The Legal Effect of Domestic Rulings in International Law

Theories which emphasize the incompleteness of the law usually argue that courts have a dual function: to apply law and to create new or revise old law. The prevalence of interpretation, however, seems to belie this view. Interpretation straddles the divide between the identification of existing law and the creation of a new one.⁸¹⁶

1 Introduction

In this chapter, I examine the legal effect of domestic rulings in international law. I argue that this effect is both static and dynamic.⁸¹⁷ First, domestic courts enable States to respect their international obligations. They do so by enforcing international law domestically (*infra*, section 2). Second, from the perspective of the sources of international law, domestic judicial decisions also have a dynamic effect on international law, as they contribute to shaping it, on the one hand, and help interpreters ascertain it, on the other hand (*infra*, section 3).⁸¹⁸ I explain my reasons for focusing on art. 38 ICJ Statute in Chapter 2, section 5 (*supra*).

Why highlight the legal effect of domestic rulings in international law? Simply put, because a normative argument about how domestic courts must interpret international law requires understanding the essence and characteristics of their activity, and its relevance and stakes. Joseph Raz has observed

816 Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 78) 224 f.

817 I develop this further in Odile Ammann, 'How Do and Should Domestic Courts Interpret International Law? Insights From the Jurisprudence of H.L.A. Hart and Duncan Kennedy' (2019) *Transnational Legal Theory* (forthcoming).

818 On this issue, see Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 48 ff.

that answering the question of *how* interpretation must be conducted (with regard to both legal acts and other interpretative objects) must start with an account of *what* interpretation is, and of *why* it is necessary and important (*supra*, Introduction, section 2).

Part 1 of this book revolved around the question ‘What is interpretation?’, and more precisely around the question: what is the nature and essence of domestic (especially Swiss) courts’ interpretation of international law? To answer this question, I have defined the scope of my inquiry (Chapter 1), laid its conceptual groundwork (Chapter 2), and provided context on the Swiss legal order (Chapter 3).

In Part 2, my goal is to address Joseph Raz’s second question – *why* interpret? In other terms, why is legal (and, more specifically, judicial) interpretation ‘central to legal practices’?⁸¹⁹ As Raquel Barradas de Freitas notes, the word ‘central’ can designate the predominance of legal interpretation in legal practice, but also (and more convincingly) its instrumental role (ie, ‘its relevance to the pursuit of a series of ends’).⁸²⁰ The ‘why’ question is distinct from, and prior to, the question of *how* to interpret.⁸²¹

While I adopt Raz’s three-pronged structure of inquiry, my endeavor differs from his legal philosophical analysis of interpretation (*supra*, Introduction, section 2), and from his approach to the ‘why’ question. Instead of taking the perspective of an observer of the practice, as Raz does, I answer the ‘why’ question by analyzing the law as a participant in the practice. Unlike Raz, who looks at domestic law, my focus lies on international law.

As much of international legal scholarship confirms,⁸²² it is tempting to understand Raz’s ‘why’ question as one that is about the ‘role’ of domestic courts

819 Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 78) 223.

820 Barradas de Freitas (n 127) 45. See also *ibid* 273 ff. Barradas argues that interpretation plays an instrumental role in that it makes the exercise of legal authority possible. By making the law intelligible, it helps individuals understand what the law requires, and hence be guided by it. See *ibid* 278.

821 Joseph Raz states that understanding the importance of legal interpretation is necessary ‘to evaluate the different [philosophical] accounts of legal interpretation’ provided by legal theorists. See Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (n 78) 225.

822 Weill (n 61); Sloss (n 120); Jonathan I Charney, ‘International Criminal Law and the Role of Domestic Courts’ (2001) 95 *American Journal of International Law* 120; Henry G Schermers, ‘The Role of Domestic Courts in Effectuating International Law’ (1990) 3 *Leiden Journal of International Law* 77; Falk (n 50); Bradley and Goldsmith (n 171) ch 2.

when they interpret international law.⁸²³ The term 'role', however, is multifaceted and ambiguous. A role can be captured from a descriptive or from a normative angle.⁸²⁴ It can be analyzed through the lens of domestic or international law. It can be defined from a legal perspective (ie, by highlighting courts' or States' legal duties and authority), but also from a psychological or sociological perspective, etc. This role may differ depending on the source, norm, and substantive area of international law under scrutiny.⁸²⁵ Accordingly, scholarship addressing the 'role' of domestic courts in the interpretation of international legal acts is a thicket that is hard to penetrate.⁸²⁶

A closely related point, and a distinctive feature of recent scholarly analyses, is that many authors adopt functionalist approaches. This should not surprise us in light of the aforementioned comments, since functionalism is an epistemic method that focuses on the *role* (or purpose) a given object serves – this role is deemed to have explanatory value. To illustrate, scholars have enumerated domestic courts' modes of 'engagement'⁸²⁷ with international law, or the range of 'functions' these courts fulfill when interpreting it.⁸²⁸ Functionalist approaches have often been used by international lawyers,⁸²⁹ eg with regard to international courts,⁸³⁰ and they have also been popular in domestic law.⁸³¹

823 This observation has been made by Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 45.

824 See *ibid* 45 ff.

825 See *ibid* 47 f.

826 Besides the sheer quantity of contributions that have dealt with this topic, the terminologies, taxonomies, and theoretical approaches used to analyze what domestic courts do, must do, or should do when interpreting international law are diverse and sometimes intermingled. For an overview, see *ibid* 45 ff.

827 ILA, 'Preliminary Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61); ILA, 'Working Session Report of the ILA Study Group on 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).

828 Eg Weill (n 61) 179.

829 An early advocate of the 'functional approach' is Philip Jessup, 'The Functional Approach as Applied to International Law', *Proceedings of the Third Conference of Teachers of International Law* (Carnegie Endowment 1928).

830 Gleider Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014).

831 One illustration is provided by the concepts of 'translation' and 'soft originalism' used by some US constitutional legal scholars. On translation, see Lawrence Lessig, 'Understanding Changed Readings: Fidelity and Theory' (1995) 47 *Stanford Law Review* 395; Lawrence Lessig, 'Translating Federalism: United States v Lopez' (1995) 1995 *Supreme Court Law*

At first sight, functionalism is attractive because it allows us to draw a range of distinctions and to think analytically. Yet one important drawback of functionalism is its indeterminacy. How should we select among the myriad 'functions' courts perform? Why is one function deemed more important than others? Functionalism invites disagreement, as different functions are likely to be emphasized depending on the set of beliefs the scholar endorses. While purporting to be descriptive and analytically precise, functionalism substantially hinges on more fundamental value judgments.⁸³²

Rather than examining the 'functions' or causal 'impact' of domestic judicial decisions in international law, my aim, in this chapter, is to clarify why domestic courts' interpretations of international law are central (ie, important, instrumentally relevant) to the practice of international law. In other terms, I examine the legal effect of these rulings in international law.

As usual, caveats apply. First, the two aforementioned aspects (ie, the law-applying, 'static' facet of domestic courts' activity, versus its jurisgenerative, 'dynamic' effect)⁸³³ are two sides of the same coin.⁸³⁴ By enforcing international law domestically as international law requires States to do, domestic courts inevitably make law. Courts do so with respect to the relationship between domestic and international law, but also regarding the content of international law, subject to the framework established by art. 38 ICJ Statute. Second, in this chapter I am not yet evaluating domestic courts' activity. My goal, at this stage, is to clarify the legal consequences of their rulings in international law. Third, I analyze this effect in general terms, without focusing on particular norms and domains of international law. However, the effect of domestic rulings varies depending on the norm and substantive area of international law at stake.⁸³⁵ Fourth, I focus on the effect of domestic rulings in *international* law. The effect of Swiss courts' rulings in domestic law is addressed in Chapter 3 (*supra*). Fifth,

Review 125. On soft originalism, see Cass R Sunstein, 'Five Theses on Originalism' (1995) 19 *Harvard Journal of Law & Public Policy* 311. For a critique, see Michael J Klarman, 'Fidelity, Indeterminacy, and the Problem of Constitutional Evil' (1997) 65 *Fordham Law Review* 1739, 1753 ff.

832 This point has been brought to my attention by Michael Klarman.

833 On these two facets, see Edouard Dubout and Sébastien Touzé, 'La fonction des droits fondamentaux dans les rapports entre ordres et systèmes juridiques' in Edouard Dubout and Sébastien Touzé (eds), *Les droits fondamentaux: charnières entre ordres et systèmes juridiques* (Pedone 2009); Besson and Ammann (n 60) 7–9.

834 Tzanakopoulos and Methymaki (n 217). See also Antonios Tzanakopoulos, 'Domestic Courts in International Law' (*United Nations Audiovisual Library of International Law*, 2016) <legal.un.org/avl/lis/Tzanakopoulos_IL_video_1.html>.

835 Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 47 f.

the way international law is received in domestic legal orders is contingent on domestic law (Chapter 3, *supra*). These features may limit domestic courts' contribution to the sources of international law.

I now turn to the two legal effects of domestic rulings in international law, namely to their connecting (*infra*, section 2) and dynamic effect (*infra*, section 3).

2 Domestic Rulings as Means of Enforcement of International Law

A first legal effect of domestic judicial decisions on international law is that they facilitate the reception of international law in the domestic legal order. By enforcing international law domestically, they allow States to respect their international obligations (subject, of course, to the constraints established by domestic law in this respect, Chapter 3, *supra*).

International law, *qua* law, aims at being obeyed. This claim is implicit in all international legal norms, and explicit in some of them. For instance, the customary principle *pacta sunt servanda* codified in art. 26 VCLT provides that States must honor their treaty obligations. States cannot in principle rely on domestic law to justify a violation of these treaty obligations (art. 27 VCLT).⁸³⁶ States must also respect CIL and general principles of international law *qua* sources of international law (art. 38 ICJ Statute), unless these States are excluded from the scope of their legal authority.⁸³⁷

A State's violation of its international obligations triggers its international responsibility. The conditions of this responsibility are exclusively defined by international law.⁸³⁸ The ILC's Draft Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA), most of which are customary,⁸³⁹ provide

836 See also PCIJ, case concerning the *Greco-Bulgarian 'Communities'*, advisory opinion, PCIJ Series B No 17, 31 July 1930, 4, at 32. States cannot even rely on constitutional law: PCIJ, case concerning the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, advisory opinion, PCIJ Series A/B No 44, 4 February 1932, 3, at 24; ICJ, case concerning *Avena and Other Mexican Nationals (Mexico v. United States)*, judgment, ICJ Reports 2004, 31 March 2004, 12, at 65, para 139.

837 Eg if States are persistent objectors to a given norm of CIL, or in the case of regional custom.

838 ICJ, case concerning *Elettronica Sicula SpA (ELSI) (United States v. Italy)*, judgment, ICJ Reports 1989, 20 July 1989, 15, at 51, para 73.

839 Some ARSIWA provisions remain contested, such as those on serious breaches and countermeasures: James Crawford, 'State Responsibility', *Max Planck Encyclopedia of Public International Law (Online Edition)* (Oxford University Press 2006) 65 <opil.oup.com>.

that State responsibility arises whenever the State commits an internationally wrongful act,⁸⁴⁰ ie, an act incompatible with its international obligations.⁸⁴¹ The decision of a domestic court is always attributable to the State, even when it exceeds the court's competence under domestic law.⁸⁴² Thus, if domestic rulings fail to respect the State's international obligations, they trigger their State's international responsibility and its duty to provide reparation.⁸⁴³

One corollary of States' duty to obey international law is their duty to apply and enforce international law domestically through their organs, so that international law can rule.⁸⁴⁴ International law is weakly institutionalized and lacks an international police force. Therefore, it must primarily rely on the State for its domestic enforcement.⁸⁴⁵ Exceptionally, international law defines the modalities of its enforcement, eg in IHRL,⁸⁴⁶ or in the context of remedies for breaches of international law.⁸⁴⁷

States' duty to obey international law may be expressed or reinforced by more specific positive international legal duties, rights, or powers.⁸⁴⁸ The terminology used in international law to characterize these duties or competences is diverse and often inconsistent (eg the duty or competence to 'enforce', 'apply', 'interpret', 'implement', or 'give effect' to international law, to 'monitor' its application, etc.), which makes it necessary to interpret each provision to

840 Art. 1 ARSIWA.

841 Art. 12 ARSIWA.

842 Art. 4, 7 ARSIWA.

843 PCIJ, case concerning the *Factory at Chorzów (Germany v. Poland)*, judgment, claim for indemnity, merits, PCIJ Series A No 17, 13 September 1928, 4, at 29.

844 Leo Gross, 'States as Organs of International Law and the Problem of Autointerpretation', *Essays on International Law and Organization (Vol I)* (Transnational Publishers, Inc/Martinus Nijhoff 1984) 378 f.

845 Even international judges play a limited role with regard to enforcement, see Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' (n 85) 425. Some international bodies monitor the domestic enforcement of international law. One example is the Committee of Ministers of the Council of Europe, which monitors the domestic enforcement of ECtHR rulings, see Samantha Besson, 'Les effets et l'exécution des arrêts de la Cour européenne des droits de l'homme – Le cas de la Suisse' in Bernhard Ehrenzeller and Stephan Breitenmoser (eds), *Die EMRK und die Schweiz / La CEDH et la Suisse* (Schulthess 2010) 160 ff.

846 Frédéric Mégret, 'Nature of Obligations' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press 2014) 101 ff.

847 ICJ, case concerning *Avena and Other Mexican Nationals (Mexico v. United States)*, judgment, ICJ Reports 2004, 31 March 2004, 12, at 59 f, para 121.

848 Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 47.

determine its legal implications. In some cases, international law explicitly requires or empowers States not only to give effect to their international obligations domestically, but also to interpret them.⁸⁴⁹

The domestic judicial application and enforcement of international law is sometimes explicitly mandated by international law. IHL for instance tasks domestic institutions, including courts,⁸⁵⁰ with its enforcement. Other examples include ICL⁸⁵¹ or IHRL.⁸⁵² In international environmental law, access to courts is sometimes explicitly mandated.⁸⁵³ The ICJ has occasionally required that specific measures be taken by domestic courts to guarantee domestic compliance with international law,⁸⁵⁴ although domestic judges have sometimes shown resistance.⁸⁵⁵

While some authors argue that international law increasingly imposes duties upon domestic organs,⁸⁵⁶ conceptually, it is the *State's* (and not domestic courts') international legal duty to respect international law.⁸⁵⁷ States are free to choose the means by which to give effect to their international obligations. However, the nature and content of some obligations may require

849 See *ibid.* The ECHR for instance is primarily interpreted by State institutions.

850 See art. 49(2), art. 50(2), art. 129(2), and art. 146(2) of the four Geneva Conventions of 1949, respectively. On requirements of domestic enforcement in general, see Weill (n 61) 7 footnote 17.

851 Art. 1 ICC Statute. See also art. VI of the Genocide Convention of 9 December 1948.

852 Eg art. 2(3) ICCPR. The UN treaty bodies have stressed the importance for States to grant judicial remedies, so that individuals can invoke relevant international human rights obligations. See the examples mentioned by Künzli, Eugster, and Spring (n 442) 4, note 6.

853 Art. 9 Aarhus Convention. The importance of judicial review is also stressed in soft law instruments, eg the Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium on 18–20 August 2002.

854 ICJ, case concerning *Avena and Other Mexican Nationals (Mexico v. United States)*, judgment, ICJ Reports 2004, 31 March 2004, 12, at 59 f, para 121. See also Fikfak, 'Reinforcing the ICJ's Central International Role? Domestic Courts' Enforcement of ICJ Decisions and Opinions' (n 63).

855 A well-known example is the *Avena/Medellín* saga. On the other hand, some domestic courts explicitly underscore their State's duty to apply international law domestically. The Swiss Federal Tribunal for instance, early on in its case law, emphasized the State's duty to enforce international law through its institutions, eg BGE 49 I 188, at 3. The Court especially highlights judicial enforcement with respect to IHRL. See BGE 123 II 595, at 7 c); BGE 117 Ib 367, at 2 e).

856 Ward Ferdinandusse, 'Out of the Black-Box? The International Obligation of State Organs' (2003) 29 Brooklyn Journal of International Law 45.

857 This is also how the ICJ phrased the issue in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States)*, judgment, ICJ Reports 2004, 31 March 2004, 12, at 60, para 121. See also Tzanakopoulos and Methymaki (n 217) 6.

that States take certain measures to ensure that their courts will give effect to international law.

States' duty to abide by international law, and thus to implement it domestically and to act as 'officials of international law',⁸⁵⁸ explains why scholars highlight that domestic courts can, do, and/or should act as 'enforcers',⁸⁵⁹ 'agents',⁸⁶⁰ or 'faithful trustees'⁸⁶¹ of international law. Scholars describe domestic courts as the 'first port of call'⁸⁶² to adjudicate international legal issues and, when international adjudication is unavailable, as the first and only locus of international legal interpretation.⁸⁶³

Of course, the State's duty to enforce international law via its organs may conflict with other duties under domestic and especially constitutional law. From the perspective of international law, domestic law is no valid justification for disregarding international law, including its interpretative methods.⁸⁶⁴ In such cases, courts experience a 'double bind',⁸⁶⁵ as they must respect two

858 Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 *European Journal of International Law* 315; Samantha Besson, 'Sovereignty, International Law and Democracy' (2011) 22 *European Journal of International Law* 373, 375.

859 Rodney Harrison, 'Domestic Enforcement of International Human Rights in Courts of Law: Some Recent Developments' (1995) 21 *Commonwealth Law Bulletin* 1290; Masters (n 331); Oona A Hathaway and Scott J Shapiro, 'Outcasting: Enforcement in Domestic and International Law' (2011) 121 *Yale Law Journal* 252; Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (n 59); Susan Deller Ross, 'Enforcing Women's International Rights at Home: International Law in Domestic Courts', *Women's Human Rights: The International and Comparative Law Casebook* (University of Pennsylvania Press 2008); M Shah Alam, 'Enforcement of International Human Rights Law by Domestic Courts in the United States' (2004) 10 *Annual Survey of International and Comparative Law* 27; Richard F Oppong and Lisa C Niro, 'Enforcing Judgments of International Courts in National Courts' (2014) 5 *Journal of International Dispute Settlement* 344; Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 *European Journal of International Law* 815; Conforti and Francioni (n 120); Fikfak, 'Reinforcing the ICJ's Central International Role? Domestic Courts' Enforcement of ICJ Decisions and Opinions' (n 63); Weill (n 61) 117; Schermers (n 822); Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 501, 501, footnote 1.

860 Nollkaemper, *National Courts and the International Rule of Law* (n 47) 8.

861 Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (Oxford University Press 2015).

862 Nollkaemper, *National Courts and the International Rule of Law* (n 47) 11 f.

863 Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (n 57) 151.

864 Art. 27 VCLT.

865 Nollkaemper, *National Courts and the International Rule of Law* (n 47) 14.

irreconcilable legal duties of the State. These conflicts faced by domestic courts have spilt a lot of ink, although it is important to highlight that in many instances, the conflict exists not only between international and domestic law, but also within domestic law.⁸⁶⁶ Scholars have highlighted 'patterns of national contestation' of international law, patterns which domestic courts contribute to tracing.⁸⁶⁷ Yet domestic courts also resolve conflicts by giving preference to what international law requires. In most areas of international law, contestation is the exception rather than the rule.⁸⁶⁸

Existing scholarship on conflicts between domestic and international law is chiefly descriptive, in the sense that it primarily maps the existing practice and rarely examines *how* domestic courts must (or should) resolve conflicts. This question is complex, because the answer to it depends on the provisions at stake and, importantly, hinges on considerations of moral and political philosophy. The issue of how conflicts must (or should) be resolved is beyond the scope of my study, but my account has implications for how courts must handle such conflicts. The thesis I defend is that courts must use specific methods to ascertain international law (ie, textual, systematic, purposive and, if applicable, historical interpretation), and that they should strive to reason predictably, clearly, and consistently. They must do so regardless of how they resolve clashes between domestic and international law.

866 For an example, see BGE 139 I 16.

867 Raffaella Kunz, 'Judging International Judgments Anew? The Human Rights Courts Before Domestic Courts' *European Journal of International Law* (forthcoming); Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 *International Journal of Law in Context* 197; Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2015). Curtis Bradley argues that the US Supreme Court is a 'filter' between international and US law that ensures that international law fits 'the structure and values of the constitutional system', see Bradley (n 70) 102. André Nollkaemper uses the metaphors of 'safety valve[s] or gate-keeper[s]', see Nollkaemper, *National Courts and the International Rule of Law* (n 47) 303. Harold Koh views domestic actors (including courts) as a 'transmission belt' which mediates between international law and the domestic legal order: Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599, 2651. *Contra* Knop (n 859) 505.

868 Christopher McCrudden, 'Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW' (2015) 109 *American Journal of International Law* 534, 538.

3 Domestic Rulings as Contributors to the Sources and Interpretation of International Law

States' duty to apply and enforce international law domestically, including via their courts, is not the only reason why domestic courts' interpretations are central to international law. First, from the perspective of the sources of international law, domestic rulings can collectively contribute to the formation and modification of international law (*infra*, 3.1). Second, from the perspective of any domestic or international interpreter of international law, domestic judicial decisions are auxiliary means (or 'subsidiary means', as per art. 38(1)(d) ICJ Statute) that assist her in her interpretative task (*infra*, 3.2). Of course, domestic rulings have an analogous effect in domestic legal orders (*supra*, Chapter 3, 4.2.7). They can even, under certain conditions and in some States, exercise domestic legal authority beyond the particular case. Yet in this section, I focus on the place of domestic rulings in international law.

While domestic and international law increasingly overlap in terms of their respective subject matters and of the authorities that apply them, international and domestic lawmaking processes remain distinct (*supra*, Chapter 1, section 6). Even this distinction is not as sharp as it might seem, however. The sources of domestic and international law are intertwined due to the fact that States have the power to collectively create international law. When two or more States conclude a treaty, for instance, they make international law.⁸⁶⁹ States also collectively provide evidence of the two constitutive elements of CIL, State practice and *opinio juris*. Furthermore, their acts can be a manifestation of the domestic recognition of at least some general principles of international law, ie, those applied *in foro domestico*. What differs between domestic and international lawmaking processes is that the latter involve States *qua* primary lawmakers.

The place of domestic rulings in the sources of international law is ambiguous in practice and in scholarship. While there is agreement (and rightly so) that domestic rulings are not a source of international law (*infra*, 3.1.1–3.1.3),⁸⁷⁰

869 Gross (n 844) 379.

870 Some courts explicitly reject the idea that domestic rulings do and/or should have legal authority (*qua* source) on the international plane: ICJ, 'Public sitting held on Monday 12 September 2011, at 10 a.m., at the Peace Palace, President Owada presiding, in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*', <www.icj-cij.org/docket/files/143/16677.pdf>, at 21, cited in Weill (n 61) 157. See also ICTY (Trial Chamber II), *Prosecutor v. Zoran Kupreškić and Others*, trial judgment, Case No IT-95-16-T, 14 January 2000, para 540, cited in Aldo Zammit Borda, 'The Use of Precedent as Subsidiary Means and Sources of International Criminal Law' (2013) 18 *Tilburg Law Review* 65, 69. Even national courts such as the UK House of Lords have

their precise categorization is often left open (see also *supra*, Chapter 1, 2.3). Legal scholars and practitioners often mention that domestic courts ‘contribute’ to the ‘development’ of international law,⁸⁷¹ or that they may ‘facilitate the determination of the contents of [international] obligations.’⁸⁷² They consider that their rulings ‘may be relevant’ from the perspective of the identification of international law.⁸⁷³ The ILA Study Group on Domestic Courts notes that domestic courts, ‘as organs of the State, necessarily affect the content of norms of international law whenever they engage with them. They serve as agents of development (or corrosion and decay) of international law norms.’⁸⁷⁴ The role of domestic courts as ‘agents of development’⁸⁷⁵ of international law has been highlighted with regard to general international law (eg the law of international responsibility⁸⁷⁶ or the international law of jurisdiction),⁸⁷⁷

pointed out that they should not make law for other subjects of international law, including other States. See Lord Hoffmann in *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya*, (2006) UKHL 26, para 63, cited in Weill (n 61) 157.

871 Nollkaemper, *National Courts and the International Rule of Law* (n 47) 10; Tams and Tzanakopoulos (n 147); Veronika Fikfak, ‘Judicial Strategies and Their Impact on the Development of the International Rule of Law’ in Machiko Kanetake and André Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart Publishing 2016); Iovane (n 182); Harmen van der Wilt, ‘Domestic Courts’ Contribution to the Development of International Criminal Law: Some Reflections’ (2013) 46 *Israel Law Review* 207; Jennings (n 40); Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (n 126) 16. See also Devika Hovell, ‘A Dialogue Model: The Role of the Domestic Judge in Security Council Decision-Making’ (2013) 26 *Leiden Journal of International Law* 579, 592. For a legal practitioner’s view, see Gérard V La Forest, ‘The Expanding Role of the Supreme Court of Canada in International Law Issues’ (1996) xxxiv *Canadian Yearbook of International Law* 89, 100.

872 Nollkaemper, *National Courts and the International Rule of Law* (n 47) 10.

873 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’ (n 185) 3, para 4.

874 ILA, ‘Preliminary Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law’ (n 61) 13.

875 Tams and Tzanakopoulos (n 147).

876 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’ (2013) 26 *Leiden Journal of International Law* 615. See however, with regard to State responsibility: Stephan Wittich, ‘Domestic Courts and the Content and Implementation of State Responsibility’ (2013) 26 *Leiden Journal of International Law* 643.

877 Roger O’Keefe, ‘Domestic Courts as Agents of Development of the International Law of Jurisdiction’ (2013) 26 *Leiden Journal of International Law* 541.

IHL,⁸⁷⁸ ICL,⁸⁷⁹ and IHRL.⁸⁸⁰ Scholars have also discussed the role domestic courts can play in 'closing gaps' in international law, for instance in the law of immunities.⁸⁸¹

Although most international lawyers acknowledge a *de facto* 'influence' of domestic rulings on international law, domestic judicial lawmaking is often obfuscated or presented as an oblique phenomenon. Hersch Lauterpacht has probably endorsed the boldest position in this respect, suggesting that their decisions are a 'source' of international law.⁸⁸² Only few scholars use such forceful terminology.⁸⁸³ Apart from these exceptions, the reluctance to deem domestic rulings authoritative on the international plane likely goes back to the controversial nature of judicial lawmaking in domestic law (*infra*, Chapter 5, 4.2). Moreover, as previously mentioned, the entrenchment of domestic rulings in art. 38 ICJ Statute is equivocal. Finally, the effect of domestic courts' interpretation on the formation and evolution of international law is not monolithic. It depends on the source of international law at stake, on whether the scope of a given norm is inter- or intrastate, on whether mechanisms of international adjudication restrict domestic courts' interpretative freedom and, of course, on courts' rights, duties, and authority in domestic law.⁸⁸⁴ Therefore, the effect of these rulings must be assessed carefully.

In this section, my goal is to show that domestic rulings, despite States' and international lawyers' reluctance to acknowledge it, contribute to the formation, modification, and ascertainment of international law. I analyze the legal effect of these rulings with regard to treaty law (3.1.1), CIL (3.1.2), and general

878 Yaël Ronen, 'Silent Enim Leges Inter Arma – but Beware the Background Noise: Domestic Courts as Agents of Development of the Law on the Conduct of Hostilities' (2013) 26 *Leiden Journal of International Law* 599.

879 van der Wilt (n 871).

880 Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56); Iovane (n 182).

881 August Reinisch, 'To What Extent Can and Should National Courts "Fill the Accountability Gap"?' (2013) 10 *International Organizations Law Review* 572. See also Karel Wellens, 'Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap' (2004) 25 *Michigan Journal of International Law* 1159.

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

883 Hovell (n 871) 582, 591 ff. See also Jennings (n 40) 3 f. André Nollkaemper, in an article on ICL, assesses whether domestic courts are 'sources' of international law: Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182).

884 Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 48.

principles of international law (3.1.3). I also highlight the assistance domestic rulings provide to other interpreters in future interpretations of international law, pursuant to art. 38(1)(d) ICJ Statute (3.2).⁸⁸⁵

Of course, domestic rulings also constitute State practice in a different respect, on which I do not focus here: like every act of a State organ, they are attributable to the State for the purposes of international responsibility.⁸⁸⁶

3.1 *Domestic Rulings in the Sources of International Law* (Art. 38(1)(a)–(c) ICJ Statute)

3.1.1 Treaties

Art. 31–33 VCLT are widely held to codify the CIL of treaty interpretation (on this issue, see *infra*, Chapter 6). Of particular interest for the purposes of this study is art. 31(3)(b) VCLT, which states that ‘There shall be taken into account, together with the context [of the treaty]: [...] b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’.

The ILC’s Special Rapporteur on ‘subsequent agreements and subsequent practice’, Georg Nolte, addressed the ‘legal significance’ of domestic case law in a report published in 2016.⁸⁸⁷ Nolte merely observes that domestic rulings *qua* subsequent practice ‘do not raise specific problems’.⁸⁸⁸ Indeed, given that such rulings are attributable to the State,⁸⁸⁹ they can, together with other instances of domestic and foreign State practice, constitute subsequent practice in the sense of art. 31(3)(b) VCLT.⁸⁹⁰ This constitutive aspect is arguably less central

885 See already *ibid* 49 f.

886 Art. 4 ARSIWA; ILC Committee on Formation of Customary (General) International Law, ‘Final Report: Statement of Principles Applicable to the Formation of General Customary International Law’ (2000) 17 <www.ila-hq.org/index.php/committees?committeeID=22>.

887 ILC, ‘Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur’ (2016) UN Doc A/CN.4/694 36 ff para 95 ff.

888 See *ibid* 37 para 96.

889 Gerhard Hafner, ‘Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment’ in Georg Nolte (ed), *Treaties and Subsequent Practice* (Oxford University Press 2013) 113.

890 Rosanne van Alebeek, ‘Domestic Courts as Agents of Development of International Immunity Rules’ (2013) 26 *Leiden Journal of International Law* 559, 562; Marcin Kaldunski, ‘The Law of State Immunity in the Case Concerning Jurisdictional Immunities of the State (Germany v. Italy)’ (2014) 13 *The Law and Practice of International Courts and Tribunals* 54, 99; 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’ (n 185) 3 para 4; ILC, ‘(Study Group on) Principles on the Engagement

for treaty law than what is the case with CIL, as custom cannot exist without its constitutive elements, namely State practice and *opinio juris*. This also explains why domestic judicial decisions are described by the ILC as elements providing evidence of State practice of *opinio juris*,⁸⁹¹ contrary to the terminology that is typically used to describe the contribution of domestic rulings to the identification of treaty law and general principles of international law. Still, subsequent practice, when it exists, forms an integral, constitutive part of treaty law too.

This link between domestic rulings and subsequent practice is also reflected in the practice of international law. International criminal tribunals in particular have referred to domestic rulings *qua* subsequent practice,⁸⁹² albeit not always explicitly. Two examples of implicit versus explicit references to subsequent treaty practice mentioned by André Nollkaemper are the rulings of the ICTY Trial Chamber in *Krstić* and *Jelisić*.⁸⁹³ In *Krstić*, the Chamber referred to art. 31 f VCLT when 'look[ing] for guidance in the practice of States, especially their judicial interpretations and decisions'.⁸⁹⁴ In *Jelisić*, it mentioned that it had 'taken into account' '[t]he practice of States, notably through their national courts' after citing the VCLT's treaty interpretation provisions.⁸⁹⁵ It referred (without providing any details) to the Eichmann ruling of the Supreme Court of Israel, as well as to judgments of Equatorial Guinean, Vietnamese, Ethiopian, and German courts.⁸⁹⁶ While the Chamber did not mention art. 31(3)(b) VCLT in *Krstić*, it did note the relevance of domestic courts *qua* 'subsequent practice' in *Jelisić*.⁸⁹⁷

of Domestic Courts With International Law, Final Report: Mapping the Engagement of Domestic Courts With International Law' (n 15) 3. See also Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56).

891 Draft conclusions 6(2) and 10(2), ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (2018) UN Doc A/73/10 119.

892 ILC, 'First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation by Georg Nolte, Special Rapporteur' (2013) UN Doc A/CN.4/660 18 f para. 41.

893 Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 280.

894 ICTY (Trial Chamber 1), *Prosecutor v. Radislav Krstić*, Case No IT-98-33-T, judgment, 2 August 2001, para 541, cited by Nollkaemper, *ibid*.

895 ICTY (Trial Chamber), *Prosecutor v. Goran Jelisić*, Case No IT-95-10-T, judgment, 14 December 1999, para 61, cited by Nollkaemper, *ibid* 279.

896 *Ibid*, para 61, footnote 80.

897 *Ibid*, para 61. See also Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 280.

The ILC commentary to the VCLT does not specify how subsequent practice is to be ascertained. However, art. 31(3)(b) VCLT makes it clear that domestic rulings reflect subsequent treaty practice if they establish the understanding *of the parties*. Hence, they cannot merely be a manifestation of the unilateral (auto-)interpretation of the treaty by one State. It is not necessary for the practice to express the understanding of *all* the parties, however, as the word 'all' was deliberately omitted by the ILC in the drafting process.⁸⁹⁸

International lawyers often limit themselves to general remarks as to the requirements this practice must fulfill to be relevant from the perspective of the VCLT, eg that it must reflect 'a certain constant pattern of state conduct'.⁸⁹⁹ To ensure predictability, clarity, and consistency in the way subsequent practice is ascertained, it seems helpful to interpret the notion of practice of art. 31(3)(b) VCLT in light of the notion of State practice in CIL. Like State practice in CIL (see also *infra*, 3.1.2), subsequent treaty practice must reach a minimal threshold of coherence (or uniformity), constancy (or regularity), and generality (or representativeness).⁹⁰⁰ Otherwise, it cannot express *the parties'* understanding. These requirements (coherence, constancy, generality) entail that domestic rulings, to constitute subsequent practice, must (i) not contradict the practice of other State organs (so that the practice is coherent), (ii) not be isolated rulings, but belong to an established practice, and (iii) emanate from the courts of a sufficiently large number of States. The requirements are even stricter for multilateral treaties.⁹⁰¹ Of course, some differences with State practice in CIL do exist. Subsequent treaty practice pertains to the interpretation of written norms upon which the parties have previously agreed, and it must establish 'the agreement of the parties' (art. 31(3)(b) VCLT).

Assessing whether the aforementioned conditions are fulfilled indisputably involves discretion. International courts have not always been careful when ascertaining subsequent practice on the basis of domestic rulings.⁹⁰² It is also important to note, along with Samantha Besson, that 'the effects of domestic courts' judicial interpretation on the interpreted norm [ie, on customary international legal norms and general principles] are greater than they are in the case of treaties'⁹⁰³ because of the process through which these norms are

898 ILC, 'Draft Articles on the Law of Treaties With Commentaries' (n 783) 222.

899 Hafner (n 889) 113.

900 On these three requirements: Besson and Ammann (n 60) 110 ff.

901 Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 280.

902 See *ibid.*

903 Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 48.

created and changed. This explains why domestic courts have been relatively neglected in the ascertainment of subsequent treaty practice. Nonetheless, domestic rulings can be constitutive of this practice and must be examined carefully.

3.1.2 Customary International Law

Besides reflecting subsequent treaty practice (*supra*, 3.1.1), domestic rulings can help determine (or, to use the ILC's terminology,⁹⁰⁴ provide evidence of) State practice and/or *opinio juris*, the two constitutive elements of CIL.⁹⁰⁵

As previously pointed out, the contribution of domestic judicial decisions to the formation and evolution of CIL is more central than with respect to treaties (*supra*, 3.1.1) and general principles (*infra*, 3.1.3). Indeed, the very existence of custom depends on the presence of its constitutive elements. Treaties, by contrast, exist before a subsequent treaty practice develops. The absence of such a practice does not yield the conclusion that there is no treaty norm. As regards general principles, their domestic recognition does not suffice to establish their existence in international law, which must be determined through analogical reasoning. Moreover, some general principles of international law exist regardless of their recognition in *foro domestico* (on these two types of general principles, see *infra*, 3.1.3).

When do domestic rulings provide evidence of State practice and/or *opinio juris* in the context of CIL? The ILC's recent work on custom shows that many aspects of the identification of CIL remain unsettled. Still, some are widely established. State practice and *opinio juris* must satisfy the requirements of coherence (or uniformity), constancy (or regularity), and generality (or representativeness).⁹⁰⁶ The terminology used to refer to these different requirements is

⁹⁰⁴ Draft conclusion 3, ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891). The ILC notes that the term 'evidence' is to be understood in a broad sense, and that it does not refer to a formal procedure in which evidence is produced and assessed. See footnote 263, in ILC, 'Report on the Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016)' (2016) UN Doc A/71/10 84.

⁹⁰⁵ Art. 24 ILC Statute states the following: 'The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice *and of the decisions of national and international courts on questions of international law* [...]' (emphasis added).

⁹⁰⁶ Eg ILA Committee on Formation of Customary (General) International Law (n 886) 20 ff; James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 24 f. See also draft conclusions 7–8 in ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

highly inconsistent,⁹⁰⁷ however, and the practice (both domestic and international) tends not to take them seriously enough (*infra*, Chapters 6 and 8).⁹⁰⁸

The ILC cites domestic rulings among the forms of evidence of both State practice and *opinio juris*.⁹⁰⁹ The Special Rapporteur's analysis of the authority of domestic rulings from the perspective of CIL is very brief, and he only mentions their relevance *qua* State practice.⁹¹⁰ In 2016, the ILC's Secretariat conducted a comprehensive survey of international courts' reliance on domestic rulings to identify custom.⁹¹¹ Indeed, international courts such as the PCIJ and its successor, the ICJ,⁹¹² the ICTR,⁹¹³ and especially the ICTY,⁹¹⁴ have referred to domestic rulings *qua* State practice and/or *opinio juris*. Courts seldom distinguish between the two constitutive elements of CIL in this context.⁹¹⁵ As

907 For an attempted clarification: Besson and Ammann (n 60) 110 ff.

908 On the ICTY: Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 285. On the Swiss practice: Besson and Ammann (n 60).

909 ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891). See draft conclusions 5, 6(2), and 10(2).

910 ILC, 'Second Report on Identification of Customary International Law by Special Rapporteur Sir Michael Wood' (n 578) 42 para 58.

911 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' (n 185).

912 PCIJ, case concerning the s.s. 'Lotus' (*France v. Turkey*), judgment, PCIJ 1927 Series A No 10, 7 September 1927, 25 ff; ICJ, *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, judgment, ICJ Reports 2012, 3 February 2012, 99, at 122 f, para 55; 125, para 61; and especially 131 ff, para 72 ff; see also 141 f, para 96; 143, para 101.

913 See the ILC Secretariat's remarks: 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' (n 185) 28 ff para 44 ff.

914 As of 1 December 2015, the ICTY had referred to domestic rulings when identifying CIL in 49 out of 81 rulings: *ibid* 21, para 36. See also Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 281 ff. For references to domestic case law, see ICTY (Appeals Chamber), *Prosecutor v. Dražen Erdemović*, judgment, Case No IT-96-22-A, 7 October 1997, joint and separate opinion of Judge McDonald and Judge Vohrah, para 50 and 55; ICTY (Trial Chamber II), *Prosecutor v. Anto Furundžija*, judgment, Case No IT-95-17/1-T, 10 December 1998, para 194 ff; ICTY (Appeals Chamber), *Prosecutor v. Duško Tadić*, opinion and judgment, Case No IT-94-1-T, 7 May 1997, para 641 f (where the Court deemed French case law 'instructive', but of lesser relevance given that it concerned domestic law).

915 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' (n 185) 22 f para 37 f.

the ILC Secretariat notes, some never refer to domestic rulings when identifying CIL, eg the ITLOS⁹¹⁶ or the WTO Appellate Body.⁹¹⁷ Domestic rulings are typically one piece of evidence among others which courts use to determine the existence of CIL.⁹¹⁸ The domestic practice also occasionally uses domestic rulings *qua* evidence of the constitutive elements of CIL, ie, State practice and *opinio juris*.⁹¹⁹ Scholars accept this as well,⁹²⁰ although some emphasize State practice only.⁹²¹

Domestic case law is, of course, not the only basis for ascertaining CIL.⁹²² When it is inconsistent, scarce, or not representative of a *longa consuetudo*, other instances of domestic (legislative or executive) practice and/or *opinio juris* may be used. The lack of domestic 'judicial custom'⁹²³ is thus not necessarily the end of the matter with regard to CIL.

Should rulings that conflict with the position of the other branches of government be deemed an expression of State practice and/or *opinio*? While some consider that what is decisive is whether the body at stake has the final authority on a given issue under domestic law⁹²⁴ (which is not always clear,⁹²⁵ see

916 See *ibid* 18 f para 31 ff. However, individual judges of the ITLOS have done so, see *ibid* 19, para 34.

917 See 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' (n 185) 20, para 35.

918 Eg *ibid* 24, para 39.

919 Besson and Ammann (n 60) 77 f.

920 Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 281 f; Ingrid Wuerth, 'International Law in Domestic Courts and the Jurisdictional Immunities of the State Case' (2012) 13 Melbourne Journal of International Law 819, 3. See also Javier Dondé Matute, 'International Criminal Law Before the Supreme Court of Mexico' (2010) 10 International Criminal Law Review 571, 575.

921 ILA Committee on Formation of Customary (General) International Law (n 886) 18. See also the following statement of the ILA Study Group on Domestic Courts, in its 2014 Working Session Report: 'The traditional position in international law is that domestic courts engage in state practice, and thus they effectively make international law, at least on a micro-level'. ILA, 'Working Session Report of the ILA Study Group on Principles on the Engagement of Domestic Courts With International Law' (n 61) 3.

922 Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 285.

923 Besson, 'Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators' (n 56) 60.

924 Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 284.

925 On the different approaches to conflicts between the judiciary and the executive, see Wuerth (n 920) 5, 10.

eg Chapter 3, 2.1.2 and 4.2.2, *supra*), others give preference to the executive's view.⁹²⁶ The ILA Study Group on Domestic Courts considers that domestic rulings, to constitute State practice and/or *opinio*, must be accepted (or 'not "rejected"',⁹²⁷ as the Study Group puts it) by the executive. The ILC, on the other hand, states that domestic judgments 'will count less if they are reversed by the legislature or remain unenforced because of concerns about their compatibility with international law'.⁹²⁸ Yet it seems that especially when it comes to ascertaining *opinio juris*,⁹²⁹ ie, the fact that an act is performed out of a sense of legal obligation, judicial decisions should carry more weight than the acts of other State organs.⁹³⁰ Indeed, courts' institutional position requires them to base their rulings on legally relevant (as opposed to strategic)⁹³¹ reasons. It is worth stressing that this question arises if courts *contradict* the executive or the legislature, and *vice versa*, which is atypical in Switzerland (*supra*, Chapter 3, 4.2.2).

3.1.3 General Principles of International Law

Besides treaties and CIL, another source of international law consists in the 'general principles of law recognized by civilized nations' (art. 38(1)(c) ICJ Statute).⁹³² The German translation of the ICJ Statute uses the term 'Kulturvölker'. The term 'civilized' reflects an imperialistic view of international law.⁹³³ It needs to be deleted given the commitment of international law to sovereign

926 ILA Committee on Formation of Customary (General) International Law (n 886) 18. On this question, see Wuerth (n 920) 3 ff.

927 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) 4.

928 ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891) 128 para 5.

929 Ingrid Wuerth suggests that courts' institutional independence also justifies placing particular emphasis on their views to identify State practice: Wuerth (n 920) 19.

930 Eg *ibid* 9.

931 ILA Committee on Formation of Customary (General) International Law (n 886) 5.

932 It is worth pointing out that, conceptually, it is these principles' recognition (*qua* social fact) that constitutes a source of international law, not the principle itself.

933 On the imperialistic roots of international law, see eg Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1; Martti Koskenniemi, Walter Rech, and Manuel Jiménez Fonseca (eds), *International Law and Empire: Historical Explorations* (Oxford University Press 2017).

equality. However, proposals to amend the Statute in this sense have been unsuccessful.⁹³⁴

Unlike the 'subsidiary means' of art. 38(1)(d) ICJ Statute, general principles are a source of international law, but they are often considered of secondary importance compared to treaties and custom. They are deemed 'gap-fillers' that come into play when an issue is left open by other sources.⁹³⁵ General principles are of two types: some are idiosyncratic to international law (like sovereign equality), while others originate from domestic practices (like good faith).⁹³⁶ In the present study, the latter type of general principles, identified *in foro domestico*, is of particular interest.

How to identify general principles of domestic origin (ie, 'general principles of law', as opposed to 'general principles of international law *stricto sensu*')⁹³⁷? While general principles of this kind are 'traced to state practice',⁹³⁸ including to 'judicial law',⁹³⁹ it is important to note that this requirement of a practice of recognition is looser than the test applied to identify State practice and *opinio juris* in CIL. The existence of general principles of law primarily hinges on their recognition by States.

International courts (eg in ICL or IHRL) have identified general principles of law on the basis of national practices through analogical and/or comparative legal reasoning, although the methods they employ are not always transparent and comprehensive.⁹⁴⁰ Sometimes, they have used domestic court

934 Giorgio Gaja, 'General Principles of Law', *Max Planck Encyclopedia of Public International Law* (Online Edition) (Oxford University Press 2013) para 2 <opil.ouplaw.com>.

935 Samantha Besson, 'General Principles in International Law: Whose Principles?' in Samantha Besson and Pascal Pichonnaz (eds), *Les principes en droit européen / Principles in European Law* (Schulthess 2011) 39, 48 ff; Filippo Fontanelli, 'The Invocation of the Exception of Non-Performance: A Case-Study on the Role and Application of General Principles of International Law of Contractual Origin' (2012) 1 Cambridge Journal of International and Comparative Law 119, 127.

936 Besson, 'General Principles in International Law: Whose Principles?' (n 935) 33. See also Gaja (n 934) para 7 ff; Wolfgang Weiss, 'Allgemeine Rechtsgrundsätze des Völkerrechts' (2001) 39 Archiv des Völkerrechts 394, 397 ff. See also art. 21(1)(b) and (c) ICC Statute.

937 Besson, 'General Principles in International Law: Whose Principles?' (n 935) 33.

938 Crawford, *Brownlie's Principles of Public International Law* (n 906) 37.

939 Besson, 'General Principles in International Law: Whose Principles?' (n 935) 28. See also d'Aspremont, 'The Permanent Court of International Justice and Domestic Courts: A Variation in Roles' (n 240) 230 f.

940 Besson, 'General Principles in International Law: Whose Principles?' (n 935) 36 f; Jain (n 73). For an example, see Judge Bruno Simma's separate opinion in ICJ, case concerning *Oil Platforms (Iran v. United States)*, judgment, merits, ICJ Reports 2003, 6 November 2003, 324, at 354, para 66 ff. I am grateful to León Castellanos-Jankiewicz for drawing my attention to this opinion.

decisions.⁹⁴¹ In general, however, the PCIJ and ICJ rarely apply general principles as a source of international law.⁹⁴² The ICTY has been cautious in using domestic case law to ascertain general principles of international law. In *Tadić*, it deemed reliance on 'national legislation and case law' justified only if 'most, if not all, countries adopt the same notion of common purpose'. The court added that 'it would be necessary to show that, in any case, the major legal systems of the world take the same approach' to the issue at stake.⁹⁴³ Yet referring to so-called 'major legal systems' is problematic, as more weight is given to some States based on opaque criteria. As a matter of fact, Nollkaemper notes that the ICTY uses domestic case law selectively to identify general principles of international law.⁹⁴⁴

To conclude, domestic rulings help determine States' recognition of general principles of law. The weight of these rulings depends on how they fit with other domestic legislative and executive practices, analogously to what applies to CIL (*supra*, 3.1.2). The two-tiered test of State practice and *opinio juris* used for CIL does not need to be satisfied for general principles, which merely have to be 'general' and 'recognized' domestically.⁹⁴⁵ This does not mean that such principles can be invoked to circumvent the two-tiered test of CIL.⁹⁴⁶

3.2 Domestic Rulings as Auxiliary Means (Art. 38(1)(d) ICJ Statute)

If in a given case, domestic rulings do not fulfill the criteria of subsequent treaty practice, State practice, and/or *opinio juris* in the context of CIL, or the domestic practice of recognition that generates some general principles of

941 PCIJ, case concerning the *Factory at Chorzów*, claim for indemnity, jurisdiction, PCIJ Series A No 9, 26 July 1927, 4, at 31, cited by Gaja (n 934) para 9.

942 d'Aspremont, 'The Permanent Court of International Justice and Domestic Courts: A Variation in Roles' (n 240) 230 f; Besson, 'General Principles in International Law – Whose Principles?' (n 935) 39; Sienho, 'Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases' (n 73) 488.

943 ICTY (Appeals Chamber), *Prosecutor v. Duško Tadić*, judgment, Case No IT-94-1-A, 15 July 1999, para 225. See also ICTY (Trial Chamber II), *Prosecutor v. Zoran Kupreškić and Others*, trial judgment, Case No IT-95-16-T, 14 January 2000, para 680; ICTY (Trial Chamber II), *Prosecutor v. Anto Furundžija*, judgment, Case No IT-95-17/1-T, 10 December 1998, para 177.

944 See, with reference to ICTY (Trial Chamber I), *Prosecutor v. Dražen Erdemović*, sentencing judgment, Case No IT-96-22-T, 29 November 1996, para 19; Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 289.

945 Besson, 'General Principles in International Law: Whose Principles?' (n 935) 60.

946 Pierre d'Argent, 'Les principes généraux à la Cour internationale de Justice' in Samantha Besson and Pascal Pichonnaz (eds), *Les principes en droit européen / Principles in European Law* (Schulthess 2011).

international law (*supra*, 3.1), domestic case law may still be used *qua* 'subsidiary means for the determination of rules of [international] law' (art. 38(1)(d) ICJ Statute).⁹⁴⁷ I prefer to call them auxiliary means, for reasons I set out below. The use of domestic rulings *qua* auxiliary means pursuant to art. 38(1)(d) ICJ Statute by interpreters of international law stands on a different level than these rulings' contribution to the sources of international law of art. 38(1)(a)–(c) ICJ Statute (*supra*, 3.1).⁹⁴⁸ While the difference is frequently blurred in practice,⁹⁴⁹ distinctive tests apply in these two contexts.

The uncertainties surrounding art. 38(1)(d) ICJ Statute and, more generally, the place of judicial decisions in the sources of international law, reflect the *amour impossible*⁹⁵⁰ between the orthodox doctrine of the sources of international law and the effect judicial decisions (both domestic and international) have in practice (*supra*, Chapter 1, 2.3).⁹⁵¹ Given the practical significance of judicial decisions in international law, scholarly analyses of art. 38(1)(d) ICJ Statute are surprisingly scarce.⁹⁵² International lawyers often mention the provision in passing, without analyzing the legal authority of domestic rulings.

International lawyers generally agree that 'subsidiary means' are conceptually distinct from the sources of international law listed in art. 38(1)(a)–(c) ICJ Statute.⁹⁵³ On the other hand, judicial decisions are sometimes qualified as an 'indirect source'⁹⁵⁴ or a 'subsidiary source'.⁹⁵⁵ These expressions are

947 Nollkaemper notes that the ICTY has sometimes 'endowed national decisions with an apparent quasi-independent authority that cannot be reduced to a constituent element of either customary international law or a general principle of (international) law'. Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 290.

948 Besson and Ammann (n 60) 69 f.

949 Eg *ibid* 80.

950 Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication' (n 85). The expression was originally used by Ascensio (n 85).

951 Antonio Cassese highlights this tension between the law in the books and the law in practice by referring to the 'wise' versus the 'wild approach' of international judges towards 'subsidiary means': Antonio Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals: Some Methodological Remarks' in Morten Bergsmo (ed), *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Ashbjørn Eide* (Brill/Nijhoff 2003).

952 See however Aldo Zammit Borda, 'A Formal Approach to Article 38(1)(d) of the ICJ Statute From the Perspective of the International Criminal Courts and Tribunals' (2013) 24 *European Journal of International Law* 649; Zammit Borda (n 870).

953 See Zammit Borda (n 870) 68 f; Sienho (n 73) 491; Wolfrum (n 271) para 9.

954 Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law, Vol I: Peace* (9th edn, Longman 1996) 41.

955 La Forest (n 871) 98.

misleading: either something is a source of law, or it is not. 'Subsidiary means' are not sources, but material that assists decision-makers in ascertaining norms stemming from the sources of international law. The term 'subsidiary means' erroneously suggests a hierarchy or chronological priority between sources and 'subsidiary means';⁹⁵⁶ instead of acknowledging that the latter help 'elucidate'⁹⁵⁷ the former.⁹⁵⁸ Because judicial decisions are auxiliary means, they cannot usurp the authority of the 'antecedent source' of the law they 'propound'.⁹⁵⁹ As noted by the Asian-African Legal Consultative Organization (AALCO), they are 'no more than guideposts on the road to the destination, not the destination itself'.⁹⁶⁰ In this regard, the French version of the ICJ Statute is more precise than the English one, as it refers to 'auxiliary' means, ie, to means that are 'offering or providing help'.⁹⁶¹ Hence, the term auxiliary means seems more appropriate (see also *supra*, Chapter 2, 5.4).⁹⁶²

While there are exceptions,⁹⁶³ most international lawyers consider domestic rulings to fall under the 'subsidiary means' of art. 38.⁹⁶⁴ This view is reflected in the ILC's draft conclusions on CIL.⁹⁶⁵ It is supported by the fact that in the drafting process of the PCIJ Statute, the initial reference to international judicial decisions was changed to 'judicial decisions'.⁹⁶⁶ Moreover, especially in the context of CIL, international courts⁹⁶⁷ and arbitral

956 See Zammit Borda's statement that 'subsidiary means' should 'supplement' a given interpretation: Zammit Borda (n 870) 70.

957 Pellet and Müller (n 187) 944 para 305.

958 Crawford, *Brownlie's Principles of Public International Law* (n 906) 41; Wood (n 14) 12.

959 Jennings and Watts (n 954) 41.

960 Sienho Yee, 'Report on the ILC Project on "Identification of Customary International Law"' (2015) 14 *Chinese Journal of International Law* 375, 384.

961 See the definition of 'auxiliary' in <www.merriam-webster.com/dictionary/auxiliary>.

962 See also Pellet and Müller (n 187) 944 f para 306.

963 See *ibid* 953 para 323.

964 Hovell (n 871) 592; Jennings and Watts (n 954) 41 f; Higgins (n 365) 208. See also, for further references: 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) 158, footnote 18.

965 Conclusion 13(2), ILC, 'Draft Conclusions on Identification of Customary International Law, With Commentaries' (n 891).

966 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' (n 185) 6 para 10; Zammit Borda (n 952) 652.

967 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' (n 185) 8 para 16.

tribunals⁹⁶⁸ seem to use domestic rulings *qua* auxiliary means, even if they do not always explicitly say so.⁹⁶⁹ As mentioned, it is often unclear in practice whether such rulings are cited based on art. 38(1)(d) ICJ Statute, or *qua* element of determination of international law.⁹⁷⁰

The word 'subsidiary', according to André Nollkaemper, 'reflects the fact that no formal system of precedents exists [in international law], let alone a principle of stare decisis'.⁹⁷¹ Absent such doctrines, however, interpreters are left with little guidance as to the weight of domestic rulings. Yet relying on domestic rulings in an erratic way stands in a tension with lawful, predictable, clear, and consistent judicial reasoning.⁹⁷² Domestic judicial decisions are not a convenient 'shortcut' or a "quick fix" solution.⁹⁷³ They are interpretative aids that should be used with 'intellectual discipline',⁹⁷⁴ not based on convenience or result-oriented cherry-picking.

International lawyers explain that in practice, judicial decisions are usually relied on 'for their persuasive value'.⁹⁷⁵ Alain Pellet and Daniel Müller for instance write:

[P]recisely as 'there are awards and awards, some destined to become ever brighter beacons, others to flicker and die near-instant deaths', there are judgments and judgments. Central to the question is the persuasiveness of the legal reasoning.⁹⁷⁶

968 See *ibid* 7 para 13.

969 See *ibid* 16 ff para 28 ff. The ICTY too refers to domestic rulings *qua* auxiliary means, although it gives prefers to cite international rulings if they are available. See *ibid* 25 ff para 41 ff. The ICTR has occasionally used domestic rulings *qua* auxiliary means, see *ibid* 30 f para 47. On these two courts' 'wild approach' to auxiliary means, see Cassese (n 951) 21 ff.

970 Besson and Ammann (n 60) 80.

971 Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY' (n 182) 291.

972 Aldo Zammit Borda rejects the use of domestic rulings as a 'direct source', as they would be relied upon in a 'lax, uncritical' way: Zammit Borda (n 870) 66. See also Cassese 21.

973 See *ibid* 82.

974 Jennings uses this expression with regard to international rulings: Jennings (n 40) 10, 12.

975 Zammit Borda (n 870) para 7.

976 Pellet and Müller (n 187) 947 para 312. The authors are quoting Jan Paulsson, 'Report: International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics* (Kluwer Law International 2007) 881.

The notion of persuasive authority is frequently used in common law countries. Grant Lamond defines it as ‘non-binding but legally relevant considerations’.⁹⁷⁷ As Lamond explains, persuasive authority is a theoretical type of authority. It provides reasons to believe X, as opposed to reasons to do X, which is characteristic of practical authority.⁹⁷⁸

The notion of persuasiveness can be misleading. It can for example suggest that a decision is cited and followed in later cases simply because of its rhetorical force. Persuasiveness does not capture the fact that some judgments are cited in later cases (and hence have a legal effect beyond the particular case) because they are considered to offer lawful, high-quality reasoning. In this context, Samantha Besson’s distinction between decisional and interpretive authority is helpful. According to Besson, judicial decisions have ‘decisional authority’ for the parties to the dispute, but also, in some cases, ‘interpretive authority’ by guiding future interpretations of the law.⁹⁷⁹

In relation to this issue, it is important to note that the question of other interpreters’ (subjective) reliance on a given judgment (as authorized by art. 38(1)(d) ICJ Statute) is distinct from the question of the place of this judgment in the sources of international law (eg in international law, with respect to art. 38(1)(a)–(c) ICJ Statute, *supra*, 3.1). It also differs from the question of the (objective) legal authority of this ruling, be it vis-à-vis its addressees, in the legal order, or for a given court (*qua* precedent).

When should domestic rulings be used as auxiliary means pursuant to art. 38(1)(d) ICJ Statute? The answer partly follows from the two criteria I use to evaluate the practice of domestic courts (*supra*, Introduction, section 3). One criterion is courts’ use of the interpretative methods of international law, as it indicates that a decision was made in conformity with what the law requires. A second one is the quality of the court’s reasoning.⁹⁸⁰ As mentioned, the

977 Grant Lamond, ‘Persuasive Authority in the Law’ (2010) 17 *Harvard Review of Philosophy* 16, 16.

978 See *ibid* 18. See also Joseph Raz, ‘Normativity: The Place of Reasoning’ (2015) 25 *Philosophical Issues* 144, 146.

979 Besson, ‘The Erga Omnes Effect of Judgments of the European Court of Human Rights – What’s in a Name?’ (n 137); Besson, ‘Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and International Adjudication’ (n 85) 420, 422. See also von Bogdandy and Venzke (n 174); van de Kerchove (n 799) 698.

980 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’ (n 185) 34 para 56; ILC, ‘Draft Conclusions on Identification of Customary International Law, With Commentaries’ (n 891) 149 para 3. See also Christopher Greenwood, ‘Unity

predictability, clarity, and consistency of judicial decisions are indicators of high-quality legal reasoning. They suggest – but do not guarantee – that the interpretation was not reached on a whim, but after a careful, thorough examination. Third, domestic case law that is not well established provides scant support for a given solution. In this context, the requirements of coherence, constancy, and generality of State practice in the context of CIL offer guidance. These requirements are not decisive, however, and may need to be relativized when the case law on a given issue is limited. Fourth, domestic rulings that have been quashed or contradicted by higher domestic courts carry little weight, even if the requirement of internal consistency applicable in the context of CIL does not strictly apply to auxiliary means. By contrast, the warrant of rulings that have withstood the test of higher judicial instances is stronger. Fifth, the domestic context of the judicial decision must be taken into account, including the court's jurisdiction, its composition, resources, and expertise (see also the criteria highlighted in Chapter 3, *supra*). These characteristics especially help determine whether the court's reasoning is generalizable. Sixth, *obiter dicta* arguably carry less weight than the *ratio decidendi*.

While the aforementioned criteria are not exhaustive and do not offer hard and fast rules on when domestic rulings provide conclusive auxiliary means, they provide guidelines for this assessment.

4 Conclusion

I have argued that domestic rulings on international law are central to international law in two main respects. First, domestic courts, through their interpretations, can enforce international law domestically and avert their State's international responsibility (*supra*, section 2). Second, they can (collectively) contribute to the formation and evolution of international law, and hence provide indications as to its content (*supra*, 3.1), and they can be used by interpreters of international law *qua* auxiliary means (*supra*, 3.2).

Since domestic rulings, besides having domestic legal authority (*supra*, Chapter 3, 4.2.7), are central to international law in these two respects, it is important to clarify the international legal frame that constrains domestic courts' interpretations. Part 3 of this study is devoted to this question, which overlaps with Raz's third question on interpretation, namely: how to interpret?

and Diversity in International Law' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 51; Mendelson (n 73) 82; von Bogdandy and Venzke (n 174) 990 f.