4. International and Supranational Law

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Louise Bourgeois created a series of sculptures of spiders, including this imposing architecture that both intimidates and protects. She reminds us of our dependence on our mother, who created our life and towered over us as we grew up and remains an inescapable point of reference for much of our life. The law, whether national, international or supranational, has similarly intimidating qualities and - like with the mother - its protection depends on its ability to enforce protection both within the family and against a potentially hostile outer world.

There was a time when international law was considered a minor and separate subject in the study of law. By the beginning of this century it was clear that merely studying one’s own national law was not merely ‘provincial’ but also meant not being up to standards regarding positive law. The reason was that positive law, i.e. valid law
here and now, depends on national jurisdiction and within Europe, national jurisdiction increasingly incorporates both international and supranational law. For instance, fundamental rights are not only part of the national constitution, but can also be invoked based on the European Convention of Human Rights (ECHR) and – since 2009 – based on the Charter of Fundamental Rights of the European Union (CFREU). Next to these human rights instruments many treaties have been concluded under international law on other subjects (e.g. the Cybercrime Convention, the Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters) and an entire body of supranational law (i.e. the law of the European Union (EU), such as the Copyright Directive, the Unfair Commercial Practices Directive, the Machinery Directive) has become part of national jurisdiction in the Member State of the EU.

Clearly, the relevance of law for computer scientists – the architects of our new online world – cannot be reduced to that of one national jurisdiction. The combination of networked computational systems and the hyperconnectivity of the current information and communication infrastructure call for a persistent keen acuity with regard to national, international and supranational law.

In this book we focus on international law in the context of the Council of Europe (CoE, 47 contracting states) and on supranational law in the context of the EU (still 28 Member States, including the UK). The relevant legal instruments of the CoE are the Cybercrime Convention, the European Convention of Human Rights, and e.g. Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data). The relevant legal instruments of the EU are the General Data Protection Regulation, the ePrivacy Directive, the Copyright Directive and e.g. the Directive on Attacks against Information Systems). Though it would be very interesting to also discuss jurisdiction of the United Nations (UN, 193 contracting states) and discuss all the relevant trade agreements that impact national jurisdiction and positive law, we focus on the role of international and supranational law with the EU. I believe this does not make the book less interesting for e.g. US, Australian or even Asian computer scientists. On the contrary, this book aims to provide a coherent framework for understanding how law operates, combining analytical rigour and interpretive salience with concrete examples to demonstrate the relevance of the distinctions made and the perspectives taken. It would be great to add other jurisdictions as new examples, enriching the conversation at the global level on how to order our interactive, dynamic and potentially turbulent world. That being said, this book also
takes a normative perspective on how law ought to operate, rejecting instrumentalist or moralistic conceptions of law.

In this chapter we first discuss the concept of jurisdiction and its formative status in national, international and supranational law, after which we provide a more in-depth overview of international law and supranational law.

4.1 Jurisdiction in Western legal systems

The concept of jurisdiction first appears in the early 14th century, and though it has tied in with the concept of territory, the latter terms first appeared in the early 15th century. Even if Western legal systems equate jurisdiction with territorial jurisdiction this is not necessarily correct. Actually, the concept of jurisdiction is often used in two different ways, as either:

1. the competence to legislate, adjudicate, enforce, or,
2. the territory or domain over which an entity holds jurisdiction in the first sense.

Both are relevant, and we can add a second distinction, with regard to:

1. Internal jurisdiction, i.e. the competence to legislate, adjudicate and enforce the law within the state;
2. Extraterritorial jurisdiction, i.e. the competence of one state to legislate, adjudicate or enforce its law on the territory of another state.

In Anglo-American discourse the term ‘power’ is used where Europeans use ‘competence’. Very simply defined, we could say that jurisdiction refers to the power of law and where it is applicable. This raises challenging questions, such as to what extent a state can decide the limits of international or supranational jurisdiction on its own territory, and to what extent an international court gets to decide this. In other words: where must we situate the competence to decide the attribution, content and limits of competence? Because German scholarship has worked on this we call this the question of Kompetenz-Kompetenz.
4.1.1 An example

To sensitise the reader to issues of Kompetenz-Kompetenz I will take them through some of the issues encountered in international private law, which is in point of fact national law. What happens if Alies (Dutch) marries Bob (a US citizen) in Japan, whereas they will live in Russia? What law applies to the marriage: Dutch, US, Japanese or Russian law? If they want to get divorced, which court is competent: a Dutch, a US, a Japanese or a Russian court? What if they want their Dutch divorce to be recognised in Iran?

International private law confronts three types of questions, those of (1) the applicable law, those of (2) the competent court and (3) those of enforcement. The questions, regarding applicable law, ask which national law determines the legal consequences of the marriage. This may depend on choice, on a treaty, and in the end, it will always depend on national law, as such national law must recognise the choice (which may be guaranteed in a treaty signed by the relevant state). Note that the primacy of national law implies that a person may be married according to the national jurisdiction of the country where she lives, even after obtaining a valid divorce in another national jurisdiction. The second type of questions concern jurisdiction in the sense of adjudicatory competence. If one gets married in Russia, under Japanese law, which court is competent to decide on a divorce? Does this depend on the applicable law, on one’s residence, nationality or on the country where the marriage took place? The third type of questions concerns recognition and enforcement, asking under what conditions a court’s divorce decision will be recognized and enforced in another country? All these questions apply to issues of family law, as in the given example, but also to international sale of goods or services, capital investment, on labour conditions in transnational companies, or to keeping bank accounts in various countries. The complexity of the potential answers to these questions highlights the necessity of international treaties to reduce the uncertainty that evolves from this complexity. This regards questions of family law, property law, contract law and tort law, and a global economy would be substantially disrupted without international treaties that bind the contracting parties (states), thus achieving a higher level of trust and legitimate expectations between citizens, companies and other institutions that interact at the transnational level.

In the case of the marriage, one could wonder whether all this matters, or why we should care. Since a valid marriage has legal effects the answers to questions of international private law make an enormous difference. In some jurisdictions the
default is that one marries on equal terms, which means that creditors of one partner have a legal remedy against the assets of the other partner. In other jurisdictions the default is that one marries under separate estate arrangement, meaning that creditors of one partner have no legal remedy against the assets of the other partner. These defaults, as well as the possibility to opt for one or the other marital regime, differ in alternative national legal systems, and the same goes for the requirements for overruling the default regime (such as involving a notary public and the registration of prenuptial agreements).

4.1.2 National jurisdiction

What if the Netherlands want to delete the first article of their Constitution? What if the Netherlands wish to protect their citizens against internet activities undertaken from Russia or the US by means of remote hacking by Dutch police officers? What if the Netherlands wish to abide by an overall minimum term of imprisonment of 1 day and by art. 9a of the Netherlands Criminal Code; can the Netherlands resist e.g. EU legislation that imposes higher minimum sanctions?

This section will discuss the primacy as well as the limits of national jurisdiction and its relationship to international and supranational law. To ensure legal certainty, lawyers need priority rules to determine the validity of legal norms whenever they are incompatible. The simplest way to achieve this is to assume that law is a hierarchical system of legal rules, where higher rules overrule lower rules. For instance, rules derived from the Constitution will overrule rules derived from Acts of Parliament, which in turn overrule rules derived from other public authorities with rule-making competences (e.g. municipalities, supervisors). This hierarchy works relatively well within the context of a single state. The reason is that each state has both internal and external sovereignty. The concept of sovereignty in this particular sense, stems from the 1648 treaty that introduced the so-called Peace of Westphalia. This treaty brought an end to a long and devastating period of European wars during the 16th and 17th centuries. These wars were both intra- and interstate and were entangled with religious wars between Roman Catholic and Protestant rulers, aiming to consolidate their own power over their subjects, based on adherence to their own religious allegiance. The Peace of Westphalia basically declared religion a matter of private faith and private consent, establishing the idea of a nation state with consolidated borders, where the sovereign holds the power to legislate, govern and adjudicate within their territory (internal sovereignty), while respecting all other sovereigns as exclusively
competent within their territory (external sovereignty or the principle of non-interference). Note that ‘the sovereign’ is not a person, but an office. It is this office that is competent, not the person that takes office. This institutionalisation of sovereignty as an abstract entity that rules over an abstract geographical space still forms the root of the current system of sovereign states. Both the sovereign and the territory are abstract as they no longer depend on whoever takes the office of sovereign or whoever actually live within the territory.

From 1648, one could say, the nation state takes centre stage, grounded by the idea of internal and external sovereignty – which form two sides of the same coin: without external sovereignty, the sovereign cannot hold on to their internal sovereignty; without internal sovereignty, the sovereign cannot ensure external sovereignty. The result is that international law becomes the law between independent sovereign states and thus depends on consensus between these states. This is where supranational law fundamentally differs from international law, as supra-national law depends on a partial transfer of sovereignty (conferral).

It is crucial to remember: (1) that states can only be bound by international or supranational law if they so decide, as sovereigns can only obey to rules outside their jurisdiction if they have bound themselves to those rules, and, (2) the powerplay between states and between states and other powerful players, such as transnational companies and organisations, complicates (1). Various rules of international law do not depend on consent of individual states, but on assumptions about what constitutes lawful conduct, irrespective of sovereign will (ius cogens, fundamental principles of international law and some instances of customary international law). In the case of supranational law, things become even more complex, because contracting states give up part of their sovereignty to enable effective collaboration and coordination within the jurisdiction of the EU. It is therefore also crucial to remember: (3) that whereas the national jurisdiction of individual states is mutually exclusive, national, international and supranational jurisdiction will often overlap.

### 4.2 International law

It should be clear from the previous section that the actors in the domain of international law are, first of all, sovereign states. However, by now, other actors are recognised as such: international organizations (e.g. World Trade Organisation (WTO), United Nations UN), multinational companies (e.g. Shell, Google), non-gouvernmental
organisations (NGOs) (e.g. Greenpeace), and even individuals as bearers of rights under international law.

4.2.1 Sources of international law

In international law, as in domestic (national) law, the sources of law determine the identification of the applicable legal norms. Because – in principle – international law is dependent on the consent of sovereign states, treaties are an obvious source of international law. Examples of international treaties are Cybercrime convention (CoE) 2001, the Berne convention (copyright) 1971, the Paris Convention (patents etc.) 1883, the Trade Related Aspects of Intellectual Property Rights (WTO) 1994, the International Covenant on Civil and Political Rights (UN) 1966, and the ECHR: European Convention of Human Rights (CoE) 1950.

Treaties, however, are not the only source of international law. Art. 38 of the Statute of the International Court of Justice in The Hague, states the following:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

1. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
2. international custom, as evidence of a general practice accepted as law;
3. the general principles of law recognized by civilized nations;
4. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The International Court of Justice (ICJ) was established by the UN Charter, which was signed immediately after the second world war, in 1945. It is composed of 15 judges and settles legal disputes between states and gives advisory opinions on legal issues to organs and agencies of the UN. Only states may appear before and apply to this Court and the Court can only settle disputes if both parties have recognized its jurisdiction by way of a declaration ‘that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court’ (Art. 36, para. 2, of the Statute of the ICJ). Most textbooks on international law will summarize the sources of international law as:

1. Customary law (usus, opinio necessitatis)
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- This regards not just any 'habit' or 'regularity in behaviour' but a combination of a particular state practice (usus) and the recognition that such a practice expresses a legal obligation (opinio necessitates).

2. Treaties
- This regards 'contracts' between states, based on the end result of negotiated text, signed by the representatives who negotiated the text and ratified by the heads of state, after internal agreement within the states. Normally treaties enter into force after a set number of ratifications.

3. General principles of law
- For instance: promotion of human rights and self-determination of people, strict limitation of the use of force against other states, strict prohibition of acquisition of territory of another state by means of force, principle of non-intervention, equality of states,

4. Judgments and doctrine
- Judgments of international tribunals and doctrine as published by respected scholars in international law.

5. Decisions of International Bodies
- Think of the WTO, specialised bodies of the UN.

6. Unilateral actions or declarations of states
- Based on consensus, international law must accept state practice that e.g. rejects specific claims of customary law, and accept declarations by states that reject the implications of judgments by Courts whose jurisdiction they do not accept.

7. ius cogens, obligations erga omnes
- These are considered independent of the consent of states, as they concern the most flagrant violations of human dignity, genocide and crimes against humanity. This implies that even unilateral actions or decisions of individual states cannot absolve them from the applicability of ius cogens. Obligations erga omnes means that these obligations absolute (for every state, regarding every other state or person).

4.2.2 Monism and dualism in international law

How does international law bind a state that is subject to its jurisdiction? And under what conditions does international law have direct effect, i.e. direct legal effect for citizens in the form of providing them with legal rights?
Legal doctrine makes an analytical distinction between two approaches to the relationship between national and international law: a monist approach and a dualist approach.

A **monist approach** recognises only one hierarchical legal order, of which international and national law form two parts and where international law has precedence over national law. As a consequence, in this approach, international treaties overrule national law and they have binding force as they are ratified, while citizens can appeal directly to international law, which national courts are legally bound to apply.

A **dualist approach** denies that national and international law are part of the same jurisdiction, they are considered as separate legal orders. To gain binding force within the national legal order, international law must first be transposed into national legislation. In this approach, citizens cannot directly appeal to international law but have to wait for its transposition, while the same goes for national courts that are only bound by national law.

The distinction is analytical and helps to understand the messy reality of overlapping national and international jurisdictions from the perspective of national law, which ultimately decides on the force of international law within its jurisdiction. In practice both approaches are both ends of a spectrum, with for instance the UK taking a dualist perspective and The Netherlands taking a mitigated monist (or a mitigated dualist) perspective.

The choice for a monist/dualist and mitigated perspective has far reaching implications, which can best understood in terms of legal effect. For instance, if we ask about the legal effect of a treaty that has come into force but has not been transposed into national law, the answer is that under a monist legal system national courts will have to apply the treaty, and the state may become liable to its citizens to the extent that it does not comply with the treaty. It thus has direct effect in the national legal order. Under the dualist legal system, the answer would be that national courts can only apply national law, and the state will become liable to the other contracting parties for non-compliance. The treaty will not have any direct effect in the national legal order.

As an example, let’s check the Netherlands Constitution, art. 93:
Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.

The phrasing of ‘binding on all persons by virtue of the content’ is equivalent with the concept of ‘direct effect’. The Netherlands Constitution basically states that any legal norm (of international law) which directly addresses legal subjects (corporations, natural persons) has legal effect for those legal subjects, who can invoke that norm in a national court of law. For legal norms with ‘direct effect’, the Netherlands implements a monist approach. Such ‘direct effect’, however, does not apply when a legal norm of international law addresses the contracting states instead of their citizens, thus imposing an obligation on states to enact the norm. In that case, the Netherlands employs a dualist approach. Art. 93 thus follows the intent expressed in a treaty, identifying whether or not the treaty intends to directly create rights for citizens of the contracting parties.

Art. 94 of the Netherlands Constitution clarifies even more clearly the hierarchical implications of its monist approach (in case of ‘direct effect’):

Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

A prime example of a treaty with ‘direct effect’ is the European Convention of Human Rights (ECHR). Art. 94 clearly shows that the ECHR must be applied in Dutch Courts, even if that results in the inapplicability of national law. This has wide-ranging consequences for the competence of Parliament, whose Acts can thus be overruled to the extent that they conflict with the human rights treaty. This is especially interesting due to the prohibition to test Acts of Parliament against the Constitution itself, as stipulated in art. 120 of the Netherlands Constitution:

The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.

In the end, national legislation may be tested against provisions in international treaties with direct effect - but not against the Constitution. As one can imagine this prohibition has been controversial and many attempts have been made to remove it from the Constitution. The argument in favour of this prohibition is that it clarifies the
prerogative of the democratic legislature who should be the ultimate judge of whether an Act violates the Constitution.

Obviously, the Netherlands cannot be bound by international treaties, unless its democratic legislature has consented. After a treaty is agreed and signed by the contracting parties, Parliament will have to decide whether or not the Netherlands will be bound by it. If Parliament consents, the head of state (the King) will ratify, binding the state to the treaty once it comes into force. This is worded in art. 91 of the Netherland Constitution:

The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the Parliament. The cases in which approval is not required shall be specified by Act of Parliament.

The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval.

Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Chambers of the Parliament only if at least two-thirds of the votes cast are in favour.

A prime example of a treaty without direct effect is the Cybercrime Convention (CC), which addresses the contracting states of the Council of Europe and the other signatories, obliging them to enact a number of criminal offences and criminal law investigative measures in order to harmonise the criminal law enforcement measures against cybercrime. Neither the police nor individual defendants can invoke the CC directly, both will have to rely on the national implementation of its content by way of e.g. amendments of their Criminal Code and their Code of Criminal Procedure.

An important question with regard to the application of treaties, whether they have direct effect or require national implementation, is their interpretation and who gets to decide it: an international court, national court or – to make things more complicated – both. If a treaty is concluded within a specific international jurisdiction, national courts may be bound to interpret the treaty in alignment with the case law of such court or tribunal. We can e.g. think of the ECtHR, as part of the CoE, or International Court of Justice, as part of the UN. The interpretation of treaties will often involve the use of preparatory documentation that clarifies the intentions of the contracting parties and the underlying goals the treaty aims to support. An important source of law is constituted by the preamble of a treaty, consisting of the so-called ‘recitals’, that
articulate shared assumptions, goals and explanations concerning the treaty. The articles of the treaty are considered binding law, they have legal effect (either direct effect for citizens of contracting parties, or direct effect for the contracting states). Such binding effect is missing for the recitals, but they are nevertheless an important source of law, as they provide authoritative information about how the articles should be read. Since international treaties are often the result of compromise, articles may be formulated in less clear terms, as this is often the only way to obtain agreement from all parties. The more radical text of previous drafts is sometimes moved to the recitals, thus leaving it up to the courts to decide the meaning of the article.

4.3 Supranational law

Supranational law differs from international law. In the case of supranational law a set of Member States (MSs) have agreed to transfer parts of their sovereignty to a supranational organization. In practice, supranational law refers to the law of the European Union. Supranational law is not merely law between MSs (as in international law) but also law between the bodies of the EU and the citizens of the MS, who are at the same time EU citizens. Some of the legal instruments of the EU have ‘direct effect’ for EU citizens, and due to the supranational nature of the EU jurisdiction, this ‘direct effect’ does not depend on whether a MS takes a monist or a dualist approach to international law. Even the UK, which has an outspoken dualist approach, has to accept that EU Regulations have direct effect within their national jurisdiction and may overrule Acts of Parliament. That is, as long as they are part of the EU.

The history of the EU goes back to the second world war. In its aftermath, attempts were made to ensure economic interdependency between European states, thus hoping to contribute to the prevention of a new war. This led six states (the German Federal Republic (West Germany), France, Italy, the Netherlands, Belgium, and Luxembourg) to the institution of the European Coal and Steel Community (ECSC) in 1952, followed by the European Economic Community (EEC) in 1958, which aimed to institute a common internal market, enabled by the ‘four freedoms’: the free movement of goods, persons, services, and capital. In 1992 the ECSC and the EEC were integrated in the European Union, then comprising of 12 MSs.

For a long time, the main purpose of the EU was to harmonise the legislation and the policies of its MSs in order to prevent obstruction and disruption of the internal market. If the sale of washing machines is subject to different legal requirements in
different MSs, it becomes more difficult for manufacturers and retailers to produce
and sell such machines across national borders. The same goes for e.g. data protection
legislation; if the constraints for the processing of personal data differ per MS, cross
border data processing becomes a problem that will e.g. reduce cross border
eCommerce.

By now, the EU, comprising of 28 states, has a broader objective than merely the
creation and protection of an effective and efficient economic market, as it more
explicitly targets to institute an area of freedom, security and justice without internal
frontiers. This is most visible in the enactment of the Charter of Fundamental Rights of
the European Union (CFREU) that has come into force in 2009. The Charter
addresses not only the institutions and bodies of the Union but also the MSs whenever
they implement Union law.

4.3.1 Transfer of sovereignty

As one can imagine, a transfer of sovereignty implies a substantive and substantial
interference with national sovereignty. The idea that MS have transferred part of their
sovereignty to a new entity with its own jurisdiction was consolidated in the case law
of the highest court of the (then) EEC. In the seminal ‘Van Gend en Loos’ case of 1963, the
highest Court of the EU, the Court of Justice of the European Union (CJEU)
considered that:

The objective of the EEC Treaty, which is to establish a Common Market, the
functioning of which is of direct concern to interested parties in the Community,
implies that this Treaty is more than an agreement, which merely creates mutual
obligations between the contracting states. This view is confirmed by the
preamble to the Treaty, which refers not only to governments but also to peoples.
It is also confirmed more specifically by the establishment of institutions endowed
with sovereign rights, the exercise of which affects Member States and their
citizens...

This firmly establishes the transfer of specified sovereign rights, followed by a
transformative speech act that in fact declared and instituted the EEC as a
supranational legal order:

The conclusion to be drawn from this is that the community constitutes a new
legal order of international law for the benefit of which the states have limited
their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.

This has consequences for the freedom of MSs with regard to accepting ‘direct effect’ within their national legal order, as explained in the seminal Costa/ENEL case of 1964, where the court states:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States, and which their courts are bound to apply. (...) The executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the treaty.

The consequences – indeed the legal effect – of this judgment can hardly be overestimated. In accepting this judgment, the MSs have accepted that the EEC, which is now the EU, constitutes a legal order in its own right, with jurisdiction over aspects of the national legal orders of the MSs.

It remains important to note that the Constitution of a MS must allow for the transfer of sovereign power. In the Netherlands Constitution, the competence for such transfer can be found in art. 92, referring back to the conditions stipulated in art. 91(3), which has been quoted above:

Legislative, executive, and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 (3).

An arduous issue nevertheless remains: who determines the boundaries of EU legislative competence when a national constitutional court of a MS disagrees with the position taken by the CJEU? This has been coined as the issue of Kompetenz-Kompetenz, as it concerns the competence to decide on competence. On several occasions this issue has arisen, notably when the German Constitutional Court (GCC) was asked to decide the legislative competence of the EU regarding issues that may infringe the German Constitution. So far, even though the GCC claims the competence to decide on these issues, it has not invalidated any judgment of the CJEU. Clearly, the CJEU is of the opinion that it is the only authority on the competences of the EU. Thus, by avoiding a disagreement, the GCC has saved the day, since competition over competence between the two highest courts could initiate the disintegration of the EU.
4.3.2 Sources of EU law

In the context of the EU, lawyers speak of the so-called ‘acquis’ (French for what has been achieved, established). This is the body of common rights and obligations that is binding on all the Member States of the European Union. It is constantly evolving and comprises:

- the content, principles and political objectives of the Treaties;
- legislation adopted pursuant to the Treaties
- the case law of the Court of Justice;
- declarations and resolutions adopted by the Union;
- instruments under the Common Foreign and Security Policy;
- instruments under Justice and Home Affairs;
- international agreements concluded by the Community and those entered into by the MSs among themselves within the sphere of the Union's activities.

We end this chapter with the presentation of two types of legislative instruments that are core to EU law, as they feature prominently in the second part of this book (as they regulate e.g. data protection law, cybercrime and copyright). Article 288 of the Treaty of the Functioning of the European Union (TFEU) specifies:

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

We focus on regulations and directives as legislative instruments. Regulations have ‘direct effect’ in all the MS, whether or not they take a dualist approach to international law. They are (1) of general application, (2) binding in their entirety and (3) directly applicable. Note that the ‘direct effect’ is not a consequence of states
following the monist approach, but a consequence of the supranational character of EU law.

Next to regulations, the EU has another type of legislative instrument, namely **directives**. Though they are binding law, they lack ‘direct effect’. Instead they impose an obligation on the MSs to transpose the content of the directive into their own legal system, i.e. they may have to amend existing legislation or enact new statutes. Directives basically dictate that certain results must be achieved, while leaving the MSs discretion in how to achieve this, depending on their own legal system and the legal culture it embeds.

The difference between regulations and directives marks the challenges of the EU, which is neither a superstate nor a form of collaboration based on international law. On the one hand, some legislation is formulated in one and the same way and applies similarly in all MSs. On the other hand, some legislation has to be adapted by the MSs, taking into account how it could best fit with and within their legal order. The latter leaves more room for different uptake in the different MSs, which may be confusing for transnational players on the internal market, but better adapted to local circumstances. Nevertheless, even regulations may be interpreted differently across different national jurisdictions, thus jeopardizing the goals of harmonisation that are core to the EU.

**4.3.3 Case law of the CJEU**

To prevent contradictory interpretation of EU law, courts in the MSs may consult the Court of Justice of the European Union (CJEU) in a so-called preliminary proceeding, inviting the Court to provide an authoritative interpretation of EU law for the case at hand. Such preliminary rulings bind all the MSs and thus further the harmonisation of law in the EU. In chapter 1 we have already encountered a landmark case of the CJEU on the validity of the Data Retention Directive, in the light of the CFREU. We can now understand the relevance of the fact that this concerned a Directive, since directives must be implemented in national law. The Court’s judgment that declared the directive invalid, did not necessarily affect its national implementation. All MSs had to check whether their national law - based on the directive - complied with the relevant legal conditions identified by the Court for valid data retention duties for the telco operators. We reiterate these legal conditions as recounted in section 2.1.2. To qualify as **lawful restrictions of the rights to privacy and data protection**, measures enacted as an implementation of the Data Retention Directive must, even if they have a
legitimate aim and are appropriate to achieve this aim, nevertheless be proportional. According to the CJEU this entails that:

- the measures are sufficiently circumscribed, limited to what is strictly necessary
- the scope of the retention measures must be differentiated;
- relevant limitations and/or exceptions must be foreseen; as well as
- objective criteria to ensure that data is only used for the most serious offences;
- the retention period should differentiate between categories of data;
- storage outside the EU should be prohibited.

To assess whether the transposition of the directive complies with the Court’s interpretation, each MS had to check their legislation and policies against these criteria. In some MSs, the legislature found that they were compliant, whereas in other MSs courts found the relevant transposition in violation of art. 7 and 8 of the CFREU. In point of fact, two cases were referred to the CJEU, asking whether or not national transposition was in violation, notably Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v. Watson. In both cases the CJEU found that the national legislation was indeed in violation. The reasoning concerns the fact that such national legislation must comply with art. 15 of the ePrivacy directive, which protects the confidentiality of electronic communication. Art. 15 of the ePrivacy directive allows MSs to restrict the applicability of some articles, based on national legislation, if such national legislation is restricted to the goals stipulated in art. 15, contains proper safeguards and is necessary in a democratic society (the proportionality requirement). Such proportionality, according to the CJEU is absent in the case of national legislation:

national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication.

national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union.
We should note that, as in the case of international treaties, the legislative instruments of the EU often contain a number of recitals, that are not legally binding in the way that articles are, but nevertheless pivotal for the interpretation of these articles. For instance, in the judgement of Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v. Watson, the Court states in paragraph 87:

The scope of Article 5, Article 6 and Article 9(1) of Directive 2002/58, which seek to ensure the confidentiality of communications and related data, and to minimise the risks of misuse, must moreover be assessed in the light of recital 30 of that directive, which states: ‘Systems for the provision of electronic communications networks and services should be designed to limit the amount of personal data necessary to a strict minimum’.

And, in paragraph 95 the Court states that:

(...) As regards recital 11 of that directive, it states that a measure of that kind must be ‘strictly’ proportionate to the intended purpose. In relation to, in particular, the retention of data, the requirement laid down in the second sentence of Article 15(1) of that directive is that data should be retained ‘for a limited period’ and be ‘justified’ by reference to one of the objectives stated in the first sentence of Article 15(1) of that directive.

This clearly demonstrate that and how recitals may not be binding, but are indeed an important source of law.

4.4 International rule of law

International law depends on national law. First, because national law determines to what extent states are bound by international law. Second, because enforcement of international law depends on national bodies (legislature, courts, administration). This implies that international law, to a large extent, depends on states willing to bind themselves. There are some exceptions, e.g. with regard to *ius cogens*, which applies whether or not states recognise its force. But, generally speaking, one may be tempted to assume that states act as legal subjects in the realm of international law, free to negotiate treaties and free to subject themselves to whatever they deem to be in their own interest.
However, national law also depends on international law. First, because the system of sovereign states is based on mutual recognition of each other’s internal and external sovereignty. As discussed in section 1.4 and 4.1.2, sovereignty is an artificial construct, a historical artefact. Without external sovereignty, which depends on the international legal order, we cannot ‘have’ internal sovereignty. In the words of Jeremy Waldron:

In its municipal [national, mh] aspect, the state is a particular tissue of legal organization: it is the upshot of organizing certain rules of public life in a particular way. Its sovereignty is something made, not assumed, and it is made for the benefit of those whose interests it protects. In its international aspect, the sovereignty and sovereign freedom of the individual state is equally an artifact of international law. What its sovereignty is and what it amounts to is not given as a matter of the intrinsic value of its individuality, but determined by the rules of the international order.

This leads Waldron to quite another understanding of the states as legal subjects, free to act in their own interest. Instead he considers them as both sources of international law and officials of international law. The latter implies that from the perspective of the rule of law, states are not free to act in their own interests but bound by a legality principle at the level of international law. In the context of national law, the rule of law means that citizens are not there to serve the state, but the state is there to serve its citizens. In the context of international law, the rule of law means that states serve as the trustees of their citizens, bound to the rule of international law not for the sake of their own sovereignty, but for the sake of the people whose wellbeing they are entrusted with. Because this fiduciary position of states depends on the international legal order, to some extent they are also officials of the international legal order. Ultimately, this may entail a responsibility of states for subjects of other states.

References

*Introduction to international and supranational law:*


*On the sources of international law:*


*On the rule of law in international law:*


*On Kompetenz-Kompetenz:*


**Footnotes**

1. Art 9a NCC reads: ‘The court may determine in the judgment that no punishment or measure shall be imposed, where it deems this advisable, by reason of the lack of gravity of the offence, the character of the offender, or the circumstances attendant upon the commission of the offence or thereafter’. ↩
5. CJEU Case C-6/64 (1964). ↩
7. BVerfG, Judgment of the Second Senate of 07 September 2011 - 2 BvR 987/10 - paras. (1-142), ©


10. Dictum (decision) CJEU, 21 December 2016, Cases C-203/15 and C-698/15, under 1 and 2. ©