations.⁹⁶⁸ The treaty itself is unambiguous on the importance of civil society participation; it is considered 'essential' in attaining the objectives of the FCTC and its Protocols.⁹⁶⁹ Elsewhere the aim of civil society participation is described in more vague terms, as it is believed to 'create a climate of attitude that [*inter alia*] identifies legislative priorities and helps develop and enforce legislative measures' implementing the FCTC.⁹⁷⁰ Thus, here the main rationale for stakeholder participation seems to lie in the desire to enact materially sound legislation that can be applied and enforced in practice.

The question remains in which phase of the legislative process the consultation should be undertaken. A corollary of the aforementioned purposes of consultation is, first and foremost, that stakeholders must be involved during the legislative drafting process. However, this involvement should not cease upon the enactment or entry into force of the applicable laws, as may be inferred from the international legal regimes discussed in Part II. Rather, under the ICESCR, it is considered 'advisable' to continue stakeholder consultation after the moment on which the adopted laws come into effect; it is also needed during the implementation in practice of the adopted legislation, and the reviewing and monitoring thereof.⁹⁷¹

965 WHO, *Guidelines for implementation* (n 177) 24. A distinction must be made between the tobacco industry and other stakeholders. As regards the former, states should take into account in article 5, third paragraph, which provides that national public health policies regarding the use of tobacco product should be protected from commercial or other interests of the tobacco industry.

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

967 WHO, *Guidelines for implementation* (n 177) 24.

968 WHO, *Guidelines for implementation* (n 177) 44.

969 Art 4, seventh paragraph.

970 WHO, *Guidelines for implementation* (n 177) 83.

971 CESCR, 'General Comment no. 23' (n 397) par. 56 and 65, sub c.

In sum, under the regimes discussed in Part II, consultation is believed to enhance both support for, and quality of, domestic implementing legislation, before and after its entry into force. This may be reflected in one of the 'principles' identified under article 8 FCTC, which reads:

'Civil society has a central role in building support for and ensuring compliance [...] with measures, and should be included as an active partner in the process of developing, implementing and enforcing legislation'.⁹⁷²

10.3.3.4 *Provision of information concerning legislation*

Another legislative standard that must be considered part of our legislative framework is the requirement to provide information to the public with regard to the newly established or modified legal regime. Contrary to consultation, the provision of information is a non-interactive process; it is limited to the communication in one direction only: from the state authorities to the public. Furthermore, the legislative standard that will be discussed in this section does not extend to the policy instrument of information or education campaigns in general, but is confined to the provision of information *concerning the adopted legislation*. Admittedly, this distinction cannot always be easily upheld, as both campaigns may be initiated simultaneously and may even be traced back to the same legal instrument. The FCTC, for instance, refers to both; whereas on the one hand it is stated that 'there should be an education campaign [...] outlining the law', on the other hand it emphasises the need of 'raising awareness among the public and opinion leaders about the risk of second-hand tobacco smoke exposure'.⁹⁷³

Having said that, to whom should the information about the newly adopted legislation be directed? Under the FCTC, the information campaign should be aimed at business owners and building managers whom are addressed by the norms of the treaty.⁹⁷⁴ Similarly, under the CDWDW, the circle of recipients of the said information is also limited; it is recommended that the information is directed towards employers and domestic workers, the two groups whose position is directly affected by domestic measures which implement the CDWDW.⁹⁷⁵ The information that is to be provided includes newly enacted legal obligations, enforcement arrangements and sanctions in case of violations, complaint mechanisms and legal remedies.⁹⁷⁶ The objectives which are pursued by the provision of information to the public consist of an 'increase in the likelihood of smooth implementation

972 WHO, *Guidelines for implementation* (n 177) 21. A similar statement is made with regard to domestic implementing measures under article 12 of the Convention. *Ibid.*, 37.

973 WHO, *Guidelines for implementation* (n 177) 24.

974 *Ibid.*

975 Recommendation concerning Decent Work for Domestic Workers (n 829) par. 21, sub d and f.

976 *Ibid.*

and high levels of voluntary compliance'.⁹⁷⁷ Also in the context of the implementation of the obligations contained in the ICESCR, the CESCR has recommended to undertake information campaigns in order to bring the new legislation to the attention of its addressees.⁹⁷⁸

From the foregoing it may be concluded that international law envisages the instigation of information campaigns following the adoption of domestic implementing legislation. They should be aimed at the persons or entities affected by the newly adopted legislation. However, it must be added that this legislative standard has emerged under only three of the regimes discussed in Part II.

10.3.3.5 Monitoring of compliance

Once domestic implementing legislation has entered into force, it has been considered imperative to monitor compliance with the newly established regime. This legislative standard has been recognised under several of the international legal regimes discussed in Part II and consists of multiple elements. First and foremost, it encompasses the obligation to establish mechanisms for compliance monitoring at the national level.⁹⁷⁹ The existence of these arrangements, of course, is a prerequisite for the enforcement of the newly adopted legislation in practice, which is probably the reason to expressly include this standard in the applicable international legal instrument. On the other hand, this standard may be viewed as self-evident, thus not requiring any codification. The fact is, however, that of the regimes discussed in Part II, only four have made reference to the legislative standard to establish mechanisms for compliance monitoring.

Under the CDWDW this obligation is formulated in concise terms, without further details on the specific features of these monitoring mechanisms.⁹⁸⁰ A similar statement can be made with regard to the monitoring of compliance of implementing legislation under the ICESCR. In section 4.2.3.5, it was argued that, apart from references to 'national mechanisms for [...] monitoring' and 'effectively functioning labour inspectorates', there is hardly any more detailed provision on the scope and substance of the legislative standard to ensure the monitoring of compliance. This is different under the MLC, where a similar treaty provision is elaborated in 'the Code'. As we have seen in section 9.1.3.4, the Code is relatively elaborate in respect of the requirements pertaining to the monitoring of compliance. They encompass, *inter alia*, the provision that inspectorates must be competent

977 WHO, *Guidelines for implementation* (n 177) 24.

978 Section 4.2.3.9.

979 MLC art V, second paragraph; CDWDW art 17, second paragraph; CESCR, 'General Comment no. 15' (n 409) par. 50; CESCR, 'General Comment no. 16' (n 410) par. 24. Also CESCR, 'General Comment no. 23' (n 397) par. 47, sub f.

980 CDWDW art 17, second paragraph.

(i.e., in possession of the necessary expertise) and independent.⁹⁸¹ On the level of individual inspectors, it is stated that 'inspectors [should] have the training, competence, terms of reference, powers, status and independence necessary or desirable so as to enable them to carry out [their task]'.⁹⁸² These powers include the power to board ships, to carry out examinations, tests and inquiries and to give orders with a view of addressing 'deficiencies'.⁹⁸³ Furthermore, it must be guaranteed that inspectors have the 'status and conditions of service to ensure that they are independent of changes of government and of improper external influences'.⁹⁸⁴ Finally, inspections must be performed on a regular basis and at least once in a three year period.⁹⁸⁵ Less detailed provisions on compliance monitoring can be discerned under the FCTC.

In short, most of the international legal regimes seem to presuppose a responsibility of state parties to ensure the monitoring of compliance with the newly established legal regime; only four of them include an express codification of this legislative standard. The MLC and its supporting documents contain the most elaborate description this standard and stress, *inter alia*, the importance of competent and independent inspectorates.

10.3.3.6 Enforcement

In accordance with the legislative standards which may be most widely accepted under the international legal regimes we have discussed in Part II, domestic implementing legislation must be enforced. Contrary to the standard of compliance monitoring, 'enforcement' entails the use of force in response to non-compliant conduct. The relevant provision of the CCTMV is exemplary for the international codification of the legislative standard of enforcement and requires state parties to 'enforce [its provisions], including measures to prevent and punish conduct in contravention of the Convention'.⁹⁸⁶ Similarly, under the CDWDW, state parties are under the duty to 'develop and implement measures for [...] enforcement and penalties [...]'.⁹⁸⁷ This requirement, which is closely related to the legislative standard of compliance monitoring, may be considered to encompass two elements. First, it demands that states put in place a regulatory framework for the enforcement of implementing legislation (regulatory element). Second, this regulatory framework should be used by the responsible authorities in order to ensure that legislation is enforced in practice (practical element).

981 Regulation 5.1.2, first paragraph.

982 Standard A5.1.4, third paragraph.

983 Standard A5.1.4, seventh paragraph.

984 Standard A5.1.4, fourth paragraph.

985 Regulation 5.1.4, first paragraph, and standard A5.1.4, fourth paragraph.

986 Section 8.2.3.3.

987 Section 9.2.3.3.

The regulatory element of enforcement requires first and foremost the identification of the national authorities responsible for the regime's enforcement. Often, this will be the same entity or entities as those endowed with the task of compliance monitoring, as we have discussed in the previous section. Furthermore, states should put in place the legislative framework required for the imposition of penalties in response to violations of domestic implementing legislation. In this regard, the analysed international legal regimes, including the legislative instruments adopted in the framework of the EU, take a rather uniform approach, which consists of effective, proportionate and sufficiently deterrent penalties. Under EU law, this obligation is supplemented with the principle of equivalence, which demands that the conditions under which infringements of EU law are punished should be equal to the enforcement of similar domestic legal provisions.⁹⁸⁸

In addition to the imposition of penalties, the international legal regimes may refer to other enforcement measures to be implemented on the domestic level. In the terminology of the MLC, they are labelled 'corrective measures'.⁹⁸⁹ The CESCRC refers to *inter alia* 'administrative measures' when it clarified the obligations under the ICESCR.⁹⁹⁰ In exceptional cases, the international legal regimes more specifically prescribe the nature of such alternative enforcement measures. Under the FCTC, for instance, states are called upon to endow their national enforcement authorities with the authority to seize, forfeit and destroy 'non-compliant tobacco products'.⁹⁹¹ Under the CITES, states are obliged to take measures for the confiscation or return to the exporting state of specimens that were traded unlawfully.⁹⁹² These exceptions notwithstanding, our examination has demonstrated that states are left with a wide margin of discretion to further specify the open norms pertaining to the severity of penalties and on the nature of alternative enforcement measures.

The regulatory element of the legislative standard to enforce domestic implementing legislation seems to fulfil a slightly different role under two of the regimes that we have discussed in Part II, both of which are part of international criminal law: the CTOC and the ICSFT. Their character differs from the other regimes' nature, because under the CTOC and the ICSFT, enforcement itself is the policy aim central to the regimes; both treaties' core obligations demand the establishment as criminal offences of the acts that fall under their scope and to impose sanctions in response to the criminalised conduct. Compared to the other international legal regimes, therefore, the requirement of enforcement seems to be more prominent under the CTOC and the ICSFT. However, the obligation to establish as criminal offences

988 Section 5.1.2.4.

989 Section 9.1.3.4.

990 Section 4.2.3.5.

991 Section 7.2.3.3.

992 Section 8.1.3.4.

infringements of the international legal regimes' provisions, is by no means limited to international criminal law. As we have seen, criminalisation may also be required under the positive obligations derived from the ECHR⁹⁹³, the ICESCR⁹⁹⁴, the FCTC⁹⁹⁵ and the CCTMW.⁹⁹⁶

The second element requires that domestic implementing legislation should be enforced *in practice*. Arguably, this requirement is self-evident and must be read into the treaty or other obligations that call upon states to ensure the effectiveness or the enforcement of the international legal instrument at hand. Nevertheless, the practical element of enforcement has received separate attention under the ECHR. In the view of the ECtHR, states have to 'properly implement' the applicable laws, which may entail *inter alia* the obligation to institute criminal proceedings in response to any intentional taking of life under article 2 ECHR.⁹⁹⁷

10.3.3.7 Remedies

Furthermore, the provision of legal remedies may be considered imperative for the adoption of domestic implementing legislation. 'Remedies' can be loosely defined as legal procedures open to individuals to enforce rights to which they are entitled; the availability of remedies enables aggrieved individuals to enforce their rights. For the purpose of the present study, we are particularly interested in the remedies to enforce rights entrenched in domestic implementing legislation.

The legislative standard to provide for remedies differs from the enforcement of domestic implementing legislation by non-judicial public authorities, such as labour inspectorates or the criminal prosecutor. On the other hand, it remains true that remedies serve as a means to enforce domestic legislation, just as labour inspectorates and the criminal prosecutor do. This common purpose, namely enforcement, has been underlined in the framework of the implementation of the positive obligations under the ECHR. As we have seen in section 4.1.3.3, under the right to life, the ECtHR makes a distinction between the 'intentional taking of life' and other breaches of the right to life. While the former requires action by the public prosecutor, the latter category may also be addressed through the establishment of legal procedures which can be followed *by individuals* in order to obtain civil redress. For the purpose of the present section, therefore, it is important to note that the availability of legal remedies *complements* the enforcement of legislation through public authorities.

993 Sections 4.1.2.1, 4.1.2.2 and 4.1.3.3.

994 Section 4.2.3.5.

995 Section 7.2.3.3.

996 Section 8.2.3.3.

997 Section 4.1.3.3.

The legislative standard to ensure the existence of legal remedies for aggrieved individuals has been acknowledged under several of the regimes discussed in Part II. Since remedies serve as an instrument to enable individuals to enforce their rights, their importance has been recognised primarily under legal regimes that endow individuals with certain rights. Therefore, it may come as no surprise that the establishment of remedies, as a legislative standard, can be found most notably under human rights instruments. Perhaps the most prominent codification of the obligation to provide for an effective remedy can be found in article 13 ECHR, as was discussed in section 4.1.3.3.

Under the ICESCR, the existence of legal remedies in order to enforce the rights embedded in the treaty has been considered 'advisable', as we have seen in section 4.2.3.6. The purpose of remedies under the ICESCR lies in the enforcement of rights through reparation, which encompasses restitution, compensation, satisfaction or guarantees of non-repetition.⁹⁹⁸ While the specific features of the required remedies remain unspecified, the CESCR has formulated three principles which must be observed: availability, accessibility and quality. Together, they ensure that the remedies that have been put in place truly enable an individual to enforce his right(s).

The right to a legal remedy is also firmly established under EU law and also applies to rights and obligations prescribed by national implementing legislation. Its origins may be traced back to the CJEU's ruling in *Johnston*, in which it was called 'a general principle of law which underlies the constitutional traditions common to the member states'.⁹⁹⁹ Nowadays it is often referred to as the principle of effective judicial protection.¹⁰⁰⁰ It is codified in article 19 TEU, which provides:

'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

For the purpose of this section, we limit ourselves to remedies available to individuals, as opposed to EU institutions or member states, to enforce rights conferred upon them by implementing legislation adopted by the EU member states. Such remedies must be obtained before national courts, as individuals do not have the right to directly institute proceedings before the CJEU (or the General Court).¹⁰⁰¹ Typically, in situations like these, an

⁹⁹⁸ Section 4.2.3.6.

⁹⁹⁹ CJEU, *Johnston*, case C-222/84, judgment of 15 May 1986, ECLI:EU:C:1986:206, par 18.

¹⁰⁰⁰ For instance CJEU, *UNIBET*, case C-432/05, judgment of 13 March 2007, ECLI:EU:C:2007:163, par. 37; CJEU, *Associação Sindical dos Juizes Portugueses*, case C-64/16, judgment of 27 February 2018, ECLI:EU:C:2018:117, par. 35.

¹⁰⁰¹ Article 263, second and fourth paragraph, TFEU. However, national courts could request the CJEU to issue a so-called 'preliminary ruling' under article 267 TFEU. They do so by referring particular questions on the interpretation of EU law, raised in a legal case before it, to the CJEU.

individual claims that his rights under EU law have been violated as a consequence of inadequate implementation on the part of the member state.

Does EU law further specify the requirements for national remedies? Some basic elements are included in article 47 CFR.¹⁰⁰² But even before the entry into force of the CFR, the CJEU had developed a doctrine regarding national remedies. This doctrine basically entails three principles, which were stated by the CJEU in *Rewe* in 1976:

‘[I]n the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature’.¹⁰⁰³

The CJEU thus departs from the view that member states are at liberty to shape the legal remedies in their domestic legal order, which is commonly called the principle of procedural autonomy. However, member states must observe two additional principles. First, the conditions for the enforcement of rights derived from EU law must be identical to the enforcement of rights derived from purely national law (principle of equivalence). Or, as the CJEU put it, the ‘procedural rule at issue [should apply] without distinction to actions alleging infringements of Community law and to those alleging infringements of national law’.¹⁰⁰⁴ The application of this standard thus requires a comparison between the procedural safeguards applicable to rights derived from EU law and national law. Second, the available remedy must provide effective protection (principle of effectiveness).¹⁰⁰⁵ In recent case law, this principle is referred to as requiring that ‘[...] the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from EU law, [...] do not render practically impossible or excessively difficult the exercise of rights conferred by EU law’.¹⁰⁰⁶ Since

1002 It reads: ‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice’.

1003 CJEU, *Rewe* (n 515) par. 5.

1004 For instance, CJEU, *Edis*, case C-231/96, judgment of 15 September 1998, ECLI:EU:C:1998:401, par. 36.

1005 Woods and Watson, *EU Law* (n 867) 183-184.

1006 CJEU, *W and others*, case C-621/15, judgment of 21 June 2017, ECLI:EU:C:2017:484, par. 27.

Rewe the CJEU has produced a large amount of case law on the application of those principles to individual cases.¹⁰⁰⁷

A different, but closely related, question concerns the situation in which an individual has suffered losses as a result of the failure of a member state to correctly implement EU directives. Thus, it is a very particular kind of remedy available to individuals under EU law. In such a situation, should the state award compensation? The CJEU has answered this question in the affirmative and has accepted the existence of state liability, provided that the conditions developed in its case law have been fulfilled. The conditions originate from the *Francovich* judgment:

‘The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State’s obligation and the loss and damage suffered by the injured parties.’¹⁰⁰⁸

In *Brasserie du Pêcheur*, which concerned the liability of member states for violations of EU law in general (instead of for non-transposition of a directive), the CJEU ‘replaced’ the second condition from the *Francovich* judgment, cited above, with the requirement that the breach committed by the state is ‘sufficiently serious’, although the criteria developed in *Francovich* still apply in situations of non-transposition of EU directives.¹⁰⁰⁹ The application of this test, the CJEU stated, involves *inter alia* an assessment of the clarity and precision of the rule breached, and of the measure of discretion left by that rule to the national authorities.¹⁰¹⁰ If the EU instrument at hand leaves discretion to the member state to make ‘legislative choices’, a sufficiently serious breach cannot be established until the state has ‘manifestly and gravely’ disregarded the limits of its rule-making powers. If, on the other hand, the EU instrument leaves only a small margin of discretion, or no discretion at all, a mere infringement of EU law may be enough to find a ‘sufficiently serious’ breach.¹⁰¹¹

If we leave the domain of EU law and return to other international legal regimes, discussed in Part II, it becomes clear that a particular kind remedy lies in complaint mechanisms. In the framework of the CDWDW, state parties have an obligation to provide for complaint mechanisms,

1007 For a recent overview, see M. Avbelj, ‘National procedural autonomy: concept, practice and theoretical queries’ in: A. Lazowski and S. Blockmans (eds) *Research handbook on EU institutional law* (Edward Elgar Publishing, Cheltenham and Northampton 2016) 421–440.

1008 CJEU, *Francovich*, cases C-6/90 and C-9/90, judgment of 19 November 1991, ECLI:EU:C:1991:428, par. 40.

1009 CJEU, *Brasserie du Pêcheur*, joined cases C-46/93 and C-48/93, judgment of 5 March 1996, ECLI:EU:C:1996:79, par. 51–55. Also Woods and Watson, *EU Law* (n 867) 213.

1010 CJEU, *Brasserie du Pêcheur* (n 1009) par. 56.

1011 CJEU, *Dillenkofer*, joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, judgment of 8 October 1996, ECLI:EU:C:1996:375, par. 25.

which must be 'effective' and 'accessible'.¹⁰¹² Although the treaty and the applicable Recommendation are silent on the origin of those complaints, the group most likely to issue complaints, consists of domestic workers, given their vulnerable position.¹⁰¹³ Similarly, under the MLC, flag states have a duty to provide for 'on-board complaint procedures for the fair, effective and expeditious handling of seafarer complaints'.¹⁰¹⁴ These qualifications of the applicable complaint procedure have a general nature; the regimes at hand do not prescribe in more detail the various requirements that should be met. Apparently, this is for states themselves to decide.

In sum, a legislative standard to provide for legal remedies as a means of enforcement, including complaint mechanisms, can be discerned under several of the international legal regimes discussed in Part II. Criteria pertaining to the substance of such remedies are largely left for state parties to decide, a freedom which may be described as 'national procedural autonomy'. An exception to this general rule may be found under the ICESCR, where it has been argued that remedies must meet the standards of availability, accessibility and quality. Similarly, under EU law national remedies should respect the principles of effectiveness and equivalence. Finally, article 13 ECHR demands a remedy that is effective 'in law and practice'.

10.3.3.8 *Ex post evaluation of legislation*

Finally, we can derive from the regimes analysed in Part II a legislative standard which requires the evaluation of domestic implementing legislation after it has been adopted (*ex post*). First, several provisions of the ICESCR have been understood as containing an obligation to periodically review legislation in order to assess whether it still corresponds to the rights laid down in the treaty.¹⁰¹⁵ A similar requirement can be identified under various provisions of the FCTC.¹⁰¹⁶ It must be added, however, that this legislative standard can be found under two of the examined regimes only, which may be viewed as an indication that international policy makers do not demonstrate a widely shared willingness to accept such a standard.

What is the purpose of the *ex post* evaluation of implementing legislation? This purpose may be twofold, as appears from our analysis in Part II. First of all, the evaluation of implementing legislation enables state parties to assess whether they comply with the applicable international

1012 Art 17, first paragraph. A similar requirement can be identified under the MLC (regulation 5.2.2).

1013 Article 15, first paragraph, sub b, of the Convention, refers to the 'investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies in relation to domestic workers'.

1014 Section 9.1.3.4.

1015 Section 4.2.3.7.

1016 Section 7.2.3.5.

legal regime. Second, the evaluation of implementing measures is an important towards the improvement of those measures.¹⁰¹⁷ Arguably, both aims are closely related, especially in the context of regimes which can be characterised by their 'dynamic' nature. As an example, we could refer to the ICESCR, which contains, as we have seen, the obligation the 'progressively realize' the rights set forth in the treaty. Thus, the ICESCR requires the *improvement of domestic law* from a human rights' perspective rather than a static legal situation to be realised by the state parties. Against this background, it could be argued, periodic *ex post* evaluation of domestic legislation is of great importance, as it is a tool to measure progress on the part of the state.

10.3.4 Conclusion

With regard to legislative standards, our examination of the international legal regimes indicates that the standard of effectiveness, in various manifestations, could be viewed as the overarching standard that must be observed by states bound to which the regime applies. According to this standard, states must ensure that domestic implementing legislation is adopted and applied in such a way that a specified international legal regime is effective. Furthermore, the regimes discussed in Part II justify the conclusion that several legislative standards of a subsidiary nature ultimately serve the purpose of effectiveness. In this chapter, eight of those standards have been identified. Our exploration of the scope and substance, as conducted in the previous sections, has unveiled both their rudimentary character and the high level of fragmentation that can be observed.

With regard to the rudimentary character of the legislative standards, it is not easy to overlook the fact that they have been formulated in broad terms, without giving much detail as to how those standards must be complied with. For instance, it is clear that the monitoring of compliance with domestic implementing legislation, under some of the analysed regimes at least, is considered imperative under the applicable international legal regime. *How* this compliance monitoring must be performed, however, is often not described in detail.

With regard to fragmentation, it is (re-)emphasised that the legislative standards under the various international legal regimes discussed in Part II differ from one regime to the other; some regimes contain more legislative standards than other regimes. Moreover, fragmentation can even be observed *within* single international legal regimes. For instance, a specified legislative standard may apply to some provisions of the regime only; it is thus of no relevance to other norms contained in the said regime. In sum, as we may conclude here, the regulation of domestic implementing legislation under the regimes discussed here is neither extensive nor coherent.

1017 WHO, *Guidelines for implementation* (n 177) 67.

10.4 BINDING CHARACTER OF LEGISLATIVE STANDARDS

In the previous sections we have presented, on the basis of the selected regimes discussed in Part II, the common features (or: standards) of the international regulation of domestic implementing legislation. We have also pointed to the fragmentation which emerges from our analysis; the various international legal regimes differ in the ways in which they regulate implementing legislation. This is true not only for an international legal regime vis-à-vis other regimes, but also for the various obligations to adopt implementing legislation *within* each regime.

In the present section, we highlight a third aspect of the established fragmentation. This aspect is related to the character of the legislative standards entrenched in the various international legal regimes discussed in Part II. It stresses the fact that in some cases international policy makers (and judges) have accepted legislative standards as 'binding', which for the purpose of this section must be understood as flowing from one of the formal sources of international law, most notably treaty law. In other cases, as we have seen in Part II, legislative standards have been 'accepted', but only as part of non-binding documents. Put differently, we examine the *character* of legislative standards (as binding law or as non-binding norms) which have been formulated under the international legal regimes discussed in Part II. Roughly three categories can be distinguished.

At the one end of the spectre we find legislative standards which are firmly embedded in the applicable and binding international legal instrument. In some cases they can be derived from a treaty or a decision of an international organisation on the basis of a textual analysis of the instrument at hand. An example of this category can be found in article 8, first paragraph, ICSFT, which demands the 'observance of domestic legal principles' in the adoption of national implementing legislation on the identification, detection, freezing or seizure of funds (allegedly) used for terrorist purposes. Furthermore, we could refer to the right to an effective remedy, which is codified in article 13 ECHR. In other cases, they have been read into the text by judges entrusted with the task to authoritatively interpret the text. The most prominent example of this category can be found in the jurisdiction of the CJEU, which, as we have seen, has developed an extensive body of case law on the implementation of directives and regulations by the EU member states. Whatever the method of interpretation, textual or otherwise, under both categories the source of the legislative standard can be traced back to the applicable binding legal instrument.

At the other end of the spectre we find legislative standards which cannot be directly based on a binding international legal instrument. Instead, they must be derived from supporting documents. In section 7.2.3.3 on the enforcement of the FCTC, for instance, we have seen that the 'Guidelines for Implementation' prescribe the imposition of proportionate penalties for violations of several FCTC provisions, whereas such an obligation cannot be directly derived from the FCTC text. Other documents

which codify legislative standards have names such as 'Legislative guide' or 'Toolkit for implementation in national legislation'. They tend to have one thing in common: they have been drafted by experts under the auspices of an international organisation which serves as the instrument's guardian. While the 'Toolkit for implementation in national legislation' was drafted by the secretariat of the WHO 'in response to requests for guidance', the 'Legislative guide' for the implementation of the CTOC was drafted by a professor in the field of criminal justice with the participation of other experts and national governments' and international organisations' representatives.¹⁰¹⁸ As a result, from a legal point of view, the weight attached to the guidance provided in the documents may be rather limited.

The third category basically covers everything in between. It includes legislative standards which can be traced back to the applicable binding legal instrument. At the same time, the legislative standard at hand is *elaborated* in supporting documents. A case in point may be the Code annexed to the MLC, Title V of which covers the topic of 'compliance and enforcement'. It contains a binding norm and imposes the duty to bestow upon inspectors the necessary powers for *inter alia* the boarding of ships and the performance of inspections.¹⁰¹⁹ This (binding) *standard* is supplemented with a (non-binding) *guideline* which prescribes the attribution of several additional powers to inspectors, including the power to question the ship's master and the power to take samples of products.¹⁰²⁰ In other words, legislative standards which can be categorised under this group are partly binding, and partly non-binding.

The examples included in the second and third category make clear that the distinction between three groups is, indeed, a rough one; in the end, it cannot always be determined from the outset whether an established legislative standard is derived from the binding legal text itself. A typical example is the ICESCR. While the legislative standard of non-discrimination is firmly embedded in the treaty itself, many of the other legislative standards referred to in section 4.2 seem to be 'invented' by the CESCR in the general comments. In this regard, it could be argued that the general comments produced by the CESCR fulfil a similar function as implementing guidelines, handbooks etc. under the second category. This view may be contested by others who take the stance that the CESCR's general comments do not *complement* the text of the ICESCR, but merely serve as an *interpretation* of it.

In sum, the extent to which a particular legislative standard can be traced back to the international legal instrument itself, can be a matter of dispute. The availability of an authoritative interpretation, most notably through courts on the basis of compulsory jurisdiction, can provide some welcome guidance for policy makers involved in the adoption of domestic

1018 WHO, 'Toolkit. Questions and answers' (n 627) 4. UNODC, *Legislative Guides* (n 554) v.

1019 Standard A.5.1.4, seventh paragraph.

1020 Guideline B.5.1.4, eighth paragraph.

implementing legislation. In other situations, similar direction can be given in the form of implementing guidelines, legislative guides etc. This information is not only relevant as an element of our examination of the international law governing implementing legislation, but also indicates to what extent states, as negotiating parties, have (voluntarily) contracted legal *obligations* in this regard. Apparently, we may conclude, states are reluctant to accept legislative standards of a binding nature; they may consider it neither necessary nor desirable to restrict space for national decision making on implementing legislation.

10.5 CONCLUSION

In this chapter, we have approached the findings of Part II more systematically. This view has enabled us to identify the commonalities and differences of the various international legal regimes that have been under examination in the previous part. The findings in this chapter may be summarised as follows.

The regimes discussed in Part II constitute 'legal harmonisation', instead of transplantation or unification. This means that the policy aims to be achieved are formulated on the international level, whereas the means to achieve those aims within domestic legal orders are for state parties to decide. An important aspect of this harmonisation is the imposition of minimum requirements which may be complemented with domestic laws that provide additional protection to a (public) interest. In a few cases, we have found that the inclusion of optional provisions may contribute to further harmonisation, as may the permission to consider domestic 'equivalent measures' a substitute for the implementation of certain aspects of regimes that are part of international labour law.

Furthermore, we have deduced a virtual framework on the quality of implementing legislation under international law. This framework includes requirements, entrenched in binding or non-binding instruments, that govern the way in which the domestic implementation through legislative means must be performed. It has been argued that 'effectiveness' is the most prominent of elements incorporated in the framework. That standard is, however, complemented by subsidiary legislative standards which have been discussed in section 10.3.3. Together, they constitute a rudimentary set of criteria that must be observed, either mandatory or non-mandatory, by states that adopt implementing legislation in their national legal order.

We have also argued that the application of legislative standards is highly fragmented. This means that there is no uniform set of rules that is applied by international policy makers whenever a new international legal instrument is drafted. It is for this reason that the framework presented in this chapter has been called a *virtual* framework pertaining to the quality of implementing legislation. Hence, it reflects international legal practice regarding several existing legal regimes, but is itself not part of inter-

national law. Consequently, the overview presented in Part II and in the present chapter cannot be accepted as an adequate reflection of current international law *as a whole*. Given the small number of regimes that were selected in Part II, our analysis is too limited for statements on international legal practice in general. However, such statements on international legal practice in general are not essential in order to achieve the purposes of this study. What *is* essential, on the contrary, is the assessment from the perspective of legislative quality, of the legislative standards to which international policy makers have resorted, as we have seen in Part II and in this chapter. This assessment will be conducted in the next chapter.