Part IV The Regimes of the Sources of International Law, s.XXVI Sources of International Law in Domestic Law, Ch.52 Sources of International Law in Domestic Law: Relationship Between International and Municipal Law Sources

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Relationship Between International and Municipal Law Sources

I. Introduction

It is a trite statement that, given the fundamentally different character of the municipal and international legal systems, the catalogue of the sources of international law differs from those of municipal law. There are striking commonalities too, however. First, there is substantial overlap between these sources: both international and municipal law generally acknowledge custom and general principles as formal sources of law,[1] and judicial decisions and the doctrine as subsidiary means for the (p. 1138) determination of law. Secondly, international and municipal law both use the terminology of 'sources of law' to denote processes through which valid legal norms are generated.[2] Thirdly, both international and municipal law tend to codify the catalogue of sources used, respectively, in Article 38 of the Statute of the International Court of Justice (ICJ) and in national (constitutional) legislation.[3] Fourthly, this codified catalogue is generally seen as non-exhaustive. Finally, it has fallen to legal theorists to understand and systematize what a given community considers as a source of law.[4] Interestingly, quite a few of these theorists have ventured into both fields of law, or, at the very least, theoretically inclined international lawyers have sought inspiration in the works of theorists of the sources of municipal law. The reliance of many contributors to this volume on H. L. A. Hart's rule of recognition,[5] and Hans Kelsen's *Grundnorm*,[6] with a view to more fully understanding the sources of international law, is testimony to this.

In this chapter, it is, however, not my aim to theorize all commonalities and differences between the sources of municipal and international law. Rather, I start from the premise that municipal and international law have something else in common, namely their nature as a legal system. This is perhaps stating the obvious, but it bears emphasis that, as both municipal and international law use legal norms to regulate social relationships—and sometimes even the *same* social relationships—a space for inter-systemic interaction between both legal spheres emerges. In this respect, the sources of international law have a 'downstream' impact, directly or indirectly, on municipal practice, notably where they have generated inward-looking norms that are of relevance in the relationship between individuals and States, or even between individuals only. Conversely, municipal legal practice can have an 'upstream' impact on the formation of the content of the sources of international law, where these require proof of State practice and/or *opinio juris* for valid norms to be generated. These forms of interaction are linked in that the application of international law in any given case always involves a measure of interpretation, clarification, refinement, or further development. Indeed, a domestic law-ascertaining agency's (typically a domestic court's) application of international law does not only serve the purpose of mechanically applying pre-existing international law, but also represents relevant State practice that feeds into the process of international law formation, and it contains the seeds for a shift in the content of an existing (p. 1139) international norm or for the positing of an altogether new norm.[7] This chapter zooms in specifically on the upstream impact of municipal law practice on international law, placing particular emphasis on processes of customary law-ascertainment and development by domestic courts, while to

a lesser extent also integrating issues of treaty interpretation and general principles formation.

I start by explaining the relevance of municipal law for the doctrine of the sources of international law (section II: The Relevance of Municipal Law for the Sources of International Law) and notably the jurisgenerative effect of domestic court decisions (section III: The Jurisgenerative Effect of Domestic Court Decisions). Subsequently, I inquire under what circumstances the technique of 'comparative international law', piggybacking on a transnational dialogue between domestic (and possibly international) courts on questions of international law determination, can and should contribute to the development of the content of the sources of international law, in particular customary international law (section IV: Transnational Judicial Dialogue and Comparative International law as Mechanisms of International Law Development). I flag some complications with this dialogical process, particularly the particularities of domestic law (section V: Domestic Law Particularities as a Complicating Factor) and the hard-to-eradicate selection bias of international law-appliers (section VI: The Danger of Cherry-Picking). Eventually, I attempt to ground a more objective comparative international law process that is geared to effective problem-solving guided by the persuasiveness and quality of reasoning of municipal court decisions relevant to international law (section VII: Towards a More Objective Comparative International Law Process).

II. The Relevance of Municipal Law for the Sources of International Law

While international and municipal law have a different catalogue of sources and have reached different stages of legal maturity, both international and municipal law have their legal character in common as both represent systems of ordering social relationships. This common property may facilitate international law sources' reliance on municipal law for purposes of the formation or interpretation of international law sources.

(p. 1140) To be fair, international law's borrowing from municipal law can be critiqued on the ground that its primary *subjects* are fundamentally different. It has notably been claimed that States, as 'black-box' abstract entities subject to international law, lack moral motivation, unlike individuals subject to municipal law—a difference that would arguably render the borrowing of municipal law sources, which are based on an ethical substrate, incommensurable.[8] Such a view has had little traction in the doctrine of sources, however.[9] As individuals take decisions on behalf of the State, the State may be said to have a delegated institutional morality that is derivative of the personal moralities of individual decision-makers. Accordingly, lack of moral motivation is not a convincing incommensurability-based argument against using municipal law sources in international law.[10] It could thus be posited that, for international law, municipal laws are more than just naked 'facts'.[11] They have normative value in that they have the potential to facilitate, constitute, and develop international law.

In this respect, students of the sources of international law are surely aware of the openings which the theory of the sources of international law offers to municipal law. It falls to municipal law to confer a full powers mandate on State representatives to conclude treaties pursuant to Article 7 of the Vienna Convention on the Law of Treaties (VCLT),[12] (converging) municipal law can constitute subsequent State practice that serves a treaty interpretation function pursuant to Article 31 (3) (b) of the VCLT, municipal law may contain the relevant practice and *opinio juris* for the crystallization of norms of customary international law,[13] and municipal law principles, common to the main legal systems of

States, form the backbone of general principles of international law in accordance with Article 38 (1) (c) of the ICJ Statute.[14]

(p. 1141) One may also be aware that the ICJ has not shied away from applying municipal law analogies to matters of international law,[15] and, as ICJ judges have held, such municipal law solutions cannot be automatically transplanted to the international level, but are in need of abstraction and adjustment.[16] It is noticeable that these dynamics have not been limited to arcane procedural issues but have historically influenced the formation of the basic categories of public international law. While these categories have ultimately been emancipated and acquired peculiar international characteristics, their origins should not be negated. For instance, the *pacta sunt servanda*-based law of treaties developed out of the municipal law of contracts and the law of territorial sovereignty and jurisdiction was based on the Roman concept of private property, as it was rediscovered by the *glossatores*.[17]

The continuity of municipal law sources in international law is not a *fait divers*. These sources may be crucial to prevent a *non liquet*, a finding that there is a lacuna in the law, which hence fails to answer questions raised by a specific case.[18] It is municipal sources that may fill this lacuna. More generally, as international law is, unlike municipal law, a rather incomplete legal system with limited detailed rules and with weak enforcement options, its progressive development towards a more mature legal system may crucially depend on borrowing municipal law notions.[19] Under this interpretation, international law may only become true law if its sources are open to private law.

III. The Jurisgenerative Effect of Domestic Court Decisions

It is impossible within this chapter to give an exhaustive overview of the impact of municipal law and legal practice on the content of the sources of international (p. 1142) law. In the light of the focus I have chosen, I will continue to direct my attention to the impact of domestic court decisions on the generation and interpretation of international law, particularly of norms of customary international law. Obviously, a similar analysis can be carried out with respect to general principles and treaty interpretation, both of which may depend on the input of municipal legal practices.

Let me start by emphasizing that the field of research concerning itself with the jurisgenerative effect of domestic court decisions is not new. As early as 1929, Hersch Lauterpacht had highlighted the participation of domestic courts, in their capacity as organs of the international legal community, in the creation of customary international law, and in filling the frame of general principles.[20] In so doing, he took issue with dominant theories of the separation of powers, which relegated domestic courts to simple '*bouches de la loi*', agencies that *applied* rather than *generated* (*made*) international law. These days, these theories have largely been referred to the dustbin of history,[21] and a scholarly consensus has emerged that domestic courts are organs of the State, and hence that their practice is indeed relevant State practice,[22] at least until the political branches have overruled them.[23] Such domestic court practice is not in itself a source of international law,[24] but it can inform the content of the sources of international law. The dominant two-elements paradigm of customary international law allows for the decisions of domestic courts to form customary international law, provided that sufficiently uniform practice among different domestic courts can be identified, alongside *opinio juris*.

Recent scholarship has been particularly interested in the seminal role of domestic courts in the generation of international law. This renewed interest can be explained by scholars' 'discovery' of, or at least characterization of, domestic courts as independent agencies that function at arm's length from parochial political branches. Arguably, political branches would only be interested in international law as a tool to maximize narrow State interests (as foreign policy realists would argue), whereas more detached domestic courts would factor in the interests of the international (p. 1143) community when deciding cases brought before them. Thus, André Nollkaemper submits that the international rule of law

demands that the practice of domestic courts, given their professed impartiality and independence, be accorded more weight than the views of the political branches of government in the determination of the content of the sources of international law.[25] This practice, emanating from a court after all, is moreover necessarily accompanied by *opinio juris*;[26] for adherents of the modern view of customary law formation, this may, in some circumstances, carry more weight than State practice.[27] Other authors observe that where domestic courts manage to coordinate their decision-making with counterparts in other courts, they could have a major effect on international law-making; when they form a more or less united front, they might influence international tribunals' determinations of the sources of international law.[28]

It is notable that this doctrinal optimism with respect to the jurisgenerative role of domestic court decisions is not necessarily supported by empirical evidence. In fact, as we write, domestic court decisions have a relatively small impact on international law's content formation. Even as domestic courts may be applying more international law than before, there is no evidence that domestic court decisions also play an increasing role in the determination of customary international law.[29] This does not come as a surprise, as international and municipal law are distinct legal orders after all.[30] Moreover, the optimistic characterization of domestic courts as *independent* law-applying and law-generating agencies may be belied by practice. Whether domestic judges are truly independent depends on the legal-political system in which they function and on their self-identification. Even in rule-of-law-based systems, courts may well espouse parochial views that differ little from those of the political branches, and they may hardly be inclined to engage with international law.

These cautionary notes only pertain to the empirical reality of an extant provincialism on the part of domestic courts, and a limited effect of domestic court decisions on international law sources. As far as I am concerned, they do not detract from the normative truth that domestic court decisions do not just *enforce* pre-existing (p. 1144) international law, but also *create* the law.[31] As Anthea Roberts has pointed out, however, whether a specific domestic court decision will have an *actual* jurisgenerative effect depends on its *persuasiveness*. Other law-ascertaining agencies (other domestic courts, international courts) will only heed it—and thus further contribute to the creation of international law—when it is considered as persuasive.[32] It is well known that some domestic court decisions have done better than others in this respect.

IV. Transnational Judicial Dialogue and Comparative International Law as Mechanisms of International Law Development

In the past decade, international legal doctrine has shown great enthusiasm regarding the possibilities of transnational judicial dialogue and communication for purposes of domestic courts determining and interpreting international law. To the extent that this common enterprise of interpreting and developing the law,[33] through an iterative process, yields uniform State practice and *opinio juris* through mechanisms such as harmonization and isomorphism,[34] it has indeed had a direct effect on the content of the sources of international law, such as customary law.[35] Not only domestic courts, but also other law-ascertaining agencies, such as States and international courts, are thus *prima facie* well advised to heed such court practice.

As a matter of fact, international courts rely heavily—sometimes almost exclusively—on domestic (court) practice when ascertaining the existence and (p. 1145) content of international norms, notably in the field of jurisdiction and immunities.[36] To give just one recent example, in its 2014 judgment in *Jones v United Kingdom*, the European Court of Human Rights (ECtHR) rather elaborately discussed domestic court practice from nine

jurisdictions before concluding that State (official) immunity arising in civil suits alleging the commission of international crimes continued to apply under customary international law.[37] A dialogue between courts for the purposes of international law application and development is hardly new, however. As early as 1977, the German Constitutional Court engaged extensively with foreign court practice when ascertaining the norms governing immunity from execution in respect of embassy bank accounts in a decision that had a major formative impact on the current law on State immunity from execution.[38]

Going by the number of publications addressing judicial dialogue, one is tempted to believe that this dialogue has quantitatively and qualitatively increased in recent times. Still, from a descriptive perspective, instances of 'comparative international law', as this process is sometimes dubbed,[39] remain relatively rare, as is, more generally, the application of international law proper, especially customary law, in domestic courts,[40] even if international norms (e.g., on human rights) have taken on an increasingly inward-looking character.[41] This being said, we proceed on the assumption that these instances are not negligible and that their occurrence is likely to increase in the years to come, as domestic legal materials relevant to international law are becoming more widely available.[42]

What is striking when analysing extant practices of comparative international law is that foreign courts' determinations of international law are rarely seen as binding precedent or as the *ratio decidendi*. Typically, they serve to strengthen a decision which the domestic court had already reached anyway. Consequently, they can be (p. 1146) characterized as a subsidiary means of determining international law—or a material source of international law, if you wish—in accordance with Article 38 (1) (d) of the ICJ Statute. To give two examples, the Canadian Supreme Court cited the Supreme Court of India's acceptance of the precautionary principle as a norm of customary international law to further buttress its own decision based largely on a perceived consensus in the doctrine;[43] and in the well-known case of *Roper v Simmons*, the Supreme Court of the United States (US) (in a rather exceptional move) relied on foreign and international case law to support its holding that, under its interpretation of domestic law, juveniles cannot receive the death penalty.[44] However, even if comparative international law is just a confirmatory or interpretative technique,[45] domestic courts' engagement with their counterparts on questions of international law does clarify and develop international law as relevant State practice in the sense of Article 38 (1) (b) of the ICJ Statute. As a result, such engagement may directly feed into the processes that in dominant formal sources theory yield valid international norms.[46] In practical terms, such a phenomenon may notably manifest itself in respect of questions on which international legal instruments themselves remain rather silent, with domestic courts then serving as gap-fillers.[47]

V. Domestic Law Particularities as a Complicating Factor

It is advisable to be aware of a number of factors complicating courts' mutual engagement on questions germane to international law, in spite of the hopes held by comparative international law. A failure to account for these factors may cause law-ascertaining agencies to uncritically give effect to idiosyncratic or flawed foreign (p. 1147) judicial decisions when determining the content of the sources of international law. Most notably, domestic applications of international law, if they can be identified in the first place, may be suffused with domestic law particularities.[48] This may render them unfit for transposition to other jurisdictions or for the further development of international law.[49] This holds true in particular where international law has been transformed into domestic law, as such transformations may give a particular meaning to certain terms that may be out of step with international law understandings and evolutions.

Recently, this problem has informed the ECtHR's refusal to consider a recent US Supreme Court decision rejecting the immunity *ratione materiae* of a foreign State official in a civil suit to be relevant practice, as the latter court's decision was based on a domestic statute rather than on international law.[50] The problem is not limited to techniques of transformation, however. In systems which automatically incorporate international law into the domestic legal order, or allow application of international law via *renvoi* (i.e., a domestic norm allows or instructs the court to apply an international norm), the actual application of international norms takes on a particular domestic flavour, reflecting a national legal culture and history that is not necessarily shared internationally.[51] The upshot is that international diffusion of domestic court processes of international law determination may hardly be self-evident, and may even be misguided. This explains why some States may even *prohibit* their courts from relying on interpretations of international law by foreign courts, thereby, somewhat regrettably perhaps, also withholding them the opportunity to contribute to the development of the content of the sources of international law.[52]

(p. 1148) However, international law-ascertaining agencies should not too readily dismiss domestic court practice on the grounds that the municipal flavour of such practice makes it irrelevant for the formation of the sources of international law. In particular, these agencies should prove more willing to look beyond the formal distinctions between domestic and international law in domestic court practice and take into account, for purposes of international law development, relevant applications of what Antonios Tzanakopoulos has termed 'consubstantial' norms—i.e., norms that exist substantively in both domestic and international law.[53] Fundamental rights are a case in point, as they exist under both domestic constitutional and international human rights law. Thus, domestic court practice, rejecting an appeal to immunity for reason of incompatibility with the constitutional principle of access to justice, may be relevant practice for the further development of international law, as the latter principle also exists under international law. This may even apply where the ICJ has temporarily disposed of the matter,[54] as an ICJ ruling does not prevent new customary norms from emerging. As a result, the Italian Constitutional Court's decision in *Simoncioni* (2014), in which it disallowed the application of international law in case of conflict with the fundamental principle of access to justice and refused to give effect to the ICJ's judgment in *Jurisdictional Immunities of the State*,[55] could yet contribute to the further clarification and development of international law on the relationship between State immunity and the individual right to a remedy.[56] After all, in the doctrine of sources, formal sources such as custom prevail over material sources such as judicial decisions and later norms prevail over earlier ones. At the same time, it bears notice that domestic courts operating in a legal system that does not provide for far-reaching powers of constitutional review may not be able to rely on this case law as relevant precedent, lest they overstep their domestic mandate and fail to recognize the authority of the ICJ in matters of international law. This obviously hampers the process of new content-determination of the sources of international law.

(p. 1149) VI. The Danger of Cherry-Picking

A major question arising in the context of the comparative international law exercise is *how* to precisely *compare* and *weigh* different decisions on international law rendered by domestic courts.[57] An Italian court of appeal hearing an immunity case has, in this respect, disapproved of a mere quantitative approach consisting of counting the number of decisions pro and contra. According to the court, '[w]hile the judicial practice of domestic courts was important for discerning the existence of positive customary international law, the role of the interpreter did not consist in a mere arithmetical calculation of the elements of practice'; instead, 'other elements had also to be taken into account, such as the particular qualitative nature of the existing customary rules, their reciprocal interrelations, and their hierarchical position in the international legal order'.[58] On the one hand, this approach may be commendable, as a facile quantitative approach fails to deselect poorly reasoned

decisions. On the other hand, it may give considerable leeway to the interpreting court, and as a result cherry-picking may loom large. Courts and other actors may well tend to select those decisions that are favourable to a pre-determined policy-based position or that mirror already existing domestic legal preferences.[59] Reflexively invoking international legal practice to support rights and obligations that have already been articulated domestically may then just come down to a 'self-congratulatory pat on the back',[60] a vindication of prior conclusions.

Selection bias also shows itself in law-ascertaining agencies' disproportionate reliance on what they consider to be 'persuasive decisions' or 'best practices' from a limited number of other States, typically those that share the same legal system, culture, and language, and are considered to have 'international prestige'.[61] This truncated, transjudicial dialogue has notably been documented with respect to the common-law-based, English-speaking world[62] (whose system of legal reasoning (p. 1150) is, however, arguably relatively open to diverse discursive input).[63] What factors precisely inform 'domination and coalition patterns' between courts nevertheless remains unclear, although organizational theory has tried to get to grips, at least at the theoretical level, with the determinants of judicial dialogue.[64]

This cherry-picking of municipal legal practice purportedly evidencing a material source of international law is in fact a larger problem besetting the identification of the content of international law sources. The process of identification leaves ample discretion to law-ascertaining agencies, which may determine the existence of norms on the basis of a cursory examination of only *certain* municipal legal systems that happen to offer a 'general principle' that backs up a decision subjectively favoured by the agency.[65] So-called international law sources may then serve as rules of decision, but at best their existence is simply *asserted* without much evidence being proffered; at worst, they are an apology for the furtherance of political or moral preferences. An illustration of the selectiveness of the comparative international law exercise is an Italian court's decision that customary international law provides for the non-applicability of statutory limitations to international crimes, as many court decisions, both domestic and foreign, had earlier held so.[66] On closer inspection, however, it transpired that the court left decisions unsupportive of its posited norm (consciously or unconsciously) out of the picture.[67]

VII. Towards a More Objective Comparative International Law Process

In the light of the risk of—sometimes unconscious—cherry-picking by international law-ascertaining agencies, a model for more objectively grounding the (p. 1151) pruning of relevant municipal legal practices in the process of ascertaining international law sources is called for, especially with respect to norms of customary international law and general principles of international law. Arguably, such a selection should take account of the hierarchical position of the respective court, the argumentative quality of the decision (in international law terms), and the court's insulation from influences exercised by the political branches. Accordingly, engagement with domestic court practice should not mean simple acceptance, imitation, or outright rejection on unclear grounds. Given what is sometimes an idiosyncratic attitude of domestic courts towards the application and development of international norms, a critical attitude is called for. When determining the content of the sources of international law, courts should refrain from simply citing foreign court practice, but rather should engage with the substantive arguments being made and take into account cultural or political factors that influenced the foreign judicial decision.[68] Moreover, they may want to supplement domestic court practice with other relevant practice.[69] As far as possible—and I realize that this is a controversial point—courts may also want to link such practice with a domestic normative substrate to preserve the

democratic quality of the norms applied, as, after all, the sources of international law may suffer from a democratic deficit.[70]

A key issue in the comparative international law exercise is obviously the accessibility of municipal legal practices.[71] As already flagged, courts, including international courts, may disproportionately cite municipal decisions from a limited number of—notably Western—States,[72] simply because these decisions can easily be found. Initiatives such as International Law Reports and—especially—International Law in Domestic Courts can only be applauded in this respect, insofar as they also disclose relevant domestic decisions from lesser-known jurisdictions. They provide the essential material for court watchers to expose the selection bias of law-ascertaining agencies.

Accessibility of domestic court decisions is, however, just one parameter determining the influence of such decisions on questions of customary international law or treaty interpretation addressed elsewhere. Even if, *arguendo*, domestic or international courts were to have access to all pertinent domestic court decisions on international law in a language they understand (possibly with the help of translators or experts), as indicated above, they may be inherently biased towards certain 'prestigious' jurisdictions. Courts should be cognizant of this and come to realize (p. 1152) that the quality of their international arguments could be enriched when drawing on how other courts have addressed similar questions of international law. In addition, and more importantly from a sources perspective, they should realize that the international law-ascertainment exercise requires that the agency only apply a given norm as a customary one if the relevant practice is universal and quasi-uniform.[73] The same applies, for that matter, when the court is called on to ascertain subsequent practice in the context of treaty interpretation.[74] Courts should thus engage with *all* relevant domestic court decisions addressing questions of international law,[75] to the extent that the quality of reasoning is sufficient, the size of the majority is known, and the relevant court is seen as impartial and independent.[76] However counterintuitively perhaps, they may want to discount the reputation or prestige generally accorded to the court,[77] or the soft or hard power of the court's State.[78] As Justice Kirby has noted, honesty and transparency are of the essence here.[79] An honest and transparent agency engaging in a comparative international law exercise may thus well come to the conclusion that the practice of other domestic courts is simply too inconsistent to generate an international norm. This may be the price one must pay for complying with Article 38 (1) (b) of the ICJ Statute, which requires 'evidence of a *general practice accepted as law*' (emphasis added) for a norm of international custom to be accepted.

Ultimately, whether domestic court practice will be cited by foreign and international courts and more generally influence international law may, and should, crucially depend on how the judicial decision is precisely crafted. Most courts consider themselves to be *appliers* rather than *developers* of the law. This means that they are unlikely to refer to a decision of a foreign counterpart that identifies an *emerging* norm that may possibly be in tension with an *existing* norm.[80] Accordingly, whether a domestic court decision on international law can spread beyond its own biotope may well be a function of its presentation. When the court explicitly embraces a *lex ferenda* approach, it is rather unlikely to be followed, as courts do not normally (p. 1153) want to be seen to be making, let alone breaking, the law[81]—unless there is a consensus at the political level that the norm should evolve.[82] Ordinarily, however, when the court just posits the norm as *lex lata* (although in reality it may be *lex ferenda*!),[83] it may have more impact, insofar as it is not overruled by the political branches or an international court.[84] Thus, the principle that foreign State officials cannot avail themselves of their immunity *ratione materiae* in respect of crimes of torture, a principle initially affirmed by Swiss and UK courts,[85] has had a major influence on universal jurisdiction-based litigation elsewhere, even if its normative justification, and accordingly its *raison d'être*, remains elusive to this day.[86] In contrast, the Italian Court of Cassation's affirmation of an emerging norm that States cannot avail themselves of immunity in respect of

violations of *jus cogens*,[87] while internationally taken notice of, has had little impact (all the more so after the ICJ considered this norm to be in violation of international law).[88] Also, some US courts' decisions that corporations, as non-State actors, could be liable for violating customary international (human rights) law,[89] while again duly noted internationally, have had little following (although this might have been different had the US Supreme Court addressed the issue in its *Kiobel* decision).[90]

(p. 1154) VIII. Concluding Observations

Given the misgivings and uncertainties surrounding domestic courts' determination of customary international law and of the process of comparative international law,[91] it does not come as a surprise that the ILC drafting committee on the identification of customary international law gave decisions of national courts concerning the existence and content of rules of customary international law a lower status than decisions of international courts and tribunals as subsidiary means for the determination of such rules. It only suggested that '[r]egard may be had, as appropriate' to such decisions.[92] At the same time, the ILC confirmed the potential law-creating role of domestic courts, where it held—in fact, in full accordance with Article 38 (1) of the ICJ Statute—that their decisions are a form of State practice, which is not necessarily subordinate to other forms of State practice.[93] Indeed, in some fields of international law which almost exclusively mature and develop on the basis of domestic court practice (e.g., the law of immunities on which this chapter has drawn heavily), domestic courts have had, and continue to have, an undeniable impact on the formation of customary international law.[94] A distorted image of the reality of international law would emerge if law-ascertaining agencies would turn a blind eye to domestic court practice in those fields. Naturally, for such practice to feed into international law, a measure of uniformity and universality is called for. In this respect, a judicial dialogue between domestic courts is most useful, as it allows those courts to engage with each other on points of international law and increase their quality of reasoning,[95] without necessarily giving up their national legal traditions.[96](p. 1155) Such a dialogue may also result in judgments that, to a certain extent, merge different legal cultures,[97] and, in passing, make them more intelligible to foreign observers.[98]

Research Questions

- What status do decisions of national courts concerning the existence and content of rules of customary international law enjoy as a means for the determination of such rules?
- How could the objective character of the process of comparatively parsing municipal court decisions on their international law relevance (comparative international law) be improved?

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Footnotes:

1 Obviously, the exact process of law formation with respect to these sources may differ.

2 The term ‘source of law’ originated in medieval Latin (*fons juris*) and subsequently found its way in the Western municipal legal systems and public international law.

3 Statute of the International Court of Justice (ICJ) (San Francisco, 24 October 1945, 33 UNTS 993).

4 Stefan Vogenauer, ‘Sources of Law and Legal Method in Comparative Law’, in Mathias Reimann and Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 869–98, 882.

5 As set out in H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Law Series, 1961).

6 As set out in Hans Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1945).

7 On the thin line between law interpretation and law development, see Antonios Tzanakopoulos, ‘Domestic Courts in International Law: The International Judicial Function of National Courts’, *Loyola of Los Angeles International and Comparative Law Review* 34 (2011): 133–68, 135, adding that ‘decisions of courts are not simply declaratory of the law, but rather, on some micro-level at the very least, constitutive of it’.

8 Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005), 209–12.

9 It may have some traction regarding the question of compliance with international law, however. Compliance is a two-level game, that requires decision-makers to weigh the morality of honouring commitments to outsiders (other States) and the morality of being democratically responsive to the interests of insiders (the citizens). States may be tempted to invoke ‘reasons of State’ to excuse or justify non-compliance with international law. The force of State reason may make external morality precarious, or even non-existent. Still, as State reason may find its legitimacy in a State’s internal moral duties towards its citizens, it is not situated outside the moral norm.

[10] Hersch Lauterpacht, 'The Grotian Tradition in International Law', *British Yearbook of International Law* 23 (1946): 1–53, 27.

[11] Apparently contra, *Certain German Interests in Polish Upper Silesia (Germany v Polish Republic)* (Merits) PCIJ Rep Series A No. 7 (1926), p. 19.

[12] Vienna Convention on the Law of Treaties (VCLT) (Vienna, 23 May 1969, 1155 UNTS 331).

[13] It is observed that municipal law may have an impact only on *some* norms of international law, notably on those norms that may be invoked in domestic legal practice. This applies particularly to the norms on State jurisdiction, immunities, and human rights, which are frequently invoked in municipal law litigation. Municipal law may have far less impact in other fields, e.g. the use of force or the law of the sea.

[14] But see section I of chapter 51 by Ingrid B. Wuerth in this volume (arguing that '[d]espite the language of the Statute of the International Court of Justice (ICJ), general principles appear in practice to derive little of their content from domestic law').

[15] For an example of private law analogy applied by the Court, see e.g., *Appeal Relating to The Jurisdiction of the ICAO Council (India v Pakistan)* (Merits) [1972] ICJ Rep 46.

[16] Lord McNair has famously warned in this respect that private law institutions should not be imported 'lock, stock, and barrel' in international law; see *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 128, 148 (Separate Opinion by Sir Arnold McNair). See also *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240, 270 (Separate Opinion of Judge Shahabuddeen). See in general André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011), p. 276.

[17] John G. Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', *International Organization* 47 (1993): 139–74, 157; Stuart Elden, *The Birth of Territory* (Chicago: The University of Chicago Press, 2013), p. 240.

[18] On *non liquet*, see e.g., Ilmar Tammelo, 'On the Logical Openness of Legal Orders: A Modal Analysis of Law with Special Reference to the Logical Status of Non Liquet in International Law', *American Journal of Comparative Law* (1959): 187–203.

[19] Lauterpacht, 'The Grotian Tradition', p. 30, relying on Hugo Grotius.

[20] Hersch Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law', *British Yearbook of International Law* 10 (1929): 65–95.

[21] See also section III of chapter 51 by Ingrid B. Wuerth in this volume.

[22] As are obviously the interventions of the States themselves during the litigation, if they are parties to, or otherwise involved in, the domestic litigation. See Simon Olleson, 'Internationally Wrongful Acts in the Domestic Courts: The Contribution of Domestic Courts to the Development of Customary International Law Relating to the Engagement of International Responsibility', *Leiden Journal of International Law* 26 (2013): 615–42, 642.

[23] For a nuanced view, see section III of chapter 51 by Ingrid B. Wuerth in this volume (suggesting several ways to solve the conflict between plural forms of State practice and *opinio juris* for each State).

[24] But see Philip Moremen, 'National Court Decisions as State Practice: A Transjudicial Dialogue?', *North Carolina Journal of International Law and Commercial Regulation* 32 (2006): 259–74, 267. See also chapter 6 by Lauri Mälksoo in this volume (referring to

nineteenth-century doctrinal views that domestic law could be a source of international law).

25 Nollkaemper, *National Courts and the International Rule of Law*, p. 271.

26 Antonios Tzanakopoulos, 'Judicial Dialogue as a Means of Interpretation', in Helmut P. Aust and Georg Nolte, eds, *Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford: Oxford University Press, 2014), 72–95, 90.

27 Moremen, 'National Court Decisions as State Practice', pp. 272–3.

28 Eyal Benvenisti and George W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', *European Journal of International Law* 20 (2009): 59–72, 68 .

29 André Nollkaemper, 'The Role of Domestic Courts in the Case Law of the International Court of Justice', *Chinese Journal of International Law* 5 (2006): 301–22, 304.

30 Jean d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order', in Ole K. Fauchald and André Nollkaemper, eds, *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Oxford: Hart, 2012), 141–66, 162.

31 Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law', *International and Comparative Law Quarterly* 60 (2011): 57–92, 59. But see Roger O'Keefe, 'Domestic Courts as Agents of Development of the International Law of Jurisdiction', *Leiden Journal of International Law* 26 (2013): 541–58, 542, n. 2.

32 Roberts, 'Comparative International Law?', p. 90.

33 Melissa A. Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law', *Georgetown Law Journal* 93 (2004): 487–574, 492 (discounting tradition and culture); Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2009), p. 99. On the fine line between law interpretation and law development by domestic courts, see Tzanakopoulos, 'Domestic Courts in International Law', p. 134.

34 Olga Frishman, 'Transnational Judicial Dialogue as an Organisational Field', *European Law Journal* 19 (2013): 739–58, 754–5 (describing the practice of courts becoming 'similar' over time due to a transjudicial dialogue).

35 See Art. 38 (1) (b) of the ICJ Statute.

36 *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (Merits) [2002] ICJ Rep 3, 24, para. 58; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Merits) [2012] ICJ Rep 99, 123, para. 55. Generally, Rosanne van Alebeek, 'Domestic Courts as Agents of Development of International Immunity Rules', *Leiden Journal of International Law* 26 (2013): 559–78, 559.

37 ECtHR, *Jones and Others v United Kingdom* (appl. nos 34356/06 and 40528/06), Judgment (Fourth Section), 14 January 2014, Reports 2014-I, paras 110–54.

38 BVerfG, Order of the Second Senate of 13 December 1977, case no. 2 BvM 1/76, BVerfGE 46, 342, 364 ff. See currently Art. 21 (1) (a) of the United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004, not yet in force).

39 Roberts, 'Comparative International Law?'.

[40] See e.g., regarding France: Bernard Stirn, ‘La place de la coutume internationale en droit public français’, *The Law & Practice of International Courts and Tribunals* 12 (2013): 267–71, 267. Also Olleson, ‘Internationally Wrongful Acts in the Domestic Courts’, p. 621; Tzanakopoulos, ‘Judicial Dialogue’, p. 93. Contra, somewhat optimistically, André Nollkaemper, ‘The Application of Customary International Law by National Courts: Introduction’, *Non-State Actors and International Law* 4 (2004): 1–2, 1 (submitting that domestic courts regularly apply customary law).

[41] Tzanakopoulos, ‘Domestic Courts in International Law’, p. 142.

[42] E.g., through the Oxford Reports on International Law in Domestic Courts, <http://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts>, accessed 16 June 2017.

[43] *Canada Ltée (Spraytech, Société d’arrosage) and Services des Espaces Verts Ltée/Chemlawn v Town of Hudson*, Judgment of the Supreme Court, Docket No. 26937, 2001 SCC 40, ILDC 185 (CA 2001), 28 June 2001.

[44] *Roper v Simmons*, 543 U.S. 551, 577–8 (2005); ibid. at 604 (O’Connor, J., dissenting).

[45] On the relevance of comparative (international) law for the interpretation of domestic law: Stephen Breyer, ‘Keynote Address before the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 2-5, 2003)’, *American Society of International Law Proceedings* 97 (2003): 265–9, 265.

[46] See e.g., in respect of the death penalty: Waters, ‘Mediating Norms and Identity’, p. 526.

[47] See e.g., regarding State responsibility: Stephan Wittich, ‘Domestic Courts and the Content and Implementation of State Responsibility’, *Leiden Journal of International Law* 26 (2013): 643–65, 643, and 657–9 (analysing the contribution of domestic courts to the calculation of compound interest as far as reparations for internationally wrongful acts are concerned).

[48] Simonetta Stirling-Zanda, ‘The Determination of Customary International Law in European Courts (France, Germany, Italy, The Netherlands, Spain, Switzerland)’, *Non-State Actors and International Law* 4 (2004): 3–24, 4. This obviously speaks to Georges Scelle’s famous *dédoublement fonctionnel*, pursuant to which domestic courts may wear two hats, one as applier of domestic law, another as applier of international law. Georges Scelle, ‘Le phénomène juridique du dédoublement fonctionnel’, in Walter Schätzel and Hans Jürgen Schlochauer, eds, *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Frankfurt am Main: V. Klostermann, 1956), 324–42.

[49] Tzanakopoulos, ‘Judicial Dialogue’, pp. 83–5.

[50] ECtHR, *Jones and Others v United Kingdom*, para. 203 (‘Although the United States Supreme Court in *Samantar* held that officials did not fall under the notion of “State” within the meaning of the FSIA, it clarified that their immunities were governed by common law, as the statute was deemed to be only a partial codification of immunity rules in the United States’, citing *Samantar v Yousuf*, 560 U.S. 305 (2010)). See also *Houshang Bouzari et al. v Islamic Republic of Iran*, 71 OR (3d) 675 (Ont CA); ILDC 175 (CA 2004), paras 66–7.

[51] Moremen, ‘National Court Decisions as State Practice’, p. 305; ILC, First Report on Formation and Evidence of Customary International Law by Michael Wood, Special Rapporteur, 17 May 2013, UN Doc. A/CN.4/663, para. 84.

[52] Van Alebeek, ‘Domestic Courts as Agents’, p. 570. See also Melissa A. Waters, ‘Normativity in the New Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts’, *Yale Journal of International Law* 32 (2007): 455–84, 484.

[53] Tzanakopoulos, ‘Judicial Dialogue’, pp. 85–7; Tzanakopoulos, ‘Domestic Courts in International Law’, p. 143.

[54] Van Alebeek, ‘Domestic Courts as Agents’, p. 578.

[55] ICJ, *Jurisdictional Immunities of the State; Simoncioni and Others v Germany and President of the Council of Ministers of the Italian Republic (intervening)*, Constitutional review, No. 238, ILDC 2237 (IT 2014), 22 October 2014, Constitutional Court. It is noted that an Italian appeals court had earlier held that Italian courts were obliged to apply an Italian statute requiring them to give effect to ICJ decisions (Art. 3 of Law 5/2013). *Federal Republic of Germany v Ferrini* (21 January 2014) ILDC 2724 (IT 2014) (Supreme Court of Cassation). In *Simoncioni*, the Constitutional Court considered the relevant provision to be unconstitutional.

[56] Van Alebeek, ‘Domestic Courts as Agents’, p. 578.

[57] Roberts, ‘Comparative International Law?’, p. 88.

[58] *Germany v Milde (Max Josef)*, Appeal judgment, Case no. 1072/2009, *Rivista di Diritto Internazionale* 92 (2009): 618, ILDC 1224 (IT 2009), 13 January 2009, 1st Criminal Section.

[59] Moremen, ‘National Court Decisions as State Practice’, p. 264.

[60] David Haljan, *Separating Powers: International Law before Domestic Courts* (The Hague: Springer, 2013), p. 266.

[61] Ole K. Fauchald and André Nollkaemper, ‘Conclusions’, in Fauchald and Nollkaemper, eds, *The Practice of International and National Courts*, 343–62, 361. Also Frishman, ‘Transnational Judicial Dialogue’, p. 750.

[62] O’Keefe, ‘Domestic Courts as Agents’, p. 557 (citing a Canadian court referring to US and Australian case law, and an Australian court referring to US, British, and Israeli case law on questions of jurisdiction). See also Henry Burmester, ‘The Determination of Customary International Law in Australian Courts’, *Non-State Actors and International Law* 4 (2004): 39–47, 41; Waters, ‘Mediating Norms and Identity’, p. 492. Even in the common-law world, however, making a comparative international law argument for purposes of determining customary norms may not be self-evident, as States may often use only oral procedures, which do not lend themselves well for an extensive comparison. See David Lloyd Jones, ‘The Role of Lawyers in “Establishing” Customary International Law in the *Pinochet* Case’, *Non-State Actors and International Law* 4 (2004): 49–58, 56. See also Alan Boyle, ‘International Law before National Courts: Some Problems from a Common Law Perspective’, *Non-State Actors and International Law* 4 (2004): 59–64, 61 (referring, inter alia, to the non-justiciability of certain governmental powers). On the role of counsel, see also Tzanakopoulos, ‘Judicial Dialogue’, pp. 87–8. It has also been noted that courts from new democracies cross-cite more often that other courts. See Frishman, ‘Transnational Judicial Dialogue’, p. 749.

[63] Michael Kirby, ‘Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges’, *Melbourne Journal of International Law* 9 (2008): 171–89, 189.

[64] Frishman, ‘Transnational Judicial Dialogue’, p. 751.

[65] See e.g., Benedetto Conforti, *International Law and the Role of Domestic Legal Systems* (Leiden: Martinus Nijhoff, 1993), p. 66.

[66] *De Guglielmi and De Guglielmi v Germany* (19 May 2010) ILDC 1784 (IT 2010), (Court of First Instance), para. 5.4, reprinted in *Rivista di diritto internazionale privato e processuale* 46 (2010): 1006.

[67] ibid., comment A3 (the court even overlooked relevant Italian precedents going the other way).

[68] Jaye Ellis, 'General Principles and Comparative Law', *European Journal of International Law* 22 (2011): 949–71, 971.

[69] Also Waters, 'Mediating Norms and Identity', p. 529.

[70] On democratic legitimacy, see chapter 34 by José Luis Martí in this volume.

[71] Fauchald and Nollkaemper, 'Conclusions', p. 361.

[72] See e.g., ICJ, *Arrest Warrant of 11 April 2000*, para. 58 (citing case law of the UK House of Lords and the French Court of Cassation in respect of the principle of immunity *ratione personae* of high-ranking State officials). See also Maurice Mendelson, 'The Effect of Customary International Law on Domestic Law: An Overview', *Non-State Actors and International Law* 4 (2004): 75–85, 75–6 (warning for the danger of generalizing from a limited amount of State practice).

[73] *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] (Judgment) ICJ Rep 3, 43, para. 74. Compare van Alebeek, 'Domestic Courts as Agents', p. 570. See also Waters, 'Normativity in the New Schools', p. 467.

[74] Article 31 (3) (b) of the VCLT; see Oliver Dörr, 'General Rule of Interpretation', in Oliver Dörr and Kirsten Schmalenbach, eds, *The Vienna Convention on the Law of Treaties: A* Commentary (Heidelberg: Springer, 2011), 521–71, 556.

[75] Also Tzanakopoulos, 'Judicial Dialogue', p. 91 (referring to 'a necessity, if not an obligation'); Waters, 'Mediating Norms and Identity', p. 495 (calling it a matter of 'judicial comity').

[76] See also Mendelson, 'The Effect of Customary International Law on Domestic Law', p. 83.

[77] See the descriptive (non-normative) observation of Frishman, 'Transnational Judicial Dialogue', p. 750.

[78] Waters, 'Mediating Norms and Identity', p. 558.

[79] Kirby, 'Transnational Judicial Dialogue', p. 174.

[80] *Jones v Ministry of the Interior Al-Mamlaka Al-Arabiya as Saudiya (The Kingdom of Saudi Arabia)* [2006] UKHL 26, para. 63 (Lord Hoffmann).

[81] Also Van Alebeek, 'Domestic Courts as Agents', p. 574. Note that domestic courts may not always be aware that they are breaking the law. See Olleson, 'Internationally Wrongful Acts in the Domestic Courts', pp. 618–19.

[82] Stirling-Zanda, 'The Determination of Customary International Law in European Courts', p. 9.

[83] In this sense, violation of the norm could still lead to the development of new norms, even without the support of the political branches. On the relationship between violation and development, see notably Tzanakopoulos, 'Domestic Courts in International Law', p. 162.

[84] E.g., in *Arrest Warrant of 11 April 2000*, the ICJ swiftly overruled a Belgian investigating magistrate who considered the immunity of a foreign affairs minister to be irrelevant in international crimes proceedings.

[85] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 2 W.L.R. 827 (H.L. 1999); *Adamov (Evgeny) v Federal Office of Justice*, Appeal Judgment, Case No. 1A 288/2005, ILDC 339 (CH 2005), 22 December 2005, Federal Supreme Court.

[86] See ILC, Report on the Work of the Sixty-Third Session (26 April–3 June and 4 July–12 August 2011), UN Doc. A/66/10, para. 113.

[87] *Germany v Mantelli and Others*, Preliminary Order on Jurisdiction, Case No 14201/2008, (2008) Riv Dir Int 896, ILDC 1037 (IT 2008), 29 May 2008, Supreme Court of Cassation.

[88] See most notably *Natoniewski v Germany*, Cassation complaint, Case no. IV CSK 465/09, *Polish Yearbook of International Law* 30 (2010): 299, ILDC 1996 (PL 2010), 29 October 2010, Supreme Court, para. 44, citing rival case law of the Greek Supreme Court, the UK House of Lords, and the ECtHR; ICJ, *Jurisdictional Immunities of the State*.

[89] *Flomo and 22 additional child plaintiffs v Firestone Natural Rubber Company*, LLC, Appeal judgment, 643 F.3d 1013 (7th Cir. 2011), ILDC 1775 (US 2011), 11 July 2011, Court of Appeals (7th Circuit), paras 10, 14.

[90] The lower court in *Kiobel* did address the issue, reaching the opposite conclusion as the court in *Flomo: Kiobel and Others (on behalf of Kiobel and Tusima) v Royal Dutch Petroleum Co and Others*, Appeal judgment, Docket No. 06-4800-cv, Docket No. 06-4876-cv, 623 F3d 111 (2d Cir 2010), ILDC 1552 (US 2010), 17 September 2010, Court of Appeals (2nd Circuit), para. 10.

[91] See also Sir Christopher Greenwood, 'The Contribution of National Courts to the Development of International Law', Annual Grotius Lecture 2014, <https://www.biicl.org/newsitem/6044>, accessed 15 June 2017.

[92] ILC, 'Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee, UN Doc. A/CN.4/L.869 (2015), Draft conclusion 13 [14] (2). It appears that the ILC's choice in this respect is largely based on Moremen's earlier cautionary note regarding the use of foreign court decisions in determining State practice, and its use in transnational judicial dialogue. See Moremen, 'National Court Decisions as State Practice'.

[93] ILC, 'Identification of Customary International Law: Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee', Draft conclusion 6 [7], (2), and (3).

[94] See also van Alebeek, 'Domestic Courts as Agents'.

[95] Jan Wouters, 'Customary International Law before National Courts: Some reflections from a Continental European Perspective', *Non-State Actors and International Law* 4 (2004): 25–38, 38.

[96] Elies van Sliedregt, 'Pluralism in International Criminal Law', *Leiden Journal of International Law* 25 (2012): 847–55, 850 (arguing that pluralism implies that a single system (court or judge) sees itself as part of a larger system and stays connected with other single systems). An advisory role for the ICJ to answer questions posed by domestic courts on the application and interpretation of international law has also been suggested for the sake of securing the coherence of international law. See International Law Association Committee on Human Rights Law and Practice, 'The Exercise of Universal Jurisdiction in respect of Gross Human Rights Offences: First report', in *Report of the Sixty-Eight Conference of the International Law Association*, Taipei, May 1998, p. 669. This suggestion does not appear realistic, unless the resources of the ICJ were to be considerably increased.

[97] Jaye Ellis, 'General Principles and Comparative Law', p. 967 (using the concept of '*métissage*' in this respect, i.e., a dialogue that takes place among jurists 'who draw on different legal cultures in order to understand a problem that arises in a particular time and

place and identify a rule, principle, or legal concept that, it is hoped, will have some relevance at other times and in other places').

98 William Burke-White, 'International Legal Pluralism', *Michigan Journal of International Law* 25 (2003): 963–80, 974.