The Interpretation of International Law by Domestic Courts – A Topic That Matters

[T]he place of international law in municipal court cases amounts today to a quiet and often unnoticed revolution in the nature and content of international law.⁴⁰

1 Introduction

Why should we care about how domestic courts must interpret international law? In this chapter, I provide an overview of the existing literature dealing with the interpretation of international law by domestic courts, both in Switzerland and in other jurisdictions (2). I explain the reasons that lead me to focus on Switzerland (3), courts (4), domestic courts (5), and international law (6). Finally, I clarify why it is worthwhile to examine the domestic practice from the angle of interpretative methods (7).

2 The State of the Literature

In 2014, the Swiss Federal Tribunal mentioned international law in 27.3% of its published decisions. By contrast, six decades earlier, in 1954, the Court cited international law in 8.5% of them. In other terms, the share of published cases containing a reference to international law has more than tripled in 60 years.⁴¹

The Swiss example is not an outlier. The interpretation of international law in domestic courts 'has become a regular occurrence, at least in certain states

40 Robert Y Jennings, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 *International and Comparative Law Quarterly* 1, 4.

41 Ammann, 'International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal's Practice of International Law in Figures' (n 5).

and in certain fields'.⁴² International law is invoked and applied in domestic courts across the globe, be it in liberal democracies⁴³ or in authoritarian regimes,⁴⁴ in former colonial powers⁴⁵ or in decolonized States.⁴⁶

Mirroring this global trend, international law in domestic courts and domestic courts in international law are thriving fields in legal scholarship today. The myriad contributions published on the issue in recent years,⁴⁷ the launch of an online database of relevant domestic court cases in 2007,⁴⁸ and the creation of book series devoted to international law in domestic legal orders⁴⁹ are only a few examples of the interest contemporary international lawyers devote to this topic.

The issue itself is not new. International lawyers have been intrigued by domestic courts' interpretation of international law for decades.⁵⁰ 1905 saw the publication of a book by Dionisio Anzilotti entitled *Il diritto internazionale nei giudizi interni*.⁵¹ In 1929, Hersch Lauterpacht published an article in which he presented domestic municipal decisions, including court decisions, as 'sources of international law'.⁵² States have been compiling yearly digests

42 Georg Nolte, 'Introduction' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016) 1.

43 Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Alfred A Knopf 2015).

44 Congyan Cai, 'International Law in Chinese Courts During the Rise of China' (2016) 110 *American Journal of International Law* 269, 269.

45 See Tom Bingham's preface in Shaheed Fatima, *Using International Law in Domestic Courts* (Hart Publishing 2005) xi.

46 VH Hegde, 'Indian Courts and International Law' (2010) 23 *Leiden Journal of International Law* 53, 55.

47 Eg Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016); André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011).

48 Oxford Reports on International Law in Domestic Courts, <opil.oup.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts>.

49 <global.oup.com/academic/content/series/i/international-law-in-domestic-legal-orders-ildo>.

50 Hersch Lauterpacht, 'Municipal Decisions as Sources of International Law' (1929) 10 *British Year Book of International Law* 65; Richard A Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse University Press 1964); Richard Lillich, 'The Proper Role of Domestic Courts in the International Legal Order' (1970) 11 *Vanderbilt Journal of Transnational Law* 9; Thomas M Franck and Gregory M Fox (eds), *International Law Decisions in National Courts* (Transnational Publishers, Inc 1996).

51 Dionisio Anzilotti, *Il diritto internazionale nei giudizi interni* (Zanichelli 1905).

52 Lauterpacht, 'Municipal Decisions as Sources of International Law' (n 50).

of their practice of international law for years,⁵³ and the International Law Reports have included domestic rulings since their inception in the late 1920s. The scope of international law, and especially of treaty law, has been steadily expanding ever since, making it difficult for domestic lawyers and judges to ignore its existence⁵⁴ and the fact that States must respect international law.

If States have the duty to respect international law, why is it necessary to examine how domestic courts, including Swiss courts, must interpret this body of law? I argue that a new study that builds on and seeks to guide the practice, and that complements scholarly efforts to date is needed for at least five reasons.

First, existing scholarship on domestic courts and international law primarily focuses on mapping the existing practice rather than on the normative (legal⁵⁵ and/or moral) principles that must or should guide it (2.1). Moreover, legal theorists and philosophers tend to neglect international law (2.2). Third, the place of domestic judicial decisions in the sources of international law is ambiguous (2.3). Fourth, scholars and courts often neglect that the fact that States must respect the interpretative methods of international law is a corollary of their international legal obligations (2.4). Finally, a comprehensive overview and evaluation of Swiss courts' practice of international law is missing (2.5).

2.1 *Descriptive Bias*

While there is no dearth of scholarly work on international law in domestic courts, this scholarship is predominantly '*descriptive* and of a sociological kind', as Samantha Besson puts it. Consequently, this work seldom addresses the normative (legal or moral) principles domestic courts must or should respect when interpreting international law.⁵⁶

53 See the digest published annually in the Swiss Review of International and European Law, currently compiled by Lucius Caflisch. For another example out of many: Juan Santos Vara, Soledad R Sánchez-Taberneroy, and Daniel González Herrera, 'Crónica sobre la aplicación judicial del derecho internacional público en España (julio 2014 – junio 2015)' (2015) 29 Revista Electrónica de Estudios Internacionales.

54 See already *The Interpretation of Statutes* (Her Majesty's Stationery Office 1974) <www.lawcom.gov.uk/wp-content/uploads/2016/08/LC.-021-SC.-011-THE-INTERPRETATION-OF-STATUTES.pdf>.

55 As mentioned, this study focuses on *legal* principles.

56 Samantha Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' in Mary E Footer, August Reinisch, and Christina Binder (eds), *International Law and ... Select Proceedings of the European Society of International Law, Vol 5, 2014* (Hart Publishing 2016) 45.

Scholars have pointed out that domestic courts, when they interpret international law, fulfill a domestic, but also an international 'function'.⁵⁷ They have underlined this 'duality',⁵⁸ typically via Georges Scelle's sociological (and often misspelt) concept of 'dédoublement fonctionnel'.⁵⁹ They have stressed that domestic rulings contribute to the formation of international law, and that domestic judges, by citing their own rulings (or, more generally, their own State's practice), can increase the influence of this domestic practice on international lawmaking.⁶⁰ Scholars and private organizations such as the ILA have 'mapped' the types of engagement of domestic courts with international law,⁶¹ adopting a 'functional'⁶² approach or other descriptive

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- 57 Antonios Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International and Comparative Law Review* 153.
- 58 ILA, 'Proposal for an ILA Study Group on the Principles on the Application of International Law by Domestic Courts' (2011) 1 <www.ila-hq.org/index.php/study-groups>. See also Janet Walker, 'The Role of Domestic Courts in the International Legal Order: A Tribute to Richard Falk' (2005) 11 *ILSA Journal of International and Comparative Law* 365.
- 59 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* (Vittorio Klostermann 1956). Many scholars rely on Scelle's concept, eg Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57, 68; André Nollkaemper, 'The Duality of Direct Effect of International Law' (2014) 25 *European Journal of International Law* 105, 111. See also (with regard to the CJEU, which is often compared to a domestic court): André Nollkaemper, 'Between Dédoublement Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci' (2009) 20 *European Journal of International Law* 862.
- 60 Samantha Besson and Odile Ammann, 'La pratique suisse relative à la détermination du droit international coutumier' (*Freiburger Schriften zum Europarecht* Nr. 21 / *Cahiers fribourgeois de droit européen* n° 21, 2016) <www.unifr.ch/ius/euroinstitut_fr/forschung/publikationen/freiburger_schriften>.
- 61 ILA, 'Preliminary Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (2012) <www.ila-hq.org/index.php/study-groups>; ILA, 'Working Session Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (2016) <www.ila-hq.org/index.php/study-groups>; ILA, '(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15); Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* (Oxford University Press 2014); Nollkaemper, *National Courts and the International Rule of Law* (n 47) 17.
- 62 Weill (n 61) 2; ILA, '(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15) 2. See also Nollkaemper, *National Courts and the International Rule of Law* (n 47) 9 f.

approaches.⁶³ They have focused on the 'impact' of domestic case law⁶⁴ or of domestic law more generally on international law⁶⁵ and, *vice versa*, on the impact of international law on domestic cases.⁶⁶ Researchers have compiled national judicial decisions on international law,⁶⁷ and they have compared different States' domestic case law on international law.⁶⁸ Political scientists have typically been interested in why domestic courts apply international law.⁶⁹ Only a few authors suggest that domestic judges must or should conceive of their role in a particular way, be it from the perspective of domestic law⁷⁰ or from an international perspective.⁷¹ In general, scholars often dwell on the outcome of domestic courts' judgments pertaining to international law, rather than on the interpretative framework and reasoning these courts use.⁷²

63 Veronika Fikfak, 'Reinforcing the ICJ's Central International Role? Domestic Courts' Enforcement of ICJ Decisions and Opinions' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015).

64 Antonios Tzanakopoulos, 'Judicial Dialogue in Multi-Level Governance: The Impact of the Solange Argument' in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing 2012); 'International Law Through the National Prism: The Impact of Judicial Dialogue' (Netherlands Organisation for Scientific Research) <www.nwo.nl/en/research-and-results/research-projects/1/22/6722.html>.

65 Luigi Ferrari Bravo, 'International and Municipal Law: The Complementarity of Legal Systems' in R St J Macdonald and Douglas M Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff 1986); Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams 'International Law and National Law: Fluid States' in Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams (eds), *The Fluid State: International Law and National Legal Systems* (The Federation Press 2005) 8.

66 Eg Simon Olleson, *State Responsibility Before International and Domestic Courts: The Impact and Influence of the ILC Articles* (Oxford University Press 2013).

67 Fatima (n 45).

68 Anthea Roberts and others, 'Comparative International Law: Framing the Field' (2015) 109 *American Journal of International Law* 467; Roberts and others (n 8).

69 For an overview: Lisa Conant, 'Whose Agents? The Interpretation of International Law in National Courts' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 401 ff.

70 Curtis A Bradley, 'The Supreme Court as a Filter Between International Law and American Constitutionalism' (2016) 104 *California Law Review* 101.

71 Falk (n 50).

72 Eg Alexandra Huneus, 'Courts Resisting Courts: Lessons From the Inter-American Court's Struggle to Enforce Human Rights' (2011) 44 *Cornell International Law Journal* 493; Raffaella Kunz, 'Weder entfesselt noch geknebelt: Rechtsfindung nationaler Gerichte in Zeiten globalen Regierens am Beispiel des Zusammenspiels mit EGMR und IAGMR' in

When scholars actually look at the methods courts do, must, or should follow when interpreting international law, they mostly focus on international courts.⁷³ A small number of contributions deal with the methods domestic courts do, must, or should employ.⁷⁴ Yet this work often remains at a relatively high level of generality, and it concentrates on the VCLT, without questioning it. Moreover, the implications of these studies for the Swiss judicial practice are not obvious. In domestic legal theory, many are interested in the phenomenology of judicial decision-making,⁷⁵ or in empirical difficulties judges face when deciding cases.⁷⁶ When courts' legal and/or moral⁷⁷ duties and the methodological aspects of their interpretative activity do take centre stage, scholars generally ignore international law.

2.2 Domestic Bias

This last remark leads us to a second point: while the nature and essence of judicial reasoning is one of the old chestnuts of jurisprudence,⁷⁸ legal theorists and

Marje Mülder and others (eds), *Richterliche Unabhängigkeit: Rechtsfindung im Öffentlichen Recht*, 58. Assistierendentagung Öffentliches Recht (Nomos 2018). For a counterexample, see Juliette McIntyre, 'Same Pod, Different Peas: The Vienna Convention on the Law of Treaties in Australian and Canadian Courts' (2017) 3 *Canadian Journal of Comparative and Contemporary Law* 19.

73 Sienho Yee, 'Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases' (2016) 7 *Journal of International Dispute Settlement* 472; Maurice Mendelson, 'The International Court of Justice and the Sources of International Law' in Malgosia Fitzmaurice and Alan Vaughan Lowe (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996); Niels Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law' (2017) 28 *European Journal of International Law* 357; Neha Jain, 'Judicial Lawmaking and General Principles of Law in International Criminal Law' (2016) 57 *Harvard International Law Journal* 111; Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion' (2015) 26 *European Journal of International Law* 417.

74 See the contributions in Aust and Nolte (n 47).

75 Duncan Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 *Journal of Legal Education* 518; Julia Hänni, *Vom Gefühl am Grund der Rechtsfindung: Rechtsmethodik, Objektivität und Emotionalität in der Rechtsanwendung* (Duncker & Humblot 2011).

76 Adrian Vermeule, 'Interpretive Choice' (2000) 75 *New York University Law Review* 74.

77 For a seminal account of how judges should decide cases, see Ronald Dworkin, *Law's Empire* (Belknap Press 1986).

78 HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 1994); Dworkin (n 77); Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press 1997); Julie Dickson, 'Interpretation and Coherence in Legal Reasoning', *Stanford Encyclopedia of Philosophy* (2001) <plato.stanford.edu/archives/spr2010/entries/legal-reas-interpret>; Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009).

philosophers have (but for a few exceptions)⁷⁹ shied away from international law.⁸⁰ Seminal work that has dealt with international law at the margins, such as HLA Hart's *Concept of Law*,⁸¹ is outdated, at least with regard to newer developments on the international plane.⁸² In recent years, calls for an expansion of the scope of 'municipal' jurisprudence have become more vocal,⁸³ and there have been scholarly efforts to address this jurisprudential blind spot⁸⁴ and to analyze judicial interpretation in international law.⁸⁵ Yet domestic courts and the interpretative methods of international law have made only rare

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- 79 Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010); Jeremy Waldron, 'International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?' in Luís Duarte d'Almeida, James Edwards, and Andrea Dolcetti (eds), *Reading HLA Hart's 'The Concept of Law'* (Hart Publishing 2013); George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007); Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (Oxford University Press 2013); John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 238 ff; William Twining, *General Jurisprudence: Understanding Law From a Global Perspective* (Cambridge University Press 2009); Keith Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford University Press 2010); Julie Dickson, 'Who's Afraid of Transnational Legal Theory? Dangers and Desiderata' (2015) 6 *Transnational Legal Theory* 565; Timothy Endicott, "International Meaning": Comity in Fundamental Rights Adjudication' (2002) 13 *International Journal of Refugee Law* 280.
- 80 Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 78); Dworkin (n 77); Timothy Endicott, *Vagueness in Law* (Oxford University Press 2000); Michel Troper, Véronique Champeil-Desplats, and Christophe Grzegorzczak (eds), *Théorie des contraintes juridiques* (LGDJ/Bruylant 2005); Fuller (n 20); Patrick S Atiyah and Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1987).
- 81 Hart (n 78) ch x. For a critique: Waldron, 'International Law: "A Relatively Small and Unimportant" Part of Jurisprudence?' (n 79).
- 82 Such recent trends include the growth of international adjudication, the shift from interstate to intrastate international law, and the codification of secondary norms of international law.
- 83 Joseph Raz, 'Why the State?' (2014) <papers.ssrn.com/sol3/papers.cfm?abstract_id=2339522>. On this evolution, see McCrudden (n 7) 644.
- 84 Besson and Tasioulas (n 79); Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* (Cambridge University Press 2014).
- 85 Samantha Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' in Cesare Romano, Karen Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014); Hervé Ascensio, 'La notion de juridiction internationale en question' in SFDI (ed), *La juridictionnalisation du droit international* (Pedone 2003); Samantha Besson and Andreas R Ziegler (eds), *Le juge en droit européen et international / The Judge in European and International Law* (Schulthess 2013).

appearances in this context.⁸⁶ This gap is regrettable, since important insights have been gained on the nature and essence of judicial reasoning in domestic law. These analyses can undoubtedly be useful to international law if they are adjusted to the specificities of international lawmaking.

2.3 'Amour Impossible'

Third, although domestic judicial decisions are frequently relied upon *qua* interpretative guides in international legal practice, their place in the sources of international law is obscured by art. 38(1) ICJ Statute. This provision ambiguously refers to 'judicial decisions' as 'subsidiary means for the determination of rules of [international] law'. It reflects the 'amour impossible'⁸⁷ between the doctrine of the sources of international law and the influence that international⁸⁸ and domestic adjudication exert on international law in practice. While there is widespread agreement among scholars and practitioners that domestic rulings are not a source of international law, these actors often struggle to legally characterize the 'influence' that domestic courts have on the formation and evolution of international law. In practice, there is no doubt that domestic rulings on international law attract interest. They are included in many international law casebooks⁸⁹ which, already early on, contained 'copious references'⁹⁰ to them. They appear in domestic law digests,⁹¹ and they are compiled in online databases.⁹² Yet it is rarely explicitly acknowledged that these rulings contribute to the formation and evolution of treaty law, CIL, and general principles of international law, and that they are auxiliary means that help interpreters of international law in subsequent cases (*infra*, Chapter 4, section 3).

86 See however Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56); Fatimata Niang, 'De quelques contraintes européennes sur le juge suisse' in Samantha Besson and Andreas R Ziegler (eds), *Le juge en droit européen et international / The Judge in European and International Law* (Schulthess 2013).

87 Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' (n 85); Ascensio (n 85).

88 Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' (n 85).

89 Among many others: Samantha Besson, *Droit international public: Abrégé de cours et résumés de jurisprudence* (3rd edn, Stämpfli 2016); Barry E Carter and Allen S Weiner, *International Law* (6th edn, Wolters Kluwer 2011). See also, more recently, André Nollkaemper and August Reinisch (eds), *International Law in Domestic Courts: A Casebook* (Oxford University Press 2018).

90 Lauterpacht, 'Municipal Decisions as Sources of International Law' (n 50) 68, footnote 1.

91 Eg ibid 67 f, footnote 1. On this issue, see Jennings (n 40).

92 ILDC (n 48). See also the International Law Reports, <www.cambridge.org/core/series/international-law-reports/69C73E3843D70A8CDB15CFA24351CC27>.

2.4 *Legal Imperative*

The lack of attention to domestic courts' interpretative methods when they interpret international law is problematic from the perspective of States' international obligations. This aspect is sometimes neglected in practice and scholarship.⁹³ It is important to point out that in this study, I focus on what international law requires. However, the law's interpretative methods must also be respected in virtue of domestic law, as I will emphasize (Chapter 6, *infra*).

Societies governed by law cannot afford to defer to judicial 'pragmatism', or to 'pragmatic methodological pluralism', as Swiss courts call their own interpretative approach (*infra*, section 3, and Chapter 3, 4.2.6). States (including judges) must abide by the law and its interpretative methods. This is true with regard to both domestic and international law, which share the same basic interpretative methods despite some differences that exist between domestic and international lawmaking (*infra*, Chapter 5, 3.3). Pragmatism hinders this objective when it is unpredictable, opaque, and inconsistent.

In this study, I primarily focus on States' legal duties, which States must honor via their organs, including their courts. More specifically, I zoom in on the law's interpretative methods. I do not study other moral duties and principles affecting the way courts should interpret international law, such as the principle of the rule of law, the principle of judicial integrity, and the principle of fidelity to the law. While these moral duties are undoubtedly important and have a major influence on judicial reasoning, the complex issues they raise must be left for another occasion.

My study is not limited to evaluating whether Swiss courts' interpretations conform with what the law requires: I also examine whether these interpretations are good interpretations, in the sense that they succeed in illuminating the legal meaning of their object in a predictable, clear, and consistent way. Whether these characteristics of what makes a high-quality interpretation contribute to the legitimacy of this interpretation is beyond the scope of my project. Instead, I start from the assumption that these virtues are set by legal practice itself, be it domestic or international, and that it is worthwhile to pursue them. The fact that these virtues are aspirational, that there might be tensions between some of them, and that courts often fail to meet them, does not mean that these virtues are not and should not be used as guides. As a matter of fact, adherence to them pervades our legal practices, and both domestic and international lawyers and scholars routinely use them to evaluate judicial interpretations.

93 Jan Klabbbers, 'Virtuous Interpretation' in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff 2010). See also the case law discussed in Chapters 7 and 8 (*infra*).

2.5 *Swiss Gap*

As of today, a comprehensive scholarly overview and evaluation of the Swiss judicial practice of international law from the perspective of interpretative methods is missing. Scholars have analyzed the ‘Europeanization’⁹⁴ and ‘internationalization’ (or ‘globalization’)⁹⁵ of Swiss law and politics. They have highlighted the growing empirical relevance international law has had in the Swiss legal order in recent decades.⁹⁶ Articles have been devoted to the persuasive authority of EU law in the Swiss legal and judicial practice,⁹⁷ and to the way Swiss courts deal with conflicts between domestic law and IHRL.⁹⁸ Some monographs address selected aspects of Swiss courts’ application of international law, eg by compiling existing case summaries⁹⁹ or by highlighting specific features of the case law.¹⁰⁰ However, there is no overarching account of how Swiss courts do and must interpret international law that is not confined to particular substantive areas,¹⁰¹

94 Emilie Kohler, *Le rôle du droit de l’Union européenne dans l’interprétation du droit suisse* (Stämpfli 2015); Francesco Maiani, ‘Lost in Translation: Euro-Compatibility, Legal Security, and the Autonomous Implementation of EU Law in Switzerland’ (2013) 1 *European Law Reporter* 29.

95 Eg Carl Baudenbacher, ‘Judicial Globalization: New Development or Old Wine in New Bottles?’ (2003) 38 *Texas International Law Journal* 505; Wolf Linder, ‘Swiss Legislation in the Era of Globalisation: A Quantitative Assessment of Federal Legislation (1983–2007)’ (2014) 20 *Swiss Political Science Review* 223.

96 Linder (n 95).

97 Francesco Maiani, ‘La “saga Metock”, ou des inconvénients du pragmatisme helvétique dans la gestion des rapports entre droit européen, droit bilatéral et droit interne’ (2011) 130 *Zeitschrift für Schweizerisches Recht / Revue de droit suisse* 27; Maiani (n 94); Samantha Besson and Odile Ammann, ‘L’interprétation des accords bilatéraux Suisse-UE : une lecture de droit international’ in Astrid Epiney and Stefan Diezig (eds), *Schweizerisches Jahrbuch für Europarecht 2013/2014 / Annuaire suisse de droit européen 2013/2014* (Schulthess 2014).

98 Eva Maria Belser and Rekha Oleschak Pillai, ‘Engagement of Swiss Courts With International Law: Looking at the Swiss Federal Supreme Court and Its Ways of Dealing With Conflicts Between Domestic Law and International Human Rights Guarantees’ (on file with author).

99 Andreas R Ziegler (ed), *La jurisprudence suisse du droit international public : les grands arrêts du Tribunal fédéral suisse de droit international public* (Dike 2015).

100 Helen Keller, *Rezeption des Völkerrechts: Eine rechtsvergleichende Studie zur Praxis des u.s. Supreme Court, des Gerichtshofes der Europäischen Gemeinschaften und des schweizerischen Bundesgerichts in ausgewählten Bereichen* (Springer 2003).

101 Olivier Jacot-Guillarmod, *Le juge national face au droit européen : perspective suisse et communautaire* (Helbing & Lichtenhahn/Bruylant 1993); Astrid Epiney, Beate Metz, and Benedikt Pirker, *Zur Parallelität der Rechtsentwicklung in der EU und in der Schweiz: Ein Beitrag zur rechtlichen Tragweite der ‘Bilateralen Abkommen’* (Schulthess 2012); Eleanor Cashin Ritaine, ‘Le juge suisse confronté au droit étranger’ (2015) 25

sources,¹⁰² or norms¹⁰³ of international law, or to particular aspects of the relationship between Swiss law and international law.¹⁰⁴ Most contributions dealing with Swiss courts' interpretative methods focus on domestic law¹⁰⁵ and the so-called 'pragmatic methodological pluralism'¹⁰⁶ used by the Swiss Federal Tribunal to interpret Swiss law. They often do so without challenging this pragmatic approach, and without looking at how it plays out with regard to international law.¹⁰⁷ Foreign (non-Swiss) legal scholars sometimes mention

Schweizerische Zeitschrift für internationales und europäisches Recht / Revue suisse de droit international et de droit européen 33; Vanessa Thalmann, *Reasonable and Effective Universality: Conditions to the Exercise by National Courts of Universal Jurisdiction* (Schulthess 2018).

- 102 Mario Kronauer, *Die Auslegung von Staatsverträgen durch das Schweizerische Bundesgericht* (Polygraphischer Verlag 1972); Simonetta Stirling-Zanda, 'The Determination of Customary International Law in European Courts (France, Germany, Italy, The Netherlands, Spain, Switzerland)' (2004) 4 *Non-State Actors and International Law* 3; Olivier Jacot-Guillarmod, 'Strasbourg, Luxembourg, Lausanne et Lucerne: Méthodes d'interprétation comparées de la règle internationale conventionnelle' in Jean-François Perrin (ed), *Les règles d'interprétation: principes communément admis par les juridictions, Enseignement du 3e cycle de droit 1988* (Editions universitaires, 1989); Besson and Ammann (n 60).
- 103 Xavier Oberson, 'Récents développements dans le droit de l'assistance internationale en matière fiscale, notamment avec les Etats-Unis: sept leçons à tirer de l'affaire UBS' in François Bellanger and Jacques de Werra (eds), *Genève au confluent du droit interne et du droit international: Mélanges offerts par la Faculté de droit de l'Université de Genève à la Société suisse des juristes à l'occasion du Congrès 2012* (Schulthess 2012); Gregor T Chatton, *Vers la pleine reconnaissance des droits économiques, sociaux et culturels* (Schulthess 2014); Epiney, Metz, and Pirker (n 101).
- 104 Daniel Wüger, *Anwendbarkeit und Justiziabilität völkerrechtlicher Normen im schweizerischen Recht: Grundlagen, Methoden und Kriterien* (Stämpfli 2005).
- 105 Ernst Kramer, *Juristische Methodenlehre* (4th edn, CH Beck/MANZ/Stämpfli 2013); Alain Papaux, *Introduction à la philosophie du 'droit en situation': de la codification légaliste au droit prudentiel* (Schulthess 2006); Tornike Keshelava, *Der Methodenpluralismus und die ratio legis: Eine sprachkritische Untersuchung* (Schulthess 2012); Pascal Pichonnaz and Stefan Vogenauer, 'Le "pluralisme pragmatique" du Tribunal fédéral: une méthode sans méthode? Réflexions sur l'ATF 123 III 292' (1999) *Aktuelle juristische Praxis / Pratique juridique actuelle* 417; Marc Amstutz and Marcel Alexander Niggli, 'Recht und Wittgenstein I, Wittgensteins Philosophie als Bedrohung der rechtswissenschaftlichen Methodenlehre' in Pierre Tercier (ed), *Gauchs Welt: Festschrift für Peter Gauch zum 65. Geburtstag* (Schulthess 2004).
- 106 As I will explain in more detail (*infra*, Chapter 3, 4.2.6), 'pragmatism' is used by the Court to denote an anti-theoretical approach, on the one hand, and a result-oriented one, on the other. 'Pluralism' designates the fact that the Court does not accept any hierarchy among the interpretative methods.
- 107 On this issue, see Besson and Ammann (n 97).

Swiss cases to illustrate their theories and findings,¹⁰⁸ but they seldom go beyond the cases available in the ILDC database of Oxford University Press.¹⁰⁹ This is problematic, be it only because the small sample of Swiss decisions included is hardly representative.¹¹⁰

3 Why Switzerland?

To study the interpretation of international law in domestic courts without looking at a specific domestic legal order has the advantage of yielding broadly applicable findings about the domestic judicial practice. However, the difficulty with such an approach is that many domestic legal (and, of course, extra-legal) features constrain¹¹¹ and influence how the courts of a given State interpret international law. Some States are monist and directly incorporate international law into their legal order. Others are dualist and require that international law be transposed domestically in order to be valid under domestic law. In some jurisdictions, courts are bound by a doctrine of *stare decisis*. In others, adherence to precedent is not a judicial duty, even if judges usually seek to maintain consistency across cases. Some courts issue majority, plurality, and dissenting opinions, have transparent voting procedures, and have the legal power to strike down laws deemed unconstitutional and/or incompatible with their State's international obligations, while courts in other States do not. Some nations are members of many international and regional organizations and host a range of such organizations on their territory. Others are more isolated and, therefore, are not confronted with specific international legal issues.

Explaining and evaluating the features of domestic courts' interpretative activity while remaining disconnected from the idiosyncrasies of domestic legal orders risks generating very thin findings that remain at a high level of generality. As the domestic judicial practice of international law is heterogeneous,¹¹² entering the 'domestic thicket'¹¹³ in which international law is embedded

108 Mathias Forteau, 'The Role of the International Rules of Interpretation for the Determination of Direct Effect of International Agreements' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016); Nollkaemper, *National Courts and the International Rule of Law* (n 47).

109 Forteau (n 108); Nollkaemper, *National Courts and the International Rule of Law* (n 47).

110 As of June 2019, the database contained 37 Swiss decisions.

111 On this concept, see Troper, Champeil-Desplats, and Grzegorzczak (n 80).

112 Nolte (n 42).

113 Carter and Weiner (n 89) 150.

provides a richer understanding of how international law penetrates domestic legal orders, and of how the domestic judicial practice must and can be improved.

While some insights about the courts of one State cannot be generalized, others are more broadly applicable. Some international legal issues arise more frequently in some jurisdictions than in others, and this practice can inform courts in other States with less experience of such issues. Moreover, the Swiss legal order is influenced by the legal systems of France, Germany, Italy, the United States and, in recent years, increasingly by EU law, which warrants cross-fertilization. The conditions under which domestic legal orders can borrow from the practice of other States are complex. They represent a core issue in comparative law that I cannot fully develop here. Instead, I want to stress that Swiss courts' practice of international law offers an interesting case study for a variety of reasons. These reasons, I argue, outweigh other factors that could speak against taking Switzerland as a main example, eg its relatively small population, its idiosyncratic foreign policy, and its moderate, if not weak geopolitical power (which could justify labelling Switzerland a 'semiperipheral' State).¹¹⁴

First, Switzerland is monist (*infra*, Chapter 3, 2.2.1): international law is interpreted by Swiss courts without having to be transposed into domestic law and, therefore, without prior legislative intervention.¹¹⁵ Courts in dualist States interpret international law too, albeit in its 'domesticated' form. Given the absence of such a legislative filter in Switzerland,¹¹⁶ Swiss courts' contribution to the domestic interpretation of international law is likely to be significant.

Second, because of the characteristics of Swiss foreign relations (*infra*, Chapter 3, 2.1), eg the presence of numerous IOs on Switzerland's territory and its treaty relationships with other States and organizations like the EU, the Swiss legal order is confronted with a range of international legal issues that may not exist, or be as salient, in other States.

Third, Swiss courts' institutional relationship to the political branches is noteworthy. Indeed, Swiss judges operate in a semi-direct democracy where citizens can have a say on issues of foreign relations and on the relationship

¹¹⁴ This terminology is used by Anthea Roberts. See Roberts, *Is International Law International?* (n 9) 45.

¹¹⁵ One could argue that all States are initially dualist, since they have the power to establish the conditions under which international law is given effect in their legal order. If one follows this view, States subsequently become monist or dualist.

¹¹⁶ Of course, Swiss courts also interpret domestic legislation that implements international legal obligations.

between domestic law and international law (*infra*, Chapter 3, 3.4). Moreover, Swiss judges are typically elected by the legislature and, as a result, affiliated with a political party (*infra*, Chapter 3, 4.2.4). This proximity of politics to foreign relations law, on the one hand, and to courts, on the other, is based on considerations of democratic legitimacy. It also makes it all the more important that Swiss courts maintain the independence and impartiality required by their domestic legal duty to abide by the law and by some of Switzerland's international obligations.

Fourth, the Swiss State has an ambiguous relationship to international law. One important cause of ambivalence is the recent success, at the ballot box, of political initiatives challenging Switzerland's existing international obligations, but it is not the only one. Other factors include Switzerland's commitment to neutrality, and its reluctance to join organizations such as the EU and, until 2003, the UN (*infra*, Chapter 3, 2.1). Of course, this ambiguity exists in the vast majority of States, yet the combination of the aforementioned factors, including this 'Swiss exceptionalism', makes the Swiss case law particularly intriguing.

Fifth, Swiss courts rely on a so-called 'pragmatic methodological pluralism' to interpret the law, including international law. (For a more detailed analysis of this concept, see *infra*, Chapter 3, 4.2.6.) In short, 'pragmatism' (as the term is used by the Swiss Federal Tribunal, and in contrast with its philosophical meaning)¹¹⁷ describes Swiss judges' result-oriented and anti-theoretical approach to interpretation. 'Pluralism' denotes their rejection of any hierarchy between the law's interpretative methods. Especially due to Swiss courts' pragmatism, and due to the fact that this anti-theoretical flavor is also reflected in many Swiss scholarly pieces on judicial interpretation,¹¹⁸ the Swiss case law needs further theorizing. This also applies to international law: as Eva Maria Belser and Rekha Oleschak Pillai note, '[t]he way in which domestic courts in Switzerland engage with international law and how they choose between avoidance, alignment and contestation strategies is often difficult to predict and sometimes hard to understand'.¹¹⁹

Finally, despite its aforementioned idiosyncratic features, Switzerland is left out of the vast majority of comparative analyses of domestic courts'

117 Christopher Hookway, 'Pragmatism', *Stanford Encyclopedia of Philosophy* (2008) <plato.stanford.edu/entries/pragmatism>.

118 Hans Peter Walter, 'Die Praxis hat damit keine Mühe ... oder worin unterscheidet sich die pragmatische Rechtsanwendung von der doktrinen Gesetzauslegung – wenn überhaupt?' (2008) 144 *Zeitschrift des Bernischen Juristenvereins* 126.

119 Belser and Oleschak Pillai (n 98) 1.

interpretation of international law.¹²⁰ More generally, English-speaking jurisdictions such as the United States and the United Kingdom are overrepresented in relevant scholarship (*inter alia* out of linguistic convenience),¹²¹ but also in databases providing access to domestic judgments pertaining to international law. Moreover, relatively few publications include the Swiss legal order.¹²² These gaps are unfortunate, especially given Switzerland's good overall compliance with international law¹²³ and its democratic political culture. One of my aims is thus to make the Swiss practice more accessible to scholars and practitioners. While considerations of visibility (and, for publishers, profitability) increasingly constrain the choices scholars make when determining which jurisdictions to focus on, there is a case for studying small States, too. International legal scholarship must also focus on less 'mainstream' domestic legal orders than the usual suspects, namely the United States, the United Kingdom, etc. As Gelter and Siems note, 'lawyers, judges, and legal scholars in the smaller country in such an asymmetric relationship often are aware of current legal developments in the larger one, while jurists from the larger country remain ignorant about developments in the smaller one'.¹²⁴ Moreover, contrary to many large and powerful States, smaller and less influential States have a strong interest in ensuring that international legal obligations are taken seriously.¹²⁵

120 Aust and Nolte (n 47); Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Brill/Nijhoff 1997); Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press 2011); David L Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009).

121 See the examples cited in 'Article 19. Interpretation of Treaties' (1935) 29 *American Journal of International Law* 937.

122 There are some exceptions, of course, eg Neumann and Peters (n 12); Stirling-Zanda (n 102); Andreas R Ziegler, 'Subtle but Enduring – The Role of Domestic Courts in the Shaping of International Economic Law Through Proper Interpretation of Domestic Law: The WTO Agreement Before Swiss Courts' in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing 2012); Thurnherr (n 12); Keller (n 100).

123 On the ECHR, for instance, see Switzerland Press Country Profile (last updated in April 2019), <www.echr.coe.int/Documents/CP_Switzerland_ENG.pdf>. See also the (overall positive) concluding observations of the various UN treaty bodies pertaining to Switzerland, <tbinetnet.ohchr.org/_layouts/TreatyBodyExternal/TBSearch.aspx>.

124 Martin Gelter and Mathias M Siems, 'Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe' (2014) 21 *Supreme Court Economic Review* 215, 247.

125 Federal Council, *Botschaft zur Volksinitiative 'Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)'*, FG 2017 5355, at 5407.

4 Why Courts?

One could argue that international law (just like domestic law) is ‘interpreted’ by a broad range of actors: governments, diplomats, legislatures, IOs, NGOs, corporations, judges, municipal officials, lawyers, and other individuals all engage in international legal interpretation.¹²⁶

This is indeed true if we consider the broad meaning of ‘legal interpretation’ in ordinary language.¹²⁷ Moreover, some international legal acts are predominantly interpreted by specific authorities. In Switzerland, CIL is mostly interpreted by the federal executive, less frequently by courts, and only exceptionally by the legislature.¹²⁸ Yet not all actors we loosely consider to be ‘legal interpreters’ have the legal duty to explain the law’s meaning to others,¹²⁹ and the power to do so in a legally authoritative way, ie, in a way that gives reasons for action to the law’s subjects. Courts, on which I focus, are unique in this respect.

Still, why narrow down my study to the interpretations of ‘judges in black robes’,¹³⁰ instead of taking a broader look at how international law must be interpreted by legal officials? Why focus on domestic courts, ie, on judicial institutions constituted by domestic law, of which the jurisdiction and procedural law are governed by domestic law?¹³¹

This choice is justified because, in contemporary societies governed by law, courts have the legal duty to provide reasons for their decisions.¹³² Given courts’ duty to obey the law, these reasons must be legally relevant; otherwise, courts act unlawfully.¹³³ Said reasons must show that the judicial decision is indeed required by law, as opposed to policy, tradition, or etiquette. Other State

¹²⁶ Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press 2012); Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015).

¹²⁷ Raquel Barradas de Freitas, *Explaining Meaning: Towards a Minimalist Account of Legal Interpretation* (University of Oxford 2013, on file with author) 2 f.

¹²⁸ Besson and Ammann (n 60).

¹²⁹ Barradas de Freitas (n 127) 2 f.

¹³⁰ Dworkin (n 77) 12.

¹³¹ See *e contrario* Besson, ‘Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication’ (n 85) 418.

¹³² Zenon Bankowski and others, ‘On Method and Methodology’ in D Neil MacCormick and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (Aldershot 1991) 13 f; Hutchinson and Duncan (n 7) 107.

¹³³ Barradas de Freitas (n 127) 182.

organs do not have comparable duties: provided it respects the applicable legal procedure, the executive can make decisions based on strategic considerations, and domestic legislatures typically adopt new laws because such laws are deemed opportune by their majority. By contrast, as US Supreme Court Justice John Marshall famously held in *Marbury v. Madison*, '[i]t is emphatically the province and duty of the judicial department to say what the law is'.¹³⁴ Thus, judicial interpretation lends itself particularly well to legal analysis. It is also worth recalling that we (lawyers) typically¹³⁵ evaluate judicial interpretations based on the extent to which they are lawful, predictable, clear, and consistent. We do not simply assess them based on their rhetorical appeal or a cost-benefit analysis, for instance. It is precisely such a legal evaluation that I undertake in this study.

5 Why Domestic Courts?

If courts are particularly interesting (*supra*, section 4), why study domestic courts rather than international ones?¹³⁶ One reason is that, from the perspective of the sources of international law, domestic judicial decisions help ascertain international law in general (art. 38(1)(d) ICJ Statute), but also – and this distinguishes them from international rulings – constitute elements for its determination (art. 38(1)(a)–(c) ICJ Statute) (*infra*, Chapter 4, section 3). Indeed, a domestic ruling, if consolidated by the practice of other national institutions and States, can shape the 'subsequent practice' of the parties to a treaty (art. 38(1)(a) ICJ Statute, art. 31(3)(b) VCLT), lead to the emergence of CIL (art. 38(1)(b) ICJ Statute), or express States' recognition of a general principle of law (art. 38(1)(c) ICJ Statute). Moreover, like international rulings, domestic judgments are 'subsidiary means for the determination of rules of [international] law' (art. 38(1)(d) ICJ Statute). The more these rulings conform to the criteria of legality and high-quality reasoning (*supra*, Introduction, section 3), the more guidance they provide for future interpretations of international law, both domestically and on the international plane.

Of course, domestic rulings also distinguish themselves in virtue of their legal authority in the domestic legal order. Some international courts (such as

¹³⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), at 177.

¹³⁵ At least to the extent we engage in doctrinal and theoretical legal analysis, and not in moral or political philosophy, for instance.

¹³⁶ I clarify the notions of 'domestic court' and 'international court' in Chapter 2, section 4 (*infra*).

the ECtHR or the ICJ) have the power – subject to the characteristics of their respective jurisdiction – to authoritatively determine States' rights and obligations. Yet States are usually free to choose the means by which to enforce such rulings domestically. By contrast, domestic rulings are always legally authoritative domestically, unless they are appealed to a higher domestic instance. They can hence give effect to the State's international legal obligations in the domestic legal order. Domestic rulings have decisional authority, but also, in some cases, interpretive authority in the domestic legal order (ie, authority in the context of future interpretations of the law).¹³⁷

Another reason that makes it worthwhile to focus on domestic courts is that they adjudicate a broader range of issues than international judges. Indeed, in principle,¹³⁸ domestic courts' jurisdiction encompasses domestic law, international law (be it in its domesticated or in its original form, depending on whether the domestic legal order is dualist or monist), and issues pertaining to the relationship between domestic and international law. International judges, by contrast, usually have jurisdiction over a narrower subset of issues, and they do not in principle interpret domestic law (*infra*, Chapter 2, section 4). Due to the scope of their jurisdiction, it is all the more important that domestic courts reach their decisions in conformity with what the law and high-quality legal reasoning require.

Moreover, as Hege Elisabeth Kjos notes, 'international courts and tribunals stand in the shadow of domestic courts when it comes to the number of cases rendered with a public international law dimension'.¹³⁹ This justifies looking at domestic courts, and not merely at international ones, as is often the case in scholarship.

In this book, I distinguish domestic courts from regional ones, such as the ECtHR or the CJEU. The latter have the legal power to bind a number of States,

137 On the distinction between decisional and interpretive authority in the context of international adjudication, see Samantha Besson, 'The Erga Omnes Effect of Judgments of the European Court of Human Rights – What's in a Name?' in Samantha Besson (ed), *La Cour européenne des droits de l'homme après le Protocole 14 : Premier bilan et perspectives / The European Court of Human Rights After Protocol 14: Preliminary Assessment and Perspectives* (Schulthess 2011) 129; Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' (n 85) 420.

138 Some international legal issues may be removed from domestic courts' jurisdiction, eg Chapter 3, 4.2.1 (*infra*).

139 Hege Elisabeth Kjos, 'International Law Through the National Prism: The Role of Domestic Law and Jurisprudence in Shaping International Investment Law' in Mary E Footer, August Reinisch, and Christina Binder (eds), *International Law and ... Select Proceedings of the European Society of International Law, Vol 5, 2014* (Hart Publishing 2016) 269.

which usually belong to a specific geographic area, and which have accepted the jurisdiction of these regional judicial bodies. Admittedly, given its position as the highest court of an autonomous legal order (which is not the case of the ECtHR), the CJEU can be likened to a domestic court in cases where it interprets international law.¹⁴⁰ Yet the fact that the EU legal order is integrated into domestic legal orders and that international law is interpreted both at the EU level and by the courts of the EU Member States adds a layer of complexity to the analysis. This limits the applicability of the 'domestic court' analogy.

I also distinguish domestic courts from hybrid ones, such as the Special Tribunal for Lebanon or the Extraordinary Chambers in the Courts of Cambodia. The jurisdiction and/or procedural law of hybrid courts are governed by both domestic and international law, and these courts usually operate for a limited period, with a narrower jurisdiction than domestic courts. Hybrid courts hence form a category of their own.

It is important to stress than by emphasizing the role of domestic courts, my aim is not to suggest that these courts should step in and solve every issue that arises at the interface of the domestic legal order and international law. The rule of law is sometimes (erroneously) viewed as 'synonymous with "the rule of the Courts"'.¹⁴¹ In liberal democracies like Switzerland (*infra*, Chapter 3, section 3), fundamental decisions that affect a society should be made at the ballot or in parliament rather than in the courtroom. Still, domestic judgments shape international law and its relationship to domestic law (and, of course, domestic law itself). This fact is often ignored or sidelined in scholarly¹⁴² and

¹⁴⁰ ILA, '(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15) 2; ILA, 'Preliminary Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61) 2; Helmut Philipp Aust, Alejandro Rodiles, and Peter Staubach, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 *Leiden Journal of International Law* 75, 100. On this issue, see eg Jed Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?' (2014) 3 *Cambridge Journal of International and Comparative Law* 696; Odile Ammann, 'The Court of Justice of the European Union and the Interpretation of International Legal Norms: To Be or Not to Be a "Domestic" Court?' in Samantha Besson and Nicolas Levrat (eds), *L'Union européenne et le droit international / The European Union and International Law* (Schulthess 2015).

¹⁴¹ Arthur Lehman Goodhart, 'The Nature of International Law' (1936) 22 *Transactions of the Grotius Society* 31, 85.

¹⁴² Andreas Glaser, 'Umsetzung und Durchführung des Rechts der Bilateralen Verträge in der Schweiz: Institutionen und Verfahren' in Andreas Glaser and Lorenz Langer (eds), *Die Verfassungsdynamik der europäischen Integration und demokratische Partizipation: Erfahrungen und Perspektiven in Österreich und der Schweiz* (Dike/Nomos/

official¹⁴³ analyses of (and public debates on) the relationship between domestic and international law. It is therefore important to scrutinize domestic courts' activity and, if necessary, to formulate recommendations for its improvement.

6 Why International Law?

Do domestic courts deal with legal acts that are distinctive from domestic ones when they interpret international law? Arguably not, for in some respects, the 'divide' between domestic and international law is anything but sharp.¹⁴⁴ Written and unwritten law, agreements (both private and public), custom, and general principles exist in both domestic and international law. Many sources of international law draw upon State practice. Domestic laws often mention the State's international legal obligations, and domestic legal practices enable (or undermine) the observance of these obligations in the domestic legal order. State organs implement both domestic and international law.¹⁴⁵ Importantly, the respective subject matters of these two bodies of law tend to converge,¹⁴⁶ especially due to the proliferation of 'inward-looking'¹⁴⁷ international legal norms governing States' conduct within their own jurisdiction.

Because of these overlaps between domestic and international law (which scholars have captured via concepts such as 'consubstantial norms',¹⁴⁸

facultas 2015); Andreas Glaser and Lorenz Langer, 'Die Institutionalisierung der Bilateralen Verträge: Eine Herausforderung für die schweizerische Demokratie' (2013) 23 Schweizerische Zeitschrift für internationales und europäisches Recht / Revue suisse de droit international et de droit européen 563.

143 Federal Council, *Das Verhältnis von Völkerrecht und Landesrecht, Bericht des Bundesrates in Erfüllung des Postulats 07.3764 der Kommission für Rechtsfragen des Ständerates vom 16. Oktober 2007 und des Postulats 08.3765 der Staatspolitischen Kommission des Nationalrates vom 20. November 2008*, 5 March 2010, FG 2010 2263 (hereinafter: Federal Council, 2010 Report on International and Domestic Law).

144 Janne E Nijman and André Nollkaemper, 'Introduction' in Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press 2007).

145 Jonkheer HF van Panhuys, 'Relations and Interactions Between International and National Scenes of Law' (1964) 112 *Recueil des cours de l'Académie de droit international* 7.

146 Ximena Fuentes Torrijo, 'International Law and Domestic Law: Definitely an Odd Couple' (2008) 77 *Revista Jurídica Universidad de Puerto Rico* 483.

147 Christian J Tams and Antonios Tzanakopoulos, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 *Leiden Journal of International Law* 531, 534.

148 Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (n 57); ILA, 'Preliminary Report of the ILA Study Group on

‘multi-sourced equivalent norms’,¹⁴⁹ or ‘interface norms’),¹⁵⁰ it could be argued that when domestic courts interpret international law, their activity is not fundamentally different from the interpretation of domestic law. Yet domestic laws should not be equated too hastily with international ones, as domestic and international lawmaking processes are distinct.¹⁵¹ While domestic laws are created by the legislature of one State (and, to a certain extent, by this State’s judicial and executive organs), international lawmaking typically involves at least two States via their organs.¹⁵² This difference determines the way international law must be interpreted. For instance, one cannot solely resort to one State’s unilateral, internal practice to ascertain international law. Domestic courts must take the characteristics of international lawmaking into account. Otherwise, they are not interpreting the *interpretandum*.

International law creates distinctive challenges for legal interpreters, not only because its process of formation differs from that of domestic norms, but also because it is frequently vague, as I will argue in more detail (*infra*, Chapter 5, 4.1.2).¹⁵³ Unfortunately, and to expand on my previous remarks on the topic (*supra*, 2.2), legal theorists and philosophers have tended to neglect international law, with the exception, perhaps, of international human rights law.¹⁵⁴ Detailed jurisprudential analyses of the interpretation of international

Principles on the Engagement of Domestic Courts With International Law’ (n 61); ILA, ‘(Study Group on) Principles on the Engagement of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law’ (n 15) 13. For a critique of this terminology (but not of the existence of relationships between domestic and international law, eg in IHRL): Besson, ‘Human Rights’ Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators’ (n 56).

149 Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing 2011).

150 Nico Krisch, ‘Pluralism in International Law and Beyond’ (2015) 8 <papers.ssrn.com/sol3/papers.cfm?abstract_id=2613930>.

151 Samantha Besson, ‘Theorizing the Sources of International Law’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 167.

152 See also Mattias Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 *European Journal of International Law* 907, 915.

153 On vagueness, see Hart (n 78) 124 ff. On its relationship to open texture, see Friedrich Waismann, ‘Symposium: Verifiability’ (1945) 19 *Proceedings of the Aristotelian Society* 119, 123; Joseph Horowitz, *Law and Logic: A Critical Account of Legal Argument* (Springer 1972) 9; Frederick Schauer, ‘On the Open Texture of Law’ (2011) 4 f <papers.ssrn.com/sol3/papers.cfm?abstract_id=1926855>. See also *infra*, Chapter 5.

154 Eg Endicott, ‘“International Meaning”: Comity in Fundamental Rights Adjudication’ (n 79); Kristen Hessler, ‘Resolving Interpretive Conflicts in International Human Rights Law’ (2005) 13 *Journal of Political Philosophy* 29.

law are rare in canonical works of legal theory. Even scholars who have provided seminal descriptive or normative accounts of the mechanics of domestic adjudication have often bracketed international law.¹⁵⁵ This also applies to Swiss scholarship on domestic adjudication. As Holger Fleischer notes, ‘most literature on [legal interpretation and statutory interpretation] still treats interpretative methodology as a national field of study’.¹⁵⁶ This neglect, which has a range of causes¹⁵⁷ that I cannot fully explore here, makes it timely to devote attention to the topic.

Another important justification and trigger for analyzing domestic courts’ interpretation of international law is that this activity takes up an increasingly significant place in domestic (and Swiss)¹⁵⁸ adjudication. This practical significance is not only due to Switzerland’s growing network of treaties with other States and IOs. It is also symptomatic of a shift in the subject matter of international law. As is well known, this body of law is evolving from a law predominantly governing interstate relationships to one increasingly concerned with intrastate matters. Many other factors explain the rising significance of international law in domestic and Swiss courts, such as the internationalization of judges and lawyers’ legal education, or the greater accessibility of international legal documents (see however *infra*, Conclusion and Recommendations, section 2). The precise weight of these causes would require empirical verification and will not be dwelled upon here. What matters, for my purposes, is that the relevance of international law in domestic courts makes it a worthwhile and topical object of inquiry.

A last reason for focusing on international law relates to the specificities of the Swiss legal order (*infra*, Chapter 3), and to the impact of these features on the relationship between domestic and international law. Chief among these peculiarities are Switzerland’s semi-direct democracy (*infra*, Chapter 3, 3.4), coupled with recent trends in Swiss politics. In the past, popular proposals to

155 Kennedy, *A Critique of Adjudication* (n 78); Hart (n 78); Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 78); Dworkin (n 77); Henry M Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (mimeographed, tentative edition 1958).

156 Holger Fleischer, ‘Comparative Approaches to the Use of Legislative History in Statutory Interpretation’ (2012) 60 *American Journal of Comparative Law* 401, 402.

157 This neglect may for instance be due to a lack of specialized training or interest in international law, to a sense that international law is not conceptually different from domestic law or, to the contrary, to a sense that the (alleged) ‘inferiority’ of international law justifies analyzing it separately from domestic law.

158 Ammann, ‘International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal’s Practice of International Law in Figures’ (n 5).

amend the Swiss Constitution were rarely accepted by Swiss voters, but in the last couple of decades the success rate of these popular initiatives has risen significantly. This, and the increased targeting of international law by some political groups,¹⁵⁹ creates tensions with Switzerland's international obligations. Because the Swiss Constitution does not offer mechanisms to arbitrate conflicts between constitutional or federal statutory law, on the one hand, and international law, on the other,¹⁶⁰ this task is shifted to the courts. In light of the scarce guidance provided by the Constitution, Swiss courts face the challenge of having to develop a predictable, clear, and consistent approach to such conflicts. Their 'pragmatic methodological pluralism' (*infra*, Chapter 3, 4.2.6), in particular, needs to be critically evaluated in the context of the interpretation of international law and, if necessary, adjusted to its specificities. More generally, in a time when international law experiences heightened contestation and criticism in the domestic political realm,¹⁶¹ it is particularly essential that judges, international lawyers, and the public in general remain aware of the mandatory international legal framework that constrains States in the interpretation of their international obligations.

7 Why Focus on the Law's Interpretative Methods?

A method is a way of doing something. It designates 'a systematic procedure, technique, or mode of inquiry employed by or proper to a particular discipline or art'.¹⁶²

I focus on what methods international law requires States to use when they interpret international legal acts via their organs, and more specifically via their courts. However, it is worth noting that domestic courts also have the duty to respect the law's interpretative methods under domestic law. Of course, the differences between domestic and international lawmaking explain why the methods that have developed in domestic legal orders diverge, in some minor respects, from the interpretative methods of international law. One example

159 See in general Tamar Hostovsky Brandes, 'International Law in Domestic Courts in an Era of Populism' (2019) 17 *International Journal of Constitutional Law* 576.

160 See especially art. 5(4) and art. 190 Cst.

161 Eg James Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81 *Modern Law Review* 1; Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 *Journal of Human Rights Practice* 1.

162 See the definition of 'method' in <www.merriam-webster.com/dictionary/method>. I explore related, yet distinct concepts in Chapter 2, section 5 (*infra*).

concerns the use of legislative history, which is only permitted under specific conditions under international law. Under Swiss law, by contrast, historical interpretation is on the same footing as other interpretative methods. However, these domestic peculiarities are irrelevant from the perspective of international law. They are not valid justifications for disregarding the interpretative methods of international law. Moreover, such nuances should not detract from the fact that the basic methods of interpretation of domestic and international law, and their respective justifications, are identical (see Chapters 5 and 6, *infra*).

For many years now, methods of judicial interpretation have come under heavy criticism. Sean D. Murphy even writes that '[c]ontroversy over the utility and limits of canons and other interpretive principles has bedevilled the field of jurisprudence since ancient times'.¹⁶³ Legal realists,¹⁶⁴ critical legal scholars,¹⁶⁵ and political scientists¹⁶⁶ have emphasized that judicial reasoning is influenced by arbitrary considerations. First, such authors are usually skeptical of attempts to discern a method in domestic judicial decisions. 'When someone starts talking about "interpretation", reach for your gun',¹⁶⁷ some warn. Others consider that what the law is depends on what judges 'ate for breakfast'.¹⁶⁸ Second, these scholars typically argue that formulating normative recommendations for domestic courts regarding the methods they must use (which is my endeavor in this study) is futile because judicial interpretation is inherently 'political' and judicial discretion inevitable. Curtis Mahoney notes that in the United States, the interpretative methods of treaty law are 'undertheorized'.¹⁶⁹ In Switzerland, many judges, lawyers, and legal scholars are reluctant to reflect upon the methods of judicial reasoning and to revise

163 Sean D Murphy, 'The Utility and Limits of Canons and Other Interpretive Principles in Public International Law' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2018) 13.

164 Eg Holmes (n 22).

165 Eg Kennedy, *A Critique of Adjudication* (n 78); Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (n 75).

166 Eg Martin M Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981).

167 William G Lycan, *Judgement and Justification* (Cambridge University Press 1988) 195. This sentence is cited in Michael S Moore, 'The Interpretive Turn in Modern Theory: A Turn for the Worse?' (1989) 41 *Stanford Law Review* 871, 871.

168 Alex Kozinski, 'What I Ate for Breakfast and Other Mysteries of Judicial Decision Making' (1993) 26 *Loyola of Los Angeles Law Review* 993.

169 Curtis J Mahoney, 'Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties' (2007) 116 *Yale Law Journal* 824, 828.

existing accounts of adjudication. Hans Peter Walter, who served on the Swiss Federal Tribunal from 1984 to 2002, explains that the Court's 'pragmatic methodological pluralism' (*supra*, 2.5 and *infra*, Chapter 3, 4.2.6) is unproblematic in practice,¹⁷⁰ and most Swiss scholars do not question the 'pragmatic' approach. Third, prudentialism (a doctrine that seeks to maximize the protection of some interests, and hence to avoid outcomes jeopardizing them) has gained traction in legal thinking.¹⁷¹ It is highly prevalent in public debates and official statements regarding Switzerland's relationship with international law.¹⁷² The Swiss executive more often mentions the strategic importance for Switzerland to respect international law than the State's international legal duties (*infra*, Chapter 3, 2.1.1).¹⁷³ Prudentialism suggests that abiding by the law (and, hence, by its interpretative methods) is only warranted in some circumstances and is a strategic choice. Last, and relatedly, the prevalence of descriptive analyses of domestic judicial interpretation of international law (*supra*, 2.1), of which Georges Scelle's 'dédoublement fonctionnel' is only one example, has distracted scholars' attention from courts' legal duties (and from other moral duties which I do not examine here).

The challenges posed by legal realism and CLS ought to be taken seriously. Even without extensive knowledge of sociology or cognitive psychology, one can expect that as an empirical matter, considerations that are independent from the legal act and its features (eg subjective preferences, socio-cultural aspects, or psychological features) do influence judicial decision-making. Attempts to downplay the influence of such factors are unconvincing. On the other hand, to stress that interpretative methods must be respected does not imply the endorsement of a counterfactual, mechanistic view of judicial decision-making. Non-evaluative conceptions of judicial decision-making (provided they have ever been endorsed at all) seem obsolete and even laughable to most lawyers today.¹⁷⁴ Deductive reasoning requires that the premises

¹⁷⁰ Walter (n 118).

¹⁷¹ On prudentialism in US constitutional legal argument, see Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press 1982) ch 5. On its role in US foreign relations, see Curtis A Bradley and Jack L Goldsmith, *Foreign Relations Law: Cases and Materials* (3rd edn, Wolters Kluwer 2009) 42.

¹⁷² Eg Federal Council, *Botschaft zur Volksinitiative 'Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)'*, FG 2017 5355.

¹⁷³ Federal Council, *2010 Report on International and Domestic Law* (n 143), 2271 f.

¹⁷⁴ Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12 German Law Journal 979, 985.

of the syllogism be clarified beforehand,¹⁷⁵ and a polity that confers legal authority upon judges gives them the power to do so. Even legal positivists whose theories are rejected by critical legal scholars in some of their aspects¹⁷⁶ highlight the frequent vagueness of the law, and the evaluative judgments its interpretation requires.¹⁷⁷

Instead of denouncing judicial value judgments, which are a necessity, we (lawyers and scholars) should strengthen the devices by which judicial discretion is kept within reasonable bounds. The law's interpretative methods are an important safeguard in this context. They are not merely part of an efficiency calculus,¹⁷⁸ or a convenient way of making rulings acceptable to their addressees. Their respect, I argue, is mandated by States' international obligations. It is also required by judges' domestic legal duty to apply the law (*infra*, Chapter 5).

Scholars have scrutinized the methods used by international courts to interpret international law.¹⁷⁹ They have also looked at those relied upon

175 This is also acknowledged by Swiss scholars, eg Yann Grandjean, 'Le juge est-il un acteur politique?' (2013) *Aktuelle juristische Praxis / Pratique juridique actuelle* 365, 369.

176 Duncan Kennedy, 'A Left/Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation', *Legal Reasoning: Collected Essays* (Davies Group Publishers 2008).

177 This position has also been endorsed by natural lawyers. See eg Samuel Pufendorf, *De jure naturae et gentium libri octo* (Clarendon Press/H Milford 1934) 818: 'laws cannot possibly foresee all cases, nor mention them, by reason of their infinite variety (Xenophon, The Cavalry Commander [ix. 1]: "To write out all that a man ought to do is no more possible than to know everything that is going to happen" (B.))'.

178 On this view, see Vermeule (n 76).

179 On the ICJ, see Eirik Bjorge, 'The International Court of Justice's Methodology of Law Ascertainment and Comparative Law' in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (Oxford University Press 2015); Talmon (n 73); Peter Tomka, 'Custom and the International Court of Justice' (2013) 13 *The Law and Practice of International Courts and Tribunals: Special Issue on 'The Judge and International Custom'* 195; Alberto Alvarez-Jiménez, 'Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000–2009' (2011) 60 *International and Comparative Law Quarterly* 681; Robert Kolb, *Interprétation et création du droit international: esquisse d'une herméneutique juridique moderne pour le droit international public* (Bruylant 2006); Sienho (n 73); Petersen (n 73). On the *ad hoc* international criminal tribunals, see Noora Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals* (Routledge 2014); Birgit Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International 'ad hoc' Criminal Tribunals for Rwanda and Yugoslavia* (Martinus Nijhoff 2010). On the CJEU, see Jiří Malenovský, 'Le juge et la coutume internationale: perspective de l'Union européenne et de la Cour de justice' (2013) 12 *The Law and Practice of International Courts and Tribunals – Special Issue on 'The Judge and International Custom'* 217; Pieter Jan Kuijper, 'The European Court and the Law of Treaties: The Continuing Story' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University

by domestic courts with regard to domestic¹⁸⁰ and international law. In the latter case, they have mostly used the VCLT.¹⁸¹ It is worth noting that at the time this book was being finalized (June 2019), the Vienna Convention had just celebrated its fiftieth anniversary, and it had been in force for nearly forty years. However, international lawyers and scholars often consider domestic rulings on international law with suspicion. Reasons for this distrust include domestic courts' alleged lack of expertise and methodological rigor,¹⁸² parochialism (ie, a neglect of the peculiarities of international law or even an avoidance of international legal issues),¹⁸³ judicial imperialism vis-à-vis other

Press 2011); Ammann, 'The Court of Justice of the European Union and the Interpretation of International Legal Norms: To Be or Not to Be a "Domestic" Court?' (n 140). On the ECtHR, see Ineta Ziemele, 'Customary International Law in the Case Law of the European Court of Human Rights: The Method' (2013) 12 *The Law and Practice of International Courts and Tribunals: Special Issue on 'The Judge and International Custom'* 243.

180 See (for Swiss courts) Pichonnaz and Vogenauer (n 105). See also the references mentioned *supra*, 2.5.

181 Aust and Nolte (n 47).

182 Massimo Iovane, 'Domestic Courts Should Embrace Sound Interpretative Strategies in the Development of Human Rights-Oriented International Law' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012); André Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' in Gideon Boas and William A Schabas (eds), *International Criminal Developments in the Case Law of the ICTY* (Martinus Nijhoff 2003) 292.

183 Lawrence Hill-Cawthorne, 'Application of International Humanitarian Law by Domestic Courts' (*EJIL: Talk!*, 2015) <www.ejiltalk.org/application-of-international-humanitarian-law-by-domestic-courts>. See also Michael P Van Alstine, 'The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection' (2005) 93 *Georgetown Law Journal* 1885; Anthony Gray, 'Forum Non Conveniens in Australia: A Comparative Analysis' (2009) 38 *Common Law World Review* 207; Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 *European Journal of International Law* 159; Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *American Journal of International Law* 241; Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964) 371; ILA, 'Preliminary Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61) 7; Nollkaemper, 'The Duality of Direct Effect of International Law' (n 59); Michael Waibel, 'Principles of Treaty Interpretation: Developed for and Applied by National Courts?' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Unity, Diversity, Convergence* (Oxford University Press 2016); Wood (n 14) 12; Sergei Y Marochkin and Vladimir A Popov, 'International Humanitarian and Human Rights Law in Russian Courts' (2011) 2 *Journal of International Humanitarian Legal Studies* 216. See also the findings (pertaining to the practice of Canadian courts) of Joshua Karton and Samantha Wynne, 'Canadian Courts and Uniform Interpretation: An Empirical Reality Check' (2013) 18 *Uniform Law Review* 281; Jutta Brunnée and Stephen Toope, 'A Hesitant Embrace: The Application of

States,¹⁸⁴ and the influence of domestic legal constraints on domestic rulings.¹⁸⁵ In the United States, for instance, judges and scholars often analyze international law through the lens of ‘US foreign relations law’¹⁸⁶ and tend to obliterate the international perspective. Hence, a minority of scholars even consider that domestic rulings should not be used as ‘subsidiary means for the determination of rules of [international] law’ pursuant to art. 38(1)(d) ICJ Statute.¹⁸⁷ On the other hand, judicial reasoning can be deemed important because, as the English Judge Cator put it with regard to the British Prize Court in Egypt, a court is ‘primarily the guardian of its nation’s honour and foreign countries will cite its decisions as indicating the temper of its people. An English Prize Court should certainly interpret the rules of International Law in a broad spirit rather than a narrow one’.¹⁸⁸ This debate shows that scholars, judges, and lawyers do express interest in – and concerns about – the methods domestic courts use to interpret international law.

International Law by Canadian Courts’ (2002) XL Canadian Yearbook of International Law 3. On the parochialism of US courts, see Margaret Hartka, ‘The Role of International Law in Domestic Courts: Will the Legal Procrastination End?’ (1990) 14 Maryland Journal of International Law 99; Martin A Rogoff, ‘Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court’ (1996) 11 American University Journal of International Law and Policy 559. See however Shany, who rejects the mainstream diagnosis of domestic judicial parochialism: Yuval Shany, ‘National Courts as International Actors: Jurisdictional Implications’ (2009) 15 federalismi.it – Rivista di diritto pubblico italiano, comunitario e comparato 2.

184 Antonio Cassese, ‘Remarks on Scelle’s Theory of “Role Splitting” (dédoulement fonctionnel) in International Law’ (1990) 1 European Journal of International Law 210, 231, footnote 55.

185 ILA, ‘Working Session Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law’ (n 61) 11; ILC, ‘First Report on Formation and Evidence of Customary International Law by Special Rapporteur Sir Michael Wood’ (2013) UN Doc A/CN.4/663 37, para 84. See also (with reference to the ICTY): ILC Secretariat, ‘Identification of Customary International Law: The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law’ (2016) UN Doc A/CN.4/691 25 f, para 41.

186 Bradley and Goldsmith (n 171).

187 Alain Pellet and Daniel Müller, ‘Article 38’ in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 953 para 323. See also (implicitly): Gerald Fitzmaurice, ‘Some Problems Regarding the Formal Sources of International Law’ in *Symbolae Verzijl* (Martinus Nijhoff 1958).

188 David Foxton, ‘International Law in Domestic Courts: Some Lessons From the Prize Court in the Great War’ (2002) 73 British Year Book of International Law 261, 270. According to Foxton, this commitment to international law was merely rhetorical.

Resorting to specific interpretative methods is, of course, not a panacea. Judicial interpretations reached through flawless methods may still be illegal or – by the standards of legal argumentation – poorly reasoned (*infra*, Chapter 5). Moreover, for obvious reasons of judicial economy and practicability, domestic courts cannot engage in a detailed, textbook-like analysis of the sources of international law whenever an international legal issue arises. Yet if courts interpret international law in conformity with its interpretative methods, and in a predictable, clear, and consistent way, many of the aforementioned charges against domestic case law are rebutted.