Swiss Courts and the Interpretation of Unwritten International Law

[There is a] need for clarity as regards the sources of public international law, or at least as much clarity as possible. Questions relating to sources lie at the heart of international law. Of particular concern is the lack of rigour shown by some domestic judges when it comes to determining the rules of customary international law.\footnote{1717}{Michael Wood, ‘What Is Public International Law? The Need for Clarity About Sources’ (2011) 1 Asian Journal of International Law 205, 205.}

[How the existence of rules of customary international law, and their content, are to be determined,] is not only of concern to specialists in public international law; others, including those involved with national courts, are increasingly called upon to identify rules of customary international law. In each case, a structured and careful process of legal analysis and evaluation is required to ensure that a rule of customary international law is properly identified, thus promoting the credibility of the particular determination as well as that of customary international law more broadly.\footnote{1718}{ILC, ‘Draft Conclusions on Identification of Customary International Law, With Commentaries’ (n 891) 122 para 2.}

1 Introduction

While treaty law is undoubtedly the source of international law that is most frequently used in domestic courts, it is not the only one. Besides written international legal acts, courts also apply unwritten ones, namely customary international law (CIL) and general principles of international law.\footnote{1719}{There is a wealth of literature on unwritten international law. For recent contributions, see eg Peter Staubach, The Rule of Unwritten International Law: Customary Law, General Principles, and World Order (Routledge 2018); Chimni (n 1193).}
Compared to treaty law (supra, Chapter 7), there is little domestic judicial practice pertaining to CIL, and this practice is often more ‘hesitant’.

\[\text{This } a \text{fortiori applies to general principles of international law, which are barely cited. As I will explain, courts’ fluctuating terminology}\] makes it hard to identify the few cases dealing with these two sources of international law.

 Nonetheless, there are various important reasons for studying domestic courts’ interpretation of CIL and general principles of international law. First, both do provide answers to international legal issues. Consider, for example, the customary principle \textit{pacta sunt servanda}, or the general principle of international law according to which the violation of an international legal duty triggers a duty to provide reparation.\[1722\] The legal norms that prescribe the use of the four interpretative methods, as well as other secondary norms of international law, are customary norms themselves. Second, the interpretation of both CIL and general principles of international law is governed by specific methods with which States must comply (supra, Chapters 5 and 6). It is therefore important that this practice does not escape scrutiny. Third, the influence of CIL and general principles of international law on the formation of international law (especially on the formation of treaty law) cannot be overstated. A vast number of treaties have been codified based in part on CIL. Fourth, given that some States are frequently exposed to specific customary international legal issues and general principles of international law, their experience is at least occasionally relied on by other States to ascertain the law governing these matters (on the concept of ‘specially affected States’, see supra, Chapter 3, 2.1).

In the first section of this chapter, I examine the domestic judicial practice of CIL, with an emphasis on the Swiss practice (2). As always, my focus lies on courts’ compliance with the interpretative methods of CIL, and with the virtues of high-quality reasoning (on these two basic criteria of evaluation, see supra, Introduction, section 3). The next section is devoted to domestic courts’ interpretation of general principles of international law (3). I evaluate this practice based on the same aforementioned criteria. Finally, after this \textit{tour d’horizon} of the Swiss practice, I provide an overall evaluation thereof (4), once again from the perspective of legality and quality. As was the case in my chapter on treaty law (Chapter 7, supra), the case law on which this chapter is based reflects the state of courts’ online databases or websites in June 2019.

1720 Hegde (n 46).
1721 On this issue, see also Besson and Ammann (n 60) 16 ff.
1722 \textit{PCIJ}, case concerning the \textit{Factory at Chorzów (Germany v. Poland)}, judgment, claim for indemnity, merits, \textit{PCIJ} Series A No 17, 13 September 1928, 4, at 29.
It is important to recall at the outset that legal norms requiring the use of interpretative methods are secondary norms. Hence, they are customary norms. Norms about interpretative methods are largely the product of judicial law (supra, Chapter 5, section 3, and Chapter 6, section 2). When courts interpret custom, they generate a practice that can contribute to defining the interpretative methods of customary law (as is also the case with the methods of interpretation of treaty law and of general principles of international law). Indeed, domestic rulings provide evidence of the constitutive elements of CIL (supra, Chapter 4, 3.1.2). This explains, though it does not justify, why domestic courts may be tempted to refer to their own practice to identify customary interpretative methods. This circularity cannot detract from the fact that courts are not the only actors whose practice matters for the purposes of identifying customary interpretative methods. When interpreting international law, courts must use the methodological yardsticks defined by the practice of States at large, not only by themselves (or by their own State). This is the case regardless of whether domestic law requires them to respect their previous rulings, the case law of other domestic courts, or the decisions of other domestic authorities.

2 Customary International Law

In this section, I describe the practice of domestic courts on CIL in general (2.1), before taking a closer look at the Swiss judicial practice (2.2).

2.1 Domestic Courts and the Interpretation of Customary International Law

As was the case with treaty interpretation (supra, Chapter 7, section 2), the present section mainly relies on scholarly analyses of domestic courts’ interpretation of CIL. I have relied on accounts providing insights (even at the margins) into the judicial interpretative methods of CIL in African, Asian, European, and other regions.

1723 Maripe (n 354); Nwapi (n 1388).
1724 Takashiba (n 1383); Hegde (n 46); Marochkin and Popov (n 183); Karim (n 1383).
North American,1726 South American,1727 and Oceanian1728 jurisdictions, as well as on broader analyses of the domestic practice.1729 While I have, whenever possible, used analyses of domestic courts’ interpretation of CIL that are not limited to a given substantive area (eg to IHRL), the dearth of scholarship on the issue made it necessary to also rely on more specialized contributions.1730 Unfortunately, and even more so than for treaty law, it is difficult to find relevant scholarship for some jurisdictions, partly due to linguistic barriers and to limited online availability. It is crucial to develop this scholarship further in order to mitigate geographic bias.

Drawing parallels between foreign legal scholarship about the foreign court practice, on the one hand (2.1), and Swiss case law and legal scholarship, on the other (2.2), raises issues of comparability. Moreover, scholarship alone provides limited insight into a State’s judicial practice, especially when this scholarship is scarce (which, unfortunately, is often the case). I hence also relied on judgments that had been added to the ILDC database as of June 2019.1731 For similar reasons as for my analysis of treaty interpretation (supra, Chapter 7), I did not canvass all available ILDC judgments dealing with CIL and its methods. Instead, I focused on rulings from jurisdictions for which relevant scholarship was available.1732

Listing cases from an array of jurisdictions also raises questions of comparability given the differences that characterize domestic legal orders. In France,1733 Mexico,1734 and the Netherlands,1735 for instance, the Constitution

1729 Eg Staubach (n 1265); Iovane (n 182).
1730 This applies, for instance, to articles published in 2010 in a special issue of the International Criminal Law Review devoted to Latin America and CIL. See also Gordon A Christenson, ‘Customary International Human Rights Law in Domestic Court Decisions’ (1996) 25 Georgia Journal of International and Comparative Law 225; Akande and Shah (n 859).
1731 As is the case with treaty law, the database provides a filter for CIL.
1732 For these jurisdictions, I looked at all available judgments. One exception is the United States: in light of the large number of rulings available (138 as of June 2019), I focused on Supreme Court rulings.
1733 See Bernard Stirn’s observations in ‘The Judge and International Custom / Le juge et la coutume internationale’ (Council of Europe 2013) 100.
1734 Dondé Matute (n 920) 579.
1735 Stirling-Zanda (n 102) 4.
does not specifically mention CIL. This contrasts with jurisdictions such as Australia, Germany, Greece, Italy, the Philippines, Portugal, Russia, and South Korea, which mention CIL or related umbrella terms and often regulate some aspects of its relationship with domestic law.\textsuperscript{1736} While I do not analyze these constitutional characteristics, caution is warranted when comparing these various domestic practices. Even within one jurisdiction, a ruling cannot be appraised without the necessary caveats, eg the specific context in which CIL is interpreted.\textsuperscript{1737}

When looking at these domestic practices, a first finding is that a reference to CIL in domestic constitutions does not guarantee that courts actually apply it. Jan Wouters, in a comparative analysis of domestic rulings in continental Europe, observes a gap between the law in the books (eg constitutional provisions providing that CIL is binding on the domestic legal order) and the law in practice.\textsuperscript{1738} Admittedly, some courts, like the Dutch courts, have been applying CIL ‘[f]rom times immemorial’,\textsuperscript{1739} and in some substantive areas of international law, CIL is regularly applied, eg in the context of the law of immunities.\textsuperscript{1740} In general, however, scholars (and practitioners)\textsuperscript{1741} note that there is little domestic case law pertaining to this source of international law.\textsuperscript{1742} This partly explains the limited availability of scholarship on the issue.

A common scholarly diagnosis concerns domestic judges’ discomfort and hesitation vis-à-vis CIL.\textsuperscript{1743} In the United States, civil rights lawyer Paul Hoffman humorously reports that invoking CIL in court triggers the so-called ‘blank stare phenomenon’, judging from the reaction of the bench.\textsuperscript{1744} Other

\textsuperscript{1736} Eg the States listed by Yuji Iwasawa, ‘Domestic Application of International Law’ (2016) 378 Recueil des cours de l’Académie de droit international 24. For an overview of constitutional provisions of continental European States, see also Wouters (n 1223) 26 f.

\textsuperscript{1737} Stirling-Zanda (n 102) 5.

\textsuperscript{1738} Wouters (n 1223) 27.

\textsuperscript{1739} Fleuren (n 1388) 246.

\textsuperscript{1740} Akande and Shah (n 859).

\textsuperscript{1741} See Bernard Stirn’s remarks in ‘The Judge and International Custom / Le juge et la coutume internationale’ (n 1733) 99.

\textsuperscript{1742} Eg in Nigeria: Nwapi (n 1388) 55; Christian N Okeke, ‘The Use of International Law in the Domestic Courts of Ghana and Nigeria’ (2015) 32 Arizona Journal of International and Comparative Law 371, 415. See also, on the Austrian case law, Reinisch and Bachmayer (n 1074) 10.

\textsuperscript{1743} Wouters (n 1223) 27. This unease is also reflected in legal scholarship, see Vassilis P Tzevelekos, ‘Introductory Note: Beyond the Identification of International Customary Rules’ (2017) 19 International Community Law Review 1, 1.

\textsuperscript{1744} Hoffman (n 1726). In Scotland, by contrast, courts have held that there is no need to produce expert evidence on the content of CIL, as it is part of Scots law. See Stephen C Neff,
US scholars denounce courts’ ‘legal procrastination’\textsuperscript{1745} regarding CIL. Rosalyn Higgins observes that ‘there is sometimes a nervousness or disinclination [of domestic courts] about getting into this area’.\textsuperscript{1746} In Bangladesh, courts prefer to apply domestic legislation rather than CIL when mentioning a particular right.\textsuperscript{1747} In Kenya as well, some cases show courts’ failure to address relevant issues pertaining to CIL.\textsuperscript{1748} Even when courts use a CIL norm, they are often eager to demonstrate that it has been codified, and/or that it is reflected in written statements.\textsuperscript{1749} Courts are especially reluctant to apply CIL due to their concern that this might contradict the principle of legality, be it in the area of criminal law\textsuperscript{1750} or more generally.\textsuperscript{1751} In Latin America, by contrast, courts’ use of CIL\textsuperscript{1752} to set aside domestic statutory limitations has been considered unconstitutional by many scholars,\textsuperscript{1753} and courts’ methods for identifying CIL in this context have been criticized.\textsuperscript{1754} For judges to neglect CIL as a matter of principle is deeply worrying, as it means a source of international law is being ignored by the courts. This is problematic from the perspective of the legality of judicial decisions, but also from the perspective of their quality, given that courts do not provide cogent reasons for this neglect.

\textsuperscript{1746} Hartka (n 183).
\textsuperscript{1747} Higgins (n 365) 211.
\textsuperscript{1748} Karim (n 1383) 106.
\textsuperscript{1750} For a critical analysis, see Wouters (n 1223) 28 ff.
\textsuperscript{1752} On these concerns, see Handl-Petz (n 1384) 86 f.
\textsuperscript{1753} On the use of international law more generally for this purpose, see Viera Gallo Quesney and Lübbert Álvarez (n 1386) 109 ff. See however (regarding amnesty laws) Eguiguren Praeli (n 1386) 4.
\textsuperscript{1754} Eg (in Argentina), Parenti (n 1727) 498 ff. For examples of such cases, see (among others): Office of the Prosecutor v. Priebke (Erich), Ordinary appeal judgment, request of extradition, p/457/xxx, ILDC 1599 (AR 1995), 2 November 1995, Argentina; Supreme Court [CS]; Riveros v. Office of the Public Prosecutor, Recourse of cassation and unconstitutionality, M 2333 XLII, ILDC 1084 (AR 2007), 13 July 2007, Argentina; Supreme Court [CS].
\textsuperscript{1755} Eg Chile v. Arancibia Clavel (Enrique Lautaro), Appeal Judgment, Case No 259, A 533 XXXVIII, ILDC 1082 (AR 2004), 24 August 2004, Argentina; Supreme Court [CS], and the attached analysis of ILDC reporter Fabián Raimondo.
Judges’ unease regarding CIL is particularly problematic given some of the (usually implicit) considerations on which it rests. Jan Wouters, whose analysis focuses on continental Europe, mentions the widespread assumption that CIL is indeterminate, and judges’ concern that its application might be perceived as ‘undemocratic’. However, as Wouters rightly notes, these characteristics and risks are by no means necessary and unique features of CIL. According to him, courts are mostly inhibited by ‘psychological factors’. Other explanations for this judicial uneasiness towards CIL listed by Wouters are constraints imposed by domestic constitutional law, including domestic procedural rules (all of which are irrelevant from the perspective of the State’s duty to comply with international law), the (flawed) understanding that custom primarily governs interstate relations and hence lacks direct effect, and both lawyers’ and judges’ lack of familiarity with CIL. This last point is symptomatic of a more generalized, yet mistaken, neglect of unwritten law, be it domestic or international. August Reinisch and Peter Bachmayer contend that domestic courts’ frequently careless and laconic treatment of CIL is primarily due to ‘pragmatic’ efficiency considerations. Several scholars have noted that the application of CIL is at least partly contingent on the composition of the bench.

What also emerges from the domestic judicial practice is the imprecise terminology used by domestic courts to refer to CIL. This jeopardizes predictability, clarity, and consistency, but also legality when the two-tiered test of State practice and opinio juris is elided. CIL is sometimes ambiguously or implicitly referred to (eg via the expression ‘rules of international law’). Courts often fail to distinguish CIL from general principles of international law, and they tend to conflate CIL and jus cogens.

1755 Wouters (n 1223) 31 ff.
1756 See ibid.
1757 Staubach (n 1265) 115.
1758 Eg Paquete Habana, Decision, No 395, No 396, 175 US 677 (1900), 23 S.Ct. 290 (1900), 44 L.Ed. 320 (1900), ILDC 392 (US 1900), 8 January 1900, United States; Supreme Court [us], at para 68.
1759 Reinisch and Bachmayer (n 1074) 47.
1760 Eg in Bangladesh: Karim (n 1383) 106 ff. Another example is Chile: Guzmán Dalbora (n 1727) 537.
1761 Eg (mentioning the practice of English courts) Maripe (n 354) 259.
1762 Handl-Petz (n 1384) 88; Marochkin and Popov (n 183) 230 f; Wouters (n 1223) 34. This confusion is sometimes already enshrined in domestic constitutional law. See Hannes Vallikivi, ‘Domestic Applicability of Customary International Law in Estonia’ (2002) VII Juridica international 28, 31.
1763 Marochkin and Popov (n 183) 230 f.
note that Austrian courts sometimes refer to ‘general international law’, which thus circumvents the two-tiered test required for the determination of CIL.\textsuperscript{1764} Similarly, as observed by Massimo Iovane, courts sometimes rely on general principles of international law instead of establishing the existence of State practice and \textit{opinio juris} (a stringent test which may thwart the proof of the existence of CIL).\textsuperscript{1765} In Botswana, the High Court has relied on soft law to establish an ‘international consensus on the importance of access to water’, without mentioning CIL, and without clarifying how it had ascertained this consensus.\textsuperscript{1766}

Even when courts apply and clearly refer to CIL, their reasoning is rarely detailed, which is problematic from the perspective of the legality and quality of judicial reasoning. Courts typically neglect the two constitutive elements of State practice and \textit{opinio juris}. When they mention CIL, they simply assert its existence without substantiating their statements.\textsuperscript{1767} Iovane notes that domestic courts tend to assert the customary nature of specific treaties (or, more generally, of a given norm) without examining State practice on the issue.\textsuperscript{1768} Simonetta Stirling-Zanda, in her study of the practice of a number of European courts, notes that judges seldom look at State practice and \textit{opinio juris}.\textsuperscript{1769} She observes that in the Italian case law, for instance, a thorough analysis of the two constitutive elements of custom is ‘a rare finding’.\textsuperscript{1770} In Estonia, Hannes Vallikivi criticizes the laconism of the domestic judicial practice on CIL, noting that courts do not explain why custom is (or is not) applied in the case at hand.\textsuperscript{1771}

Scholars also note the uneven level of detail of the case law on CIL within the same jurisdiction.\textsuperscript{1772} As already mentioned, not every case in which CIL is applicable requires a thorough, exhaustive analysis of custom and of its interpretative methods, and considerations of judicial economy preclude

\textsuperscript{1764} Reinisch and Bachmayer (n 1074) 41 ff.
\textsuperscript{1765} Iovane (n 182) 617.
\textsuperscript{1766} Maripe (n 354) 277.
\textsuperscript{1767} Hegde (n 46) 69; Stirling-Zanda (n 102) 17; Reinisch and Bachmayer (n 1074) 31. On the ICJ’s tendency to assert the existence of CIL, see Talmon (n 73).
\textsuperscript{1768} Iovane (n 182) 610 f.
\textsuperscript{1769} Stirling-Zanda (n 102) 3 f.
\textsuperscript{1770} See ibid 13. See eg Chibomba v. Embassy of the Republic of Zambia to the Italian Republic, Final appeal judgment, Case No 13980/2017, ILDC 2703 (IT 2017), 6 June 2017, Italy; Supreme Court of Cassation. In this ruling, the Court wrongly stated that art. 11 UNCISI had customary status.
\textsuperscript{1771} Vallikivi (n 1762) 37.
\textsuperscript{1772} Stirling-Zanda (n 102) 17.
judges from doing so. The level of detail that is appropriate mainly hinges on the difficulty of the interpretative issue. Yet a generalized neglect of methodological issues is worrying. It leaves the door open for unlawful and poor-quality decision-making.

There are, of course, exceptions to these trends. Some courts have provided elaborate accounts of the conditions under which CIL can be applied, and of the methods that govern its identification.\textsuperscript{1773} German courts in particular have engaged in high-quality reasoning on CIL.\textsuperscript{1774} Japanese courts have looked at State practice and opinio juris, and their reasoning appears to be more detailed with respect to CIL than for treaty law.\textsuperscript{1775} In its famous \textit{Paquete Habana} decision of 1900, the US Supreme Court conducted an exceptionally comprehensive (though not uncontroversial) analysis of State practice, predominantly based on scholarly writings.\textsuperscript{1776} All in all, however, courts tend to shirk the analysis of State practice and opinio juris. Relatedly, some courts have sought to avoid the application of CIL by using a particularly demanding standard to appraise the criterion of the generality of State practice.\textsuperscript{1777} English judges have been more detached from the ‘consensus’ requirement (by which they presumably allude to the generality that State practice must display). They have called it ‘a fiction’, and they have emphasized the need to identify custom ‘as best they can’, based on available resources.\textsuperscript{1778} This shows that detailed reasoning does not necessarily serve the application of international law. Of course, whether this reasoning respects the sources of international law is a different question.

To establish the existence of CIL, domestic courts usually rely on auxiliary means instead of gathering more immediate evidence of State practice and opinio juris (eg official statements or other acts of State organs). A first

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\textsuperscript{1773} de Jonge (n 1387) 46 f. See also Beaulac and Currie (n 1385) 139; Reinisch and Bachmayer (n 1074) 10 ff.

\textsuperscript{1774} Eg \textit{German Holder of Greek State Bonds v. Hellenic Republic}, Second instance judgment, 5 U 98/14, ILDC 2427 (DE 2014), 4 December 2014, Germany; Schleswig-Holstein; Higher Regional Court [OLG], at para 42 f; Anonymous, Individual constitutional complaint, 2 BvR 1506/03, BVerfGE 109, 13, NJW 2004, 141, ILDC 10 (DE 2003), 5 November 2003, Germany; Constitutional Court [BVerfG], at para 42 ff.

\textsuperscript{1775} Takashiba (n 1383) 220.

\textsuperscript{1776} \textit{Paquete Habana}, Decision, No 395, No 396, 175 US 677 (1900), 20 S.Ct. 290 (1900), 44 LEd. 320 (1900), ILDC 392 (US 1900), 8 January 1900, United States; Supreme Court [US].


\textsuperscript{1778} \textit{Trendtex Trading Corporation v. Central Bank of Nigeria} [1977] QB 529 (CA) 550, at 364 (Lord Denning), cited in Staubach (n 1265) 118.
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auxiliary means that is commonly used is scholarship.\textsuperscript{1779} Scholarly writings to which courts resort for the purposes of identifying custom are often domestic\textsuperscript{1780} or stem from neighboring States.\textsuperscript{1781} A second type of auxiliary means courts consult is national and international case law.\textsuperscript{1782} Besides these auxiliary means, courts commonly rely on treaty law.\textsuperscript{1783} Some judges explicitly acknowledge and privilege the use of these resources. Australian judges for instance consider that CIL is ‘evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decision [sic]’,\textsuperscript{1784} a statement originally made by English courts.\textsuperscript{1785} Using these materials is explicitly permitted by the ILC’s draft conclusions on CIL.\textsuperscript{1786} However, it can become

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\textsuperscript{1779} Reinisch and Bachmayer (n 1074) 39 ff; Hegde (n 46) 69. Many ILDC entries confirm this statement and cannot all be cited here, eg Maritime Union of Australia, Re; Ex Parte CSL Pacific Shipping Incorporated, CSL Pacific Shipping Incorporated v. Australian Industrial Relations Commission and Others, Application to the Full Court of the Australian High Court, [2003] HCA 43, (2003) 200 ALR 39, ILDC 204 (AU 2003), 7 August 2003, Australia; High Court [HC]; Anita W v. Johannes Adam II, Prince of Liechtenstein, Final appeal/cassation, 7 Ob 316/00X, ILDC 1 (AT 2001), 14 February 2001, Austria; Supreme Court of Justice [OGH], at para 11.

\textsuperscript{1780} Regarding French courts: Stirling-Zanda (n 102) 12. See also Re Victor Raúl Pinto, Re, Pinto (Víctor Raúl) v. Relatives of Tomás Rojas, Decision on Annulment, Case No 3125-04, ILDC 1093 (CL 2007), 13 March 2007, Chile; Supreme Court, at para 29.

\textsuperscript{1781} Eg Reinisch and Bachmayer (n 1074) 39. See also Municipality of Bergen v. Regional Government of Düsseldorf, Appeal judgment, 4 C 3.07, BVerwGE 132, 152, ILDC 2745 (DE 2008), NVwZ 2009, 452, DÖV 2009, 422, 16 October 2008, Germany; Federal Administrative Court [BVerwG], at para 20.

\textsuperscript{1782} Iovane (n 182) 612 ff. See eg Public Prosecutor v. F, First instance, Criminal procedure, LJN: BAG575, 09/75001-06, ILDC 797 (NL 2007), 25 June 2007, Netherlands; The Hague; District Court. According to the reporter, the Court ‘should have been somewhat more cautious’ when it relied on a ruling of the ICTY to ascertain customary international law. See also the comprehensive materials used in Argentine Necessity Case, K and Others v. Argentina (Represented by President Néstor Kirchner), Decision of the Federal Constitutional Court, Order of the Second Senate, 2 BvM 1-5/03, 1, 2/06, vol 118, 124, 60 NJW (2007), 2610, 138 ILR 1 (2010), ILDC 952 (DE 2007), 8 May 2007, Germany; Constitutional Court [BVerfG], and S v. Ministro de Economía Hipolito Yrigoyen, Final decision, 2 BvM 9/03, BVerfGE 117, 141, NJW 2007, 2605, WM 2007, 57, DVL 2007, 242, BB 2007, 206, ILDC 465 (DE 2006), 6 December 2006, Germany; Constitutional Court [BVerfG], at para 59 ff.

\textsuperscript{1783} Nwapi (n 1388) 55. See also Office of Public Prosecutor of the Free and Hanseatic City of Hamburg v. CM and Others, Judgment, 603 KLS 17/10, ILDC 2390 (DE 2012), BeckRS 2013, 07408, 19 October 2012, Germany; Hamburg; Regional Court [LG], at para 749 f.

\textsuperscript{1784} de Jonge (n 1387) 46.

\textsuperscript{1785} The Christina [1938] AC 485, 497, Lord MacMillan.

\textsuperscript{1786} See draft conclusions 6(2), 10(2), and 11, ILC, ‘Draft Conclusions on Identification of Customs International Law, With Commentaries’ (n 891).
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problematic from the perspective of legality, eg if courts rely on insufficient, outdated, or purely domestic material. Relatedly, reasoning that is based on non-compelling resources threatens the predictability, clarity, and consistency of judicial decisions.

A striking and troubling feature of the domestic case law on CIL is its self-referential and even circular aspect. They risk of circularity is perhaps even more acute in the context of CIL than for other sources, given that domestic rulings can provide evidence of State practice and opinio juris and, qua auxilia- ry means, assist interpreters in identifying norms of CIL (supra, Chapter 4, section 3, and supra, section 1). And indeed, courts tend to predominantly (or even solely) refer to their own State’s practice and opinio juris and to their own case law, in lieu of establishing the existence of the constitutive elements of CIL or the meaning of a customary norm on the international plane. They especially tend to cite their previous case law (or that of other courts of their State) to identify custom, which represents an even more pronounced form of self-referentiality (what I call circularity). This circular and/or self-referential reasoning even concerns courts known for having, in some decisions at least, provided detailed accounts of State practice and opinio juris, eg the BVerfG. In some Commonwealth States, courts have relied on English case law to determine CIL, which represents a looser form of self-referentiality, but self-referentiality nonetheless, unless a regional custom is being ascertained. Circularity (courts’ reference to their own practice) and self-referentiality (courts’ reference to the practice of their own State) are side effects of domestic courts’ ‘peculiar double nature’, as described by the ILA Study Group on Domestic Courts: domestic judges generate State practice, but they must also identify what State practice is to interpret international law (supra, Chapter 4, section 3). Circularity and self-referentiality are also encouraged by the fact that

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1787 On this issue, see Besson and Ammann (n 60) 125 ff.
1788 See Iovane (n 182) 609; Stirling-Zanda (n 102) 9.
1789 See (among other examples found in ILDC): Research Foundation for Science Technology and Natural Resources Policy v. Union of India and Another, Appeal of monitoring committee recommendation, Writ Petition (civil) 657 of 1995, ILDC 385 (IN 2005), 1 May 2005, India; Supreme Court. See also de Jonge (n 1387) 43 f; Stirling-Zanda (n 102) 9, 17.
1790 See Stirling-Zanda (n 102) 14.
1791 Eg in Australia: The Queen v. Disun, Appeal against conviction, [2003] WASCA 47, (2003) 27 WAR 146, [2004] ALMD 703, ILDC 2954 (AU 2003), 7 February 2003, Australia; Western Australia; Supreme Court [WASC]; Court of Appeal [WASC]; Court of Criminal Appeal (historical).
courts may have a domestic legal duty to follow judicial precedents or, in the absence of a doctrine of *stare decisis*, because domestic law requires their decisions to be reasonably consistent with previous cases.\textsuperscript{1793} Regardless of these explanations, courts’ identification of international law based on their own precedents risks disregarding the sources (and evolution) of international law.

2.2 **Swiss Courts and the Interpretation of Customary International Law**

After this cursory overview of the domestic judicial practice of CIL (supra, 2.1), I analyze the Swiss judicial practice of CIL based on the methods these courts use, and based on the reasons they give to justify their interpretations.\textsuperscript{1794} Relevant cases were identified via keywords.\textsuperscript{1795} In addition, I conducted specific searches (through keywords such as ‘Staatenpraxis’, ‘pratique internationale’, and ‘tendances internationales’) to examine how courts refer to concepts linked (even loosely) to CIL, and to avoid missing relevant cases.

I have described the potential and limitations of keyword searches in other work.\textsuperscript{1796} One difficulty that must be stressed again in the context of CIL is courts’ imprecise terminology. This makes it hard to determine whether judges are actually referring to CIL.\textsuperscript{1797} Terms deemed too vague (eg ‘the law of nations’, or ‘general international law’) were excluded from the search. This terminological difficulty is not as acute in the case of treaty law, which courts usually mention through relatively precise (though inconsistent) language (agreement, treaty, convention, etc.).

Another factor that complicates the search is that Swiss judicial databases do not provide lists of decisions pertaining to CIL, contrary to what is the case

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\item Besson and Ammann (n 60) 37.
\item For a comprehensive study of the practice of the Swiss authorities pertaining to CIL, see ibid. The study references a number of rulings that are also discussed in the present book.
\item The keywords used (regardless of grammatical variations) are: Völkerw recht, völkerrechtlich, Gewohnheitsrecht, internationales Gewohnheitsrecht, droit international coutumier, droit coutumier international, coutume internationale, opinio juris, opinio iuris, diritto internazionale consuetudinario, diritto consuetudinario internazionale. Cantonal cases were surveyed in the language in which courts conduct their proceedings (German for Zurich and Basel-Stadt, French for Geneva, and German and French for the canton of Bern).
\item Examples abound. In BGer, judgment 2P.36/2004 of 9 May 2005, at 5.6, for instance, the Court states that art. 31(1) VCLT reflects the ‘general principles of customary international law’. More generally, see ilc, ‘Draft Conclusions on Identification of Customary International Law, With Commentaries’ (n 891) 123 para 2.
\end{enumerate}
with treaty law (at least for federal court databases). CIL also lacks an identifier in the Systematic Compilation of Federal Legislation, contrary to treaties, which courts often cite with their designated number in the compilation. The descriptors (or tags) on CIL attributed to some decisions of the Swiss Federal Tribunal were insufficient for the purposes of this study, given the few decisions tagged.

As was the case with treaty law, I examine the interpretative practice of the Swiss Federal Tribunal (2.2.1), of other federal courts (2.2.2), and of selected cantonal courts (2.2.3) and military tribunals (2.2.4). I also highlight the parallels between the methods Swiss courts use to interpret domestic and international custom (2.2.5). I then compare the practice of these different Swiss courts (2.2.6). Lastly, I examine the similarities and differences between the Swiss case law and the practice of other domestic courts (2.2.7).

2.2.1 The Swiss Federal Tribunal

Given the relatively few cases in which the Court has applied CIL, a diachronic analysis is unwarranted. The small number of cases also makes it difficult to identify the Swiss Federal Tribunal’s approach to the four interpretative methods (text, context, object and purpose, and history). The methods are rarely explicitly mentioned (or acknowledged as customary) in the case law, even if they must guide the identification of State practice and opinio juris (supra, Chapter 6, section 2). In fact, as I will show, these two constitutive elements are largely absent from the Swiss judicial practice as well. Both interpretative methods and constitutive elements are more salient in cases on domestic custom (infra, 2.2.5).

Instead of looking at the evolution of the Court’s case law over time, it is more compelling to take the substantive areas of international law in which the Court has referred to CIL as our angle of analysis. Relevant rulings mainly pertain to four substantive areas: the law of treaties, migration and refugee law, the law of immunities, and IHRL. While these subject matters sometimes overlap, they are useful for breaking down and evaluating the case law.

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1798 Ie, in comparison to cases dealing with treaties. See Ammann, ‘International Law in Domestic Courts Through an Empirical Lens: The Swiss Federal Tribunal’s Practice of International Law in Figures’ (n 5). The number of cases on CIL taken into account in this chapter is higher than the figures provided in this previous empirical study I conducted, since the present chapter includes rulings of the Swiss Federal Tribunal not published in the official compendium.
CIL is often mentioned in connection with the law of treaties. This is symptomatic of the role treaties play in practice to interpret custom, and vice versa. This role is endorsed by the ILC’s draft conclusions on custom, and it is visible in the practice of the Swiss authorities at large.

A first cluster of cases includes rulings that refer to the VCLT. A representative example of the Court’s way of identifying custom is provided by a decision of 1986, in which the Swiss Federal Tribunal stated that the VCLT’s provisions are applicable to intercantonal agreements if no other domestic legal provision governs the issue, and to the extent these provisions codify ‘recognized customary international law’. It then applied art. 46 VCLT, noting that this provision reflected a position that had become dominant in international law in recent decades. In this decision, the Court stressed that Switzerland had endorsed this norm, citing acts of the Swiss government and of two ministries. As will become apparent, this tendency to emphasize the Swiss practice – which, per se, does little work, if any, from the perspective of the identification of customary international law – is common in the Swiss case law. While such references to the Swiss practice serve the purposes of reinforcing the (sociological and intrastate) acceptance of the Court’s rulings, this trend is problematic from the perspective of legality. In this decision, the Court also mentioned rulings of international courts and arbitral tribunals.

In another case, the Court noted that the principles codified in art. 31(1) VCLT are ‘essentially’ a codification of CIL, and that they are consistent with its own existing case law. The customary character of the VCLT’s methods has been reiterated in later cases. In a judgment of 2018, the Swiss Federal

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1800 Draft conclusions 6(2), 10(2), and 11, ILC, ‘Draft Conclusions on Identification of Customary International Law, With Commentaries’ (n 891).
1801 Besson and Ammann (n 60) 55 ff.
1802 BGE 112 Ia 75, at 4 c).
1803 Ibid.
1804 Ibid.
1805 BGE 122 II 234, at 4 c). See also BGer, judgment 4P.114/2006 of 7 September 2006, at 5.4.1.
1806 BGE 141 II 447, at 4.3.1. See also (regarding art. 31(1) VCLT) BGer, judgment 2P.36/2004 of 9 May 2005, at 5.6. In other rulings, the Court states that treaties must be interpreted ‘based on customary international law and the international law of treaties’. See BGer, judgment 2C_498/2013 of 29 April 2014, at 5.1.
Chapter 8

Tribunal stated that even if India, one of the parties to the dispute, had not ratified the VCLT, the Convention’s provisions on treaty interpretation were applicable *qua* customary international law.\(^{1807}\) The Court has also affirmed the customary character of art. 26 and 27 VCLT,\(^ {1808}\) which have been increasingly prominent in cases dealing with conflicts between domestic and international law. The Court occasionally points out that the Convention is customary without differentiating between its provisions.\(^ {1809}\) This is problematic with regard to both the legality and the quality of the Court’s reasoning.

CIL is also mentioned in relation to aspects of treaty law other than the VCLT. Under specific conditions, and as already noted, the Court applies customary principles of treaty law to intercantonal agreements by analogy.\(^ {1810}\) Moreover, it frequently states that a given treaty provision has the status of CIL and *vice versa*, presumably to emphasize the legality of its interpretations. On the other hand, the Court also highlights instances of divergence between these sources. It has for example observed that the Vienna Convention on State Succession in Respect of Treaties, which Switzerland has not ratified to date, contains norms departing from CIL.\(^ {1811}\) In this case, the Court noted that the automatic continued validity of treaties was not supported by CIL, and that there was no unitary State practice when the Convention was adopted in 1978. In support of this statement, the Court cited writings of Swiss and foreign legal scholars, and the digest of the Swiss practice of public international law published annually in the Swiss Review of International and European Law.\(^ {1812}\) The Court then referred to its own case law.\(^ {1813}\) The decision is illustrative of the self-referential character of the practice of domestic (including Swiss) courts (see also *supra*, 2.1). It exemplifies Swiss courts’ imprecise terminology, since the Court uses the term ‘general international law’ as a synonym for ‘customary international law’.\(^ {1814}\) In another earlier case, the Court stated that there was no CIL prescribing an automatic continuation of treaties, without substantiating this statement.\(^ {1815}\) This seems insufficient from the perspective of both legality and high-quality judicial reasoning.

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1808 BG Be 125 II 417, at 4 d); BG Be 142 II 35, at 3.2.
1809 BG Be 120 Ib 360, at 2 c).
1810 Eg BG Be 96 I 636, at 4 c).
1811 BG Be 139 V 263, at 4.2.3.
1812 Ibid.
1813 Ibid, at 4.2.4.
1814 Ibid, at 10.2.
1815 BG Be 105 Ib 286, at 1 c).
A second subset of cases pertains to migration and refugee law. In a well-documented decision of 1985, the Swiss Federal Tribunal held that the principle of non-refoulement has the status of CIL.\textsuperscript{1816} It based this statement on Swiss and international legal scholarship, on a digest of the ECtHR’s case law, and on a decision published in the official digest of the Swiss federal administrative practice. Once again, the case illustrates the self-referential character of the case law. In a decision of 1997, the Court laconically noted that CIL does not give foreign nationals the right to be granted entry by a State.\textsuperscript{1817} In the landmark (and politically sensitive) \textit{Spring} judgment, the Court stated that in the 1930s, neither Swiss nor international law gave rise to a State duty to grant asylum, and that the \textit{ad hoc} approach adopted by the League of Nations with regard to this issue showed that there existed no customary definition of refugee at the time.\textsuperscript{1818} The Court exclusively relied on the writings of Swiss scholars and experts to justify this statement. This approach seems insufficient, especially given the gravity of the issue at stake. The Swiss Federal Tribunal added that at the time of the facts of the case, non-refoulement was not a mandatory principle of CIL. It then cited the writings of foreign and Swiss legal scholars,\textsuperscript{1819} which confirms the important place of scholarship in the case law. The Court further noted that based on ‘Swiss conceptions as well’, the prohibition of genocide had the status of mandatory CIL.\textsuperscript{1820} This argument can, at best, demonstrate the compliance of Swiss authorities with this prohibition, but not its customary status.

A third substantive area of CIL that is particularly prominent in the Court’s case law is the law of immunities.\textsuperscript{1821} The cases on the issue provide interesting insights into the Court’s method. In a particularly detailed, well-researched decision of 1980, the Court held that the principle of qualified (as opposed to absolute) immunity reflected CIL. The evidence cited in support of this statement is relatively extensive, compared to the laconic style of many Swiss rulings on CIL. It consists of several writings by Swiss and foreign legal scholars and two decisions issued by the BVerfG. The Court also noted that only ‘Great Britain and the socialist States’ did not endorse this principle.\textsuperscript{1822} Finally, it

\begin{footnotesize}
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\item \textsuperscript{1816} BGE 111 Ii 68, at 2 a). See also BGer, judgment 1A.212/2000 of 19 September 2000, at 5 a).
\item \textsuperscript{1817} BGE 123 Ii 472, at 4 d).
\item \textsuperscript{1818} BGE 126 Ii 145, at 4 c) aa).
\item \textsuperscript{1819} Ibid, at 4 c) bb).
\item \textsuperscript{1820} Ibid, at 4 d).
\item \textsuperscript{1821} For a recent example, see BGer, judgment 1B_258/2017 of 2 March 2018, at 9.2.
\item \textsuperscript{1822} BGE 106 Ia 142, at 3 a).
\end{itemize}
\end{footnotesize}
acknowledged that the requirement of a ‘Binnenbeziehung’ established by the Swiss Federal Tribunal did not have the status of CIL.\textsuperscript{1823} This last statement contrasts with other rulings in which the Swiss practice is presented as conclusive evidence of custom.

In a case pertaining to the respective immunities of Switzerland and Italy, for instance, the Court stated that ‘unwritten rules of international law’ are ‘reflected in scholarship and judicial decisions, for Switzerland especially in those of the Swiss Federal Tribunal’.\textsuperscript{1824} The Court has also done so in another case pertaining to the law of immunities, this time involving Turkey.\textsuperscript{1825} The aforementioned extract confirms domestic courts’ tendency to use their own practice to interpret CIL, and their imprecise terminology. The Turkish case is remarkable for its mention of foreign State practice. In fact, even such brief comparative considerations are rare in the case law,\textsuperscript{1826} as paradoxical as this may seem considering the importance of State practice for the formation (and, therefore, the identification) of CIL.

Another example of self-referentiality in the law of immunities is a decision of 1989 involving the Filipino dictator Ferdinand Marcos, in which the Court noted that CIL has always granted personal inviolability and immunity from criminal jurisdiction to heads of States, their family, and their suite. To support this statement, the Court used textbooks and the yearly digest of the Swiss practice of public international law.\textsuperscript{1827} Scholars like Simonetta Stirling-Zanda have praised this digest, remarking that it is a valuable aid for Swiss legal officials called to identify CIL.\textsuperscript{1828} Yet this should not detract from the fact that exclusively relying on the practice of the Swiss authorities is, as previously mentioned, self-referential, and potentially even circular. It can also be an expression of deference to the practice of these authorities (and especially of the executive) which is unwarranted from the perspective of the sources and interpretative methods of international law.

With regard to some issues of the law of immunities, the case law lacks precision. In a decision of 1984, the Court clarified that while it had previously stated that the European Convention on State Immunity reflected the development of international law,\textsuperscript{1829} this did not mean that it reflected CIL.\textsuperscript{1830}

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\textsuperscript{1823} Ibid, at 3 b). See also \textit{bge} 135 Iii 638, at 4.2.
\textsuperscript{1824} \textit{bge} 111 Ia 52, at 3.
\textsuperscript{1825} \textit{bge} 104 Ia 367, at 2 a).
\textsuperscript{1826} Ibid, at 2 d). For another example, see \textit{bge} 132 II 65, at 3.5.
\textsuperscript{1827} \textit{bge} 115 Ib 496, at 5 b).
\textsuperscript{1828} Stirling-Zanda (n 102) 16.
\textsuperscript{1829} \textit{bge} 111 Ia 52, at 3.
\textsuperscript{1830} \textit{bge} 110 II 255, at 4 c).
\end{flushright}
Instead of analyzing State practice and *opinio juris*, the Court used its own case law. It thereby opted for a potentially circular line of reasoning that does not univocally disclose the reasons underpinning the Court’s interpretation. The lack of customary status of said Convention has not prevented the Court from referring to it *qua* ‘expression of modern Western European conceptions’ in some cases.\(^{1831}\) In later rulings, the Court has been more reluctant to confirm the Convention’s customary character.\(^{1832}\)

In contrast to its cautious attitude vis-à-vis the customary status of the European Convention, the Court has affirmed the customary character of the UN Convention on the Jurisdictional Immunities of States and Their Property (**UNCSI**). The **UNCSI**’s text was adopted in 2004, and Switzerland ratified the Convention in 2010. As of June 2019, the Convention had not entered into force. For these and other reasons, its customary status is controversial.\(^{1833}\) The Court nonetheless noted in several decisions that the **UNCSI** ‘purports to be a codification of customary international law’,\(^{1834}\) a formulation which is anything but clear. It did not substantiate this statement, except via a scholarly piece\(^{1835}\) and its own previous case law on the **UNCSI**.\(^{1836}\) Given the implications of this interpretative conclusion, offering additional reasons is necessary from the perspective of legality and high-quality judicial reasoning.

In a judgment of 2017 involving the Syrian central bank, the Court left open whether art. 6(1) **UNCSI** had the status of **CIL**.\(^{1837}\) In another case on the **UNCSI**, the Court examined the finding of the Geneva Supreme Court’s Labor Law Chamber that art. 11 **UNCSI** codified **CIL**. The Court upheld this interpretation, stating that since Switzerland had ratified the Convention, it was ‘justified to use it as an inspiration when making a decision based on the general rules of international law of jurisdictional immunities’.\(^{1838}\) While an ‘inspiration’ is

\(^{1831}\) BGE 104 Ia 367, at 2 a). See also BGE 111 Ia 52, at 3.
\(^{1832}\) BGE 120 II 400, at 3; BGE 134 III 122, at 5.1. See also BGer, judgment 4A_331/2014 of 31 October 2014, at 3.2.
\(^{1834}\) BGE 134 III 122, at 5.1; BGE 136 III 575, at 4.3.1; BGer, judgment 4A_541/2009 of 8 June 2010, at 5.5; BGer, judgment 4A_331/2014 of 31 October 2014, at 3.1.
\(^{1835}\) BGer, judgment 4A_541/2009 of 8 June 2010, at 5.5; BGE 134 III 122, at 5.1.
\(^{1836}\) BGer, judgment 4A_541/2009 of 8 June 2010, at 5.5.
\(^{1837}\) BGer, judgment 2C_820/2014 of 16 June 2017, at 4.5.
likely not decisive, the ruling fails to convince. It suggests, once more, that the Court interprets CIL primarily based on the Swiss practice.

One could also read a self-referential tendency in the Court’s finding that the Federal Act on the Privileges, Immunities and Facilities, and the Financial Subsidies Granted by Switzerland as a Host State codifies CIL. Other cases on the law of immunities simply affirm the customary status of some treaty provisions (eg art. 31 and 37 VCDR). They also occasionally highlight divergences between treaty law and CIL.

A fourth cluster of cases pertain to IHRL. The Court has stated that some provisions of the UDHR can have the status of CIL, even if the Declaration, qua resolution of the UN General Assembly, is not legally binding. It has concluded – without providing reasons for this conclusion – that art. 26(3) UDHR does not have such a status. The Court’s reasoning is, as in many cases, highly laconic. In rare instances, the Court has referred to the ECtHR’s case law on CIL. The European Court interprets the ECHR based on a ‘European consensus’, in light of the evolving practices of the Contracting States, and hence in a way that is reminiscent of the ascertainment of CIL. Therefore, using the Court’s case law to identify CIL can be helpful. However, it cannot be used to circumvent the two-tiered test of State practice and opinio juris.

CIL has also been mentioned in other substantive domains of international law than the aforementioned four areas. These cases show that treaties and scholarship play a central role in the Court’s reasoning, provided its conclusions about custom are substantiated at all. In a number of cases, the Court has for

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1840 BGer 113 Ib 257, at 7.
1841 BGer 115 Ib 496, at 5 c).
1842 BGer, judgment 2C_738/2010 of 24 May 2011, at 3.2.3.
1843 Ibid, at 3.2.3.
1844 It has held that the European Court considers that CIL grants the accrediting State immunity with regard to its own nationals employed in its representations abroad. See BGer, judgment 4A_386/2011 of 4 August 2011, at 7. The Court has also stated, when interpreting the ECHR, that the European Court’s case law reflects State practice, see BGer 139 I I 16, at 5.2.2.
1845 Besson, ‘Human Rights’ Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators’ (n 56) 55 f.
1846 See for instance BG 129 II 114, a dispute between the canton of Zurich and a private hydroelectric power station on the appropriate amount for a water concession. See also BG 124 II 293, where the Court considers that CIL prohibits States from engaging in, encouraging, or tolerating activities on their territory that cause substantial environmental damage on the territory of a neighboring State.
example held that CIL prohibits exercises of public authority on the territory of another State without the latter’s consent. Yet the Court’s method is so laconic that it is impossible to evaluate its reasoning, except to emphasize its brevity and assertive character.

Exceptionally, the Court has contradicted the executive with respect to its interpretation of CIL. In the Noga case, the appellant invoked a legal opinion of the FDFA according to which a renunciation to immunity only affects acta jure gestionis. This statement was explicitly rejected by the Court. This inter-branch divergence is noteworthy, given the deference Swiss courts usually show to the executive in the law of immunities. In most cases, the Court did not go against the practice of other State organs, at least not explicitly.

2.2.2 Other Federal Courts

2.2.2.1 The Swiss Federal Administrative Court

While the Swiss Federal Administrative Court (SFAC) regularly mentions CIL, remarks on its methods of identification are rare. Still, while the Court applies custom less often than the Swiss Federal Tribunal, its rulings on the issue are often more detailed (supra, 2.2.1). Some judgments contain remarkably thorough analyses of CIL that are unparalleled in the Swiss judicial practice.

Like the Swiss Federal Tribunal, the SFAC has mentioned CIL in connection with the law of treaties, and more specifically with the VCLT, usually to highlight the customary character of its provisions. Drawing on scholarship, it has stressed several times that pacta sunt servanda and the prohibition to invoke domestic law to justify violations of international law have the status of CIL. The Court has not engaged in a study of State practice and opinio juris in this context. This is likely due to the undisputed character of these principles. The Court has even stated that the principle of pacta sunt servanda and the principle of good faith already applied before Switzerland’s ratification of

1848 BGE 134 III 122, at 5.3.2 and 5.3.3.
1849 Besson and Ammann (n 60) 49.
the VCLT qua CIL. The Court has relied on statements of the federal executive and on international law treatises. The Court often notes that the VCLT’s methods are customary. While many judgments addressing this matter are repetitive, in the sense that the same paragraph on the VCLT has been copied and pasted into myriad other judgments, some decisions are remarkably detailed with regard to this issue. The SFAC has also explained that CIL can be replaced by a new custom or a treaty.

The Court has affirmed the customary status of treaty provisions in the area of refugee law. It has for example noted that art. 33 of the Refugee Convention has the status of mandatory CIL. The Court has also observed that even if a State is not a party to the 1951 Refugee Convention, it must respect the principle of non-refoulement based on CIL. In both cases, the Court does not explain how it identifies this customary status, which is, as in many cases, problematic from the perspective of both legality and quality.

CIL is also used by the SFAC to identify specific sovereign rights which are not as present in the Swiss Federal Tribunal’s case law on CIL. The Court has for example considered that the sovereign right to issue passports has the status of CIL. It has also found that the territory of Campione is part of the Swiss customs territory in virtue of CIL. The SFAC based this conclusion on the practice of the Swiss Federal Tribunal, the Federal Council, and other administrative bodies, and on domestic and international legal scholarship. Remarkably, the Court also relied on statements of the Italian Ministry of Finance and of the

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1852 SFAC, judgment B-2869/2014 of 25 February 2015, at 3.2.3; SFAC, judgment A-7789/2009 of 21 January 2010, at 3.3.3; SFAC judgment B-1884/2014 of 13 July 2015, at 3.2.3. Regarding the principle of good faith, see SFAC, judgment A-4695/2015 of 2 March 2016, at 4.3.2.1.

1853 SFAC, judgment B-2869/2014 of 25 February 2015, at 3.2.3; SFAC judgment B-1884/2014 of 13 July 2015, at 3.2.3.

1854 Eg (representative of dozens of other examples) SFAC, judgment A-340/2015 of 28 November 2016, at 4.1.3.6, and at 6.

1855 Eg (and again representative of many other examples) SFAC, judgment A-6391/2016 of 17 January 2018, at 3.

1856 Ibid.

1857 Ibid, at 4.1.3.1.


1859 SFAC, judgment E-5731/2015 of 5 October 2015, at 6.1; SFAC, judgment F-4270/2016 of 29 September 2016, at 5.2; SFAC, judgment D-4460/2015 of 27 January 2016, at 8.4 (with a citation to a document of the International Rescue Committee and the Norwegian Refugee Council on the legal status of Syrian refugees). See also (noting Lebanon’s compliance with this principle) SFAC, judgment D-3429/2015 of 2 July 2015, at 4.2.3.

1860 SFAC, judgment C-6096/2012 of 6 February 2015, at 5.2.2.
European Commission.\textsuperscript{1861} These types of acts are hardly ever used by Swiss courts. The Court’s ruling goes against the tide, as Swiss courts’ reasoning is largely self-referential and/or circular, i.e., heavily based on the Swiss practice, while neglecting that of other States.

In rare cases, the Court has elaborated on the two constitutive elements of CIL, State practice and \textit{opinio juris}. Citing the ICJ, it has noted that State practice can be ascertained by examining and comparing appropriate acts of States and through other empirical means, e.g., acts States perform in the framework of IOs. By contrast, the Court has stated that \textit{opinio juris} is generally ascertained based on State practice. While this seems to conflict with the ILC’s emphasis on a separate assessment for each element,\textsuperscript{1862} the commentary to the ILC’s draft conclusions highlights that the same material can be used to assess both state practice and \textit{opinio juris}, as long as this material is ‘examined as part of two distinct inquiries’.\textsuperscript{1863} The Court has also mentioned the criteria of coherence (‘uniformità’), constancy (‘durata’),\textsuperscript{1864} and generality (‘diffusione geografica’).\textsuperscript{1865} In most instances, however, and like other Swiss and foreign domestic courts (and even international courts),\textsuperscript{1866} the SFAC ignores these two constitutive elements and simply asserts the existence of CIL.

\subsection*{2.2.2.2 The Swiss Federal Criminal Court}

The Swiss Federal Criminal Court (SFCC) has mostly mentioned CIL in the law of immunities.\textsuperscript{1867} While in some instances, the Court only mentions custom in passing, other rulings are more detailed.

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\textsuperscript{1861} SFAC, judgment A-2411/2010 of 16 August 2012, at 5.2.4.
\textsuperscript{1862} Draft conclusion 3(2), ILC, ‘Draft Conclusions on Identification of Customary International Law, With Commentaries’ (n 891).
\textsuperscript{1863} See ibid 129 para 8.
\textsuperscript{1864} The Court considers that pursuant to the Swiss Federal Tribunal, 10 years of practice are insufficient to generate customary law, especially in fiscal matters. See SFAC, judgment A-4771/2012 of 2 July 2014, at 7.2.2; SFAC, judgments A-3776/2010 and A-2411/2010 of 16 August 2012, at 6.1.2.
\textsuperscript{1866} Talmon (n 73).
\textsuperscript{1867} Eg SFCC, judgment RR.2016.386 of 24 May 2017, at 9.2. Some rulings deal with sovereign rights, analogously to the case law of the SFAC (\textit{supra}, 2.2.2.1). Based on rulings of the Swiss Federal Tribunal, the SFCC has stated that CIL excludes the exercise of public powers by one State on the territory of another State without the latter’s consent. SFCC, judgment RR.2011.321 of 30 March 2012, at 5.1; SFCC, judgment RR.2011.247+248 of 1 February 2012, at 2.1; SFCC, judgment RR.2011.176 of 21 November 2011, at 2.1.
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Some references to CIL are brief, in the sense that they laconically assert the existence of custom. This can, again, be problematic from the perspective of legality and of high-quality reasoning, though not always. In a judgment of 2014, the SFCC stated that coercive measures taken in the area of international cooperation in criminal matters can conflict with immunities granted by public international law, adding that sovereign equality applies in interstate relations pursuant to CIL. This rapid treatment of custom is understandable, given the undisputed character of this customary principle. A more problematic feature of the case is that the Court asserted that in the absence of a treaty between Switzerland and the Holy See, only CIL norms on jurisdictional immunity applied. However, instead of analyzing State practice and opinio juris, the Court referred to the case law of the Swiss Federal Tribunal and to relevant scholarship. The absence of a detailed review of State practice and opinio juris based on various interpretative methods, and the Court’s laconic assertions of the existence of CIL, are arguably unproblematic whenever custom is not central to the issue and to the Court’s reasoning. This is for example the case when custom is not applied, but merely mentioned in passing and in very general terms. Yet the boundary between such instances and those where CIL is applied and generates a controversial interpretative issue can be fuzzy. Moreover, a precedent can easily be consolidated by being cited in subsequent cases, even if its reasoning is flawed. This snowball effect makes it important for courts to be careful in their reasoning, even in judgments that do not seem complex.

Other references to custom are slightly more detailed than the examples cited so far, although they do not provide insights into the interpretative methods and constitutive elements of custom. In Nezzar, the appellant claimed that the nexus requirement Swiss courts apply in the law of immunities (ie, the requirement for immunity claims to be sufficiently tightly connected to Switzerland in order to be adjudicated) had the status of CIL. The Court stated that CIL ‘is based, according to the majority of the doctrine, on a constant, uniform, and general practice of legal subjects, accompanied by the conviction

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1868 The SFCC has for example noted, based on the Swiss Federal Tribunal’s case law, that the VCDR codifies principles of CIL regarding diplomatic immunities and privileges. See SFCC, judgment BB.2014.19 of 7 October 2014, at 1.7.1.
1870 Ibid, at 2.2.2.
1871 Ibid, at 2.2.2 and 2.2.3.
1872 Eg SFCC, decision (Beschluss) BB.2014.181–186 of 14 October 2015, at 8.2; SFCC, judgment BB.2013.40 of 13 November 2013, at 3.2.
that this practice is legally obligatory'. It then referred to scholarship and to a report of the Federal Council.\textsuperscript{1873} The Court rejected the plaintiff’s argument that the nexus requirement was customary. It did so based on the legislative history of a former provision of the smcc requiring such a nexus, legal scholarship, and the fact that the nexus requirement could lead to violations of the Geneva Conventions. The Court also mentioned the Swiss judicial and administrative practice.\textsuperscript{1874} Its other references to cIL in the Nezzar judgment are not detailed. In Adamov, an earlier case decided in 2007 and pertaining to the immunities of State representatives, the Court mentioned custom jointly with treaty law, its own case law, and legal scholarship.\textsuperscript{1875} It also noted ‘a tendency to restrict the immunities of State officials with regard to international crimes’, citing the landmark Pinochet decisions of the House of Lords of 1998 and 1999, and the ICJ’s Arrest warrant ruling of 2000.\textsuperscript{1876} The ruling is remarkable, given how rarely the Court usually refers to the practice of foreign and international courts when ascertaining cIL. Such references are, of course, more likely (and warranted) if a case deals with a cIL issue that is unsettled and in flux. Nonetheless, even in a landmark ruling such as Nezzar, the Court’s analysis of international legal practice and scholarship can be criticized for being ‘somewhat superficial and schematic’.\textsuperscript{1877}

2.2.3 Cantonal Courts
2.2.3.1 The Supreme Court of the Canton of Geneva
As is the case with the Swiss Federal Tribunal (\textit{supra}, 2.2.1) and the SFCC (\textit{supra}, 2.2.2.2), the Supreme Court of the canton of Geneva has referred to cIL in a number of rulings pertaining to the law of immunities. Based on the Swiss Federal Tribunal’s case law, the Court has stated that art. 32 VCDR (on the State’s waiver of immunity from jurisdiction) reflects cIL.\textsuperscript{1878} It has noted that the status of a foreign State in domestic litigation is governed by cIL, which grants States absolute immunity. The Court has added that ‘in Switzerland, this principle has given way to the principle of relative immunity, which is based

\begin{itemize}
\item \textsuperscript{1873} SFCC, judgment BB.2011.149 of 25 July 2012, at 3.3.2.
\item \textsuperscript{1874} Ibid.
\item \textsuperscript{1875} SFCC, judgment RR.2007.73 of 6 December 2007, at 2.2.6.
\item \textsuperscript{1876} Ibid. The Court also noted that its own case law was consistent with the ICJ’s decision.
\item \textsuperscript{1878} CJ-GE, Chambre des prud’hommes, judgment CAPH/142/2014 of 24 September 2014, at 3.2 and 3.3.
\end{itemize}
on the distinction between *acta jure imperii* and *acta jure gestionis*.1879 This indicates that the Court predominantly looks at the Swiss practice when interpreting custom.

In line with the Swiss Federal Tribunal, the Court has stated that utmost caution is warranted regarding the application of provisions of the European Convention on State Immunity *qua cil*.1880 By contrast (and, again, like the Swiss Federal Tribunal), the Court considers that the UNCSI codifies cil. In two particularly detailed rulings of 2011 and 2012, it reached this general conclusion based on a statement of the Swiss Federal Council.1881 After acknowledging that the Convention was not yet in force, it cited the ECtHR and the Hoge Raad (Supreme Court) of the Netherlands, which both deem art. 11 UNCSI customary.1882 Finally, it mentioned the case law of the Swiss Federal Tribunal, based on which the Convention and its art. 11 have customary status.1883 The references to foreign and international rulings are noteworthy, as they are particularly rare in cantonal case law (but also in the Swiss case law at large). Still, the Court heavily relies on the Swiss practice. In other decisions, it has exclusively cited the Swiss Federal Tribunal1884 or the Federal Council1885 to justify the UNCSI’s customary character.

Few cases on cil deal with topics outside the law of immunities. One example is a ruling of 2011 in which the Court stated that public law is subject to the principle of territoriality, except if a treaty, foreign law, or cil provide otherwise.1886 Relatedly, in a judgment of 2017, the Court stated that cil excludes


1882 CJ-GE, Chambre des prud'hommes, judgment CAPH/53/2012 of 13 March 2012, at 5.2.2 and 5.2.3; CJ-GE, Chambre des prud'hommes, judgment CAPH/95/2011 of 7 July 2011, at 5.1.4 ff.


the exercise of public powers by one State on the territory of another State without the latter’s consent. Given the limited number of substantive areas of international law addressed by the case law on CIL, the Court likely does not refer to custom in areas where it would be relevant. Moreover, the Court has not referred to the two constitutive elements of CIL, nor has it elaborated on the process through which CIL is formed. Its only references to opinio juris concern domestic custom (infra, 2.2.5).

2.2.3.2 The High Court and the Administrative Court of the Canton of Zurich

Only very few rulings of the High Court and of the Administrative Court of the canton of Zurich refer to CIL. As with many cantonal courts, it is likely that the dearth of case law is due to judges’ unease vis-à-vis this unwritten source (see also supra, 2.1), to the types of cases brought before cantonal courts, to the relatively small sample of case law available online, and to the limited search options provided by cantonal databases. In line with the practice of other courts, rulings of the High Court and Administrative Court of the canton of Zurich dealing with CIL pertain to subject matters such as the law of immunities, treaty law, and refugee law.

The High Court of the canton of Zurich has cited an extract of a ruling of the Swiss Federal Tribunal pertaining to the so-called ‘Binnenbeziehung’ (the nexus required by Swiss courts to adjudicate immunity claims). It has qualified this nexus requirement as (domestic) customary law. The Court has also invoked CIL (while citing a scholarly piece) regarding the definition of a treaty reservation. However, the Court’s laconism in these cases prevents a detailed assessment of its interpretative methods.

The Administrative Court has noted that the principle of non-refoulement ‘is at times attributed to CIL or, in more recent scholarship, to jus cogens’. This statement, if taken literally, could suggest that the Court disregards that CIL and jus cogens can overlap. The Court has also held that sending official communications via mail is allowed by CIL, and that it is ‘tolerated by most States’. This test (toleration) could indicate that the Court does not engage...
with the methods of determination of CIL, and that it does not carefully examine the existence of an *opinio juris*. In a ruling of 2017 pertaining to the Swiss–Australian DTA, the Court held that DTAs and treaties more generally were to be interpreted based on treaty law, CIL, and the VCLT.\textsuperscript{1895}

Overall, drawing conclusions from such a scarce practice is difficult, apart from the observation that CIL is usually mentioned incidentally.

2.2.3.3 **The Court of Appeals of the Canton of Basel-Stadt**

The Court of Appeals of the canton of Basel-Stadt has only mentioned CIL in passing.\textsuperscript{1896} It has analyzed the two constitutive elements of domestic customary law\textsuperscript{1897} (on this issue, see *infra*, 2.2.5), but not of CIL.

2.2.3.4 **The High Court and the Administrative Court of the Canton of Bern**

The Administrative Court of the canton of Bern has noted that DTAs must be interpreted based on CIL and the VCLT.\textsuperscript{1898} Apart from these few cases, the High Court and Administrative Court of the canton of Bern hardly ever refer to CIL.

2.2.4 **Military Tribunals**

Given the scarcity of cases of the Military Court of Cassation (MCC) on treaty law (*supra*, Chapter 7, 3.3.4), it comes as no surprise that even fewer cases mention CIL. A survey of the MCC’s case law from 2006 onwards did not yield relevant cases from the perspective of CIL.\textsuperscript{1899} Yet the former art. 109 of the Swiss Military Criminal Code (SMCC) sanctioned violations of the ‘laws and customs of war’, and its current art. 114 incriminates violations of customary IHL. Hence, CIL can play a role in military criminal law cases.

To identify relevant rulings, I hence relied on auxiliary means and other materials. Helpful resources include the websites of NGOs\textsuperscript{1900} or of research.
institutions which highlight important rulings (including Swiss rulings) from the perspective of IHL and ICL. What emerges is that few Swiss proceedings have led to a judicial decision. Some scholars have reported on cases pertaining to IHL and ICL, but they do not address courts’ interpretative methods. They merely highlight the difficulty for Swiss judges to apply CIL given its frequent indeterminacy, and the tension this creates with the principle of legality. This difficulty is also emphasized by the lower military tribunals.

One of the few military court cases mentioning CIL is the ruling of the Military Court of Appeal in Niyonteze. In this case, the Court noted that the former art. 109 SMCC (which was still in force at the time) sanctioned violations of the laws of war prohibited by treaty law, but also by CIL. Regarding the latter, the Court referred to ‘international norms recognized by the international community’, citing a dispatch of the Federal Council of 1967. This seems to confirm the previously highlighted trend of self-referentiality. Eventually, due to a specificity of the SMCC, the Court did not apply CIL.

2.2.5 Relationship With Interpretative Methods under Swiss Law
What is the relationship between the methods governing the interpretation of CIL and those that apply to the interpretation of domestic custom? In light of the relative richness of the Swiss Federal Tribunal’s case law compared to the practice of other Swiss courts, it is on the former that I focus in this subsection.

The similarity of the methods governing the identification of domestic versus international custom is logically entailed by the Swiss Federal Tribunal’s

perspective of CIL. Another resource is the ICRC’s website (<www.icrc.org/applic/ihl/ihlnat.nsf/vwLawsByCategorySelected.xsp?xp_countrySelected=CH>).

Eg <competenceuniversele.wordpress.com/en-suisse>.


Henzelin (n 1902) 165 f. See also Besson and Ammann (n 60) 96.

Henzelin (n 1902) 170.


Ibid, at 28.

Ibid.
acknowledgment that domestic methods govern the interpretation of all norms that are applicable in the (monist) Swiss legal order (supra, Chapter 7, 3.4). However, this similarity is less explicitly acknowledged in its case law than in its interpretation of treaties. The small number of judgments that address the methods of identification of CIL, but also of domestic customary law, likely explain this gap.\textsuperscript{1908}

Still, relevant rulings of the Swiss Federal Tribunal show that the basic interpretative methods of domestic and international custom are indeed the same. The Court has occasionally relied on textual interpretation, for instance when assessing whether domestic written law leaves room for customary law,\textsuperscript{1909} or simply to demonstrate that a custom exists,\textsuperscript{1910} does not exist,\textsuperscript{1911} or has been codified,\textsuperscript{1912} or to clarify its content.\textsuperscript{1913} It has also used systematic interpretation (again, \textit{inter alia} when examining written law and the room it leaves for a domestic custom),\textsuperscript{1914} and teleological interpretation (eg when examining the purpose of a practice\textsuperscript{1915} or when evaluating whether domestic written law needs to be complemented).\textsuperscript{1916} Finally, it has referred to historical interpretation (eg when mentioning the criterion of a sufficient duration of the practice,\textsuperscript{1917} but also to identify the historical origins of a customary norm more generally).\textsuperscript{1918}

The constitutive elements of domestic and international custom are identical as well, save for some features that hinge on the idiosyncrasies of domestic and international lawmaking.\textsuperscript{1919} It is worth noting that when the Swiss Federal Tribunal interprets domestic custom (which is a source of Swiss law),\textsuperscript{1920} its remarks on the formation and constitutive elements of custom are more detailed than when it deals with CIL. The Court has explained that customary law derives from a lasting, uninterrupted practice and \textit{opinio
juris,\textsuperscript{1921} and it has only mentioned the concept of \textit{opinio juris} with regard to domestic custom.\textsuperscript{1922} The same goes for the conditions State practice must fulfill (ie, coherence, constancy, and generality).\textsuperscript{1923}

The practice shows that domestic custom differs from CIL in some respects. Domestic customary law can only emerge if there is a lacuna in domestic written law. Domestic custom cannot contradict written domestic law.\textsuperscript{1924} Moreover, it cannot impose new tax obligations on its subjects,\textsuperscript{1925} nor can it interfere with fundamental rights.\textsuperscript{1926} Again, these peculiarities derive from rules on domestic lawmaking, and they do not affect the congruence of the interpretative methods of domestic and international law.

2.2.6 Comparing the Practice of Swiss Courts

The practices of the various Swiss courts under scrutiny share a number of traits. One such commonality pertains to the subject matter of cases dealing with CIL, namely the law of treaties, refugee law, and the law of immunities. Moreover, courts tend to emphasize the Swiss practice (as opposed to that of other States) when identifying CIL. International courts are seldom mentioned as well. CIL often serves a gap-filling function in the absence of applicable treaty law. Courts also frequently seem to invoke custom to reinforce an interpretative conclusion reached on other grounds. State practice is more frequently analyzed (though, in most cases, superficially) when courts highlight the lack of custom on a given issue. Other common features of the case law are the imprecise terminology used by the courts, an absence of references to State practice and \textit{opinio juris} in an overwhelming majority of cases, and a greater level of detail in high-profile cases, which are rare occurrences.

The Swiss case law is not homogeneous in every respect. Circular reasoning, for instance, is particularly pronounced in the Swiss Federal Tribunal’s practice, presumably because it acts as the last judicial instance with regard to many legal issues in the Swiss legal order. This also explains why other Swiss courts tend to refer to the case law of the Swiss Federal Tribunal, and not to

\begin{itemize}
\item \textsuperscript{1921} BGE 119 Ia 59, at 4 b); BGE 94 I 138, at 2 b); BGE 84 I 89, at 4; BGE 83 I 242, at 3, and BGE 81 I 26, at 4 (mentioning the requirement of \textit{opinio necessitatis}); BGE 104 Ia 305, at 4 a), and BGE 102 Ib 296, at 3 f) (\textit{opinio juris et necessitatis}).
\item \textsuperscript{1922} BGE 104 Ia 305, at 4 a); BGE 103 Ia 369, at 4 c); BGer, judgment 6B_218/2013 of 13 June 2013, at 3-3.
\item \textsuperscript{1923} BGer, judgment 6B_218/2013 of 13 June 2013, at 3-3; BGE 105 Ia 2, at 2 b).
\item \textsuperscript{1924} BGE 94 I 325, at 2; BGE 105 Ia 2, at 2 a); BGE 104 Ia 325, at 4 a); BGE 138 I 196, at 4.5.4.
\item \textsuperscript{1925} BGE 94 I 325, at 3; BGE 105 Ia 2, at 2 a); BGE 104 Ia 325, at 4 a); BGE 138 I 196, at 4.5.4.
\item \textsuperscript{1926} BGE 83 I 242, at 2; BGE 138 I 196, at 4.5.4.
\end{itemize}
their own. The SFAC has provided the most detailed accounts of the interpretative methods of CIL. Moreover, it has used CIL in relation to sovereign rights, a subject matter which hardly appears in the case law of other Swiss courts. Instances of disagreement between the courts and the executive are exceptional. They primarily concern the Swiss Federal Tribunal. It is important to stress that the scarcity of cantonal cases dealing with CIL makes it difficult to compare this cantonal practice with that of other Swiss courts.

2.2.7 Putting the Swiss Judicial Practice Into Perspective

How does the Swiss judicial practice (supra, 2.2.1–2.2.4) compare to that of other domestic courts (supra, 2.1), setting aside the differences stemming from States’ various constitutional frameworks? Apart from minor divergences, the Swiss case law reflects broader trends on the international plane.

Common features include the fact that CIL is seldom mentioned, and that, when it is, it is often in cases dealing with the law of immunities. Another generally applicable observation is courts’ unease regarding CIL, and their reliance on codifications thereof. Other commonalities are the imprecise terminology courts use to refer to CIL, the fact that analyses of State practice and opinio juris are rare, courts’ frequent reliance on treaties, scholarship, and case law, and their tendency to use their own State’s practice regarding CIL.1927

Only a few differences can be noted. One such contrast is that few Swiss rulings have addressed the tension that may exist between CIL and the principle of legality. Another one is the absence of Swiss case law pertaining to statutory limitations and their relationship to CIL (a case law that has proliferated in Latin American countries). Moreover, it is likely that judges bound by a doctrine of stare decisis are more inclined to cite precedent (usually domestic but also foreign case law) because they are used to consulting relevant cases. The fact that this practice may come less naturally to judges in civil law jurisdictions could explain why courts in Switzerland rarely refer to foreign and international case law.

3 General Principles of International Law

General principles of international law are the *parent pauvre* of the sources of international law if one considers their marginal relevance in international

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1927 For a recent publication noticing such trends, see Ryngaert and Hora Siccama (n 229).
legal practice. The ICJ, for example, ‘sparingly’ relies on general principles as a source of international law. In line with this trend, domestic courts rarely cite general principles of international law, which makes it difficult to identify and analyze domestic courts’ interpretative approach.

After providing an overview of the domestic judicial practice in general (3.1), I examine how general principles of international law are applied by Swiss courts (3.2). I conclude with an evaluation of the Swiss judicial practice regarding both CIL and general principles (4.), with the goal of assessing its legality and quality (supra, Introduction, section 3).

3.1 Domestic Courts and the Interpretation of General Principles of International Law

From the perspective of the sources of international law, domestic judicial decisions can express States’ recognition of general principles of international law (supra, Chapter 4, 3.1.3). There is hardly any scholarship on domestic courts’ interpretation of general principles of international law, which reflects the paucity of relevant domestic judicial practice in the first place (see already Chapter 6, supra). Moreover, due to the imprecise language courts use to refer to general principles of international law, relevant cases are not easily identifiable. General principles of international law are, as previously mentioned (supra, 2.1), often confused with CIL. Some domestic courts refer to general principles, while actually citing treaty provisions. Treaty law is, of course, useful to ascertain unwritten international law, as the ILC has highlighted.

Still, domestic courts do at times (though infrequently) refer to general principles of international law. The ILDC database contains a number of cases pertaining to general principles of international law. In Russia, Sergei Marochkin and Vladimir Popov note that courts have sometimes referred

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1928 Crawford, Brownlie’s Principles of Public International Law (n 906) 36. See also Sienho (n 73) 489.
1929 Marochkin and Popov (n 183) 230 f. See also ilc, ‘First Report on Formation and Evidence of Customary International Law by Special Rapporteur Sir Michael Wood’ (n 185) 16 para 36.
1930 Marochkin and Popov (n 183) 232. On the role of treaty law in the determination of CIL, see Besson and Ammann (n 60) 55 f.
1932 Eg on the Chilean case law: Guzmán Dalbora (n 1727) 539, 543.
1933 As of June 2019, 94 decisions matched the tag ‘general principles of international law’.
to this source, albeit without citing a specific principle. In Canada, the Court of Appeal for Ontario has stated that domestic interpretative methods were not to be relied upon to interpret treaties, unless these methods constituted general principles of international law. In some jurisdictions, a rich case law has developed on the principle of sustainability and related principles.

The domestic judicial practice on general principles of international law shares features with the practice pertaining to CIL (supra, 2.1). In the area of IHRL, domestic courts have identified a number of general principles of international law, but they have largely neglected States’ practice of recognition. They have mostly relied on auxiliary means (scholarship and judicial decisions), as well as treaties, acts of IOs, and soft law. This disregard for States’ practice of recognition is also observed in the context of CIL (where the test applied to State practice is stricter than the looser criterion of ‘recognition’ that serves to identify general principles of international law). In some cases, courts have provided more details as to the method of identification of general principles. Another way in which courts’ use of general principles is connected to the identification of CIL is that by relying on general principles, domestic courts circumvent the two-tiered test of State practice and opinio juris.

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1934 Marochkin and Popov (n 183) 231.
1935 van Ert (n 1385) 182.
1936 Staubach (n 1265) 122.
1939 See Iovane (n 182) 617. This observation has also been made with regard to international courts: Sienho (n 73) 490, with reference to ICJ, case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), judgment, merits, ICJ Reports 2010, 20 April 2010, 14. See also D’Argent (n 946); Petersen (n 73) 12.
stratagem jeopardizes legality. Finally, courts' terminology is imprecise, and it often conflates general principles of international law and CIL.\footnote{Eg Italia Nostra v. Ministry of Cultural Heritage and Libyan Arab Jamahiriya (Intervening), Appeal Judgment, Case No 3154/2008, ILDC 1138 (IT 2008), 23 June 2008, Italy; Council of State [Council of State].}

3.2 Swiss Courts and the Interpretation of General Principles of International Law

As is the case with CIL (\textit{supra}, 2.2), the small number of Swiss judgments that refer to general principles of international law makes a diachronic study inappropriate. To identify relevant cases, I focused on keywords\footnote{Keywords excluded from the scope of this analysis because of their indeterminacy, and that appear in the Swiss case law, include: general principles, principles of international law, principles of the law of nations, unwritten principles of international law, general rules of international law, recognized principles of international law, principles that are recognized internationally, fundamental principles of the law of nations, and principles. On some of these expressions (and others) used by Swiss courts, see Besson and Ammann (n 60) 69, 112 ff.} indicating a sufficiently explicit, unambiguous reference to a general principle of international law. Vague expressions\footnote{On some of these expressions (and others) used by Swiss courts, see Besson and Ammann (n 60) 69, 112 ff.} were excluded, as they did not clearly establish that courts were actually referring to general principles in the sense of art. 38(1)(c) ICJ Statute.\footnote{Courts (and other authorities) often refer to principles \textit{qua} category of norms rather than \textit{qua} sources of international law, for instance. See ibid 21.}

This keyword-based approach has drawbacks. Given the imprecise terminology used by the Swiss courts, some pertinent cases may not have been identified. On the other hand, the inflationary use of adjectives such as 'general' and 'principle' in judicial decisions and in legal discourse more generally – and the array of meanings attached to these terms – makes it hard to determine when they are employed to refer to general principles of international law.\footnote{On this difficulty, see already ibid 67 ff.} To speculate as to whether a given case is actually relevant, is difficult in practice and is likely to lead to overinclusive results. Moreover, even expressions that seem precise are not always used to point to a general principle of international law.
One example of such an ambiguous case is the Swiss Federal Tribunal’s ruling in a border dispute between the cantons of Valais and Ticino. The Court held that the ‘principles of international law’ were applicable to the dispute on a subsidiary basis. In this exceptionally well documented ruling, the Court referred to a number of ‘principles’ in connection with international law, yet it did not mention what source of international law it was applying. It is unclear whether it was referring to general principles in the sense of art. 38(1)(c) ICJ Statute.

In the following sections, I discuss, again, the practice of the Swiss Federal Tribunal (3.2.1), the SFAC and the SFCC (3.2.2), and judgments of cantonal (3.2.3) and military courts (3.2.4). I also highlight the convergence of the methods Swiss courts use to interpret general principles of domestic and international law, respectively (3.2.5). I then compare the practices of these various courts with one another (3.2.6), and with those of foreign domestic courts (3.2.7).

3.2.1 The Swiss Federal Tribunal

A first noteworthy feature of the practice of the Swiss Federal Tribunal is that few rulings written in German mention general principles of international law. Rulings in French, by contrast, have referred to them in a number of cases, eg by mentioning the so-called ‘principes généraux du droit des gens’. However, as I will emphasize, some of these references serve other purposes than that of invoking the general principles of art. 38(1)(c) ICJ Statute. Moreover, while the Court often cites these principles in passing, it rarely relies on them in its reasoning, nor does it seek to identify whether such general principles are indeed ‘recognized’ by States, as the ICJ Statute provides.

Second, in a number of rulings, the Swiss Federal Tribunal has used general principles as a fallback source, especially when no treaty provision was applicable. This reflects the broader tendency of courts and legal authorities to rely on written law whenever it is available, including to identify unwritten international law. This trend should not detract from the fact that general principles are on equal footing with other sources of international law. In a

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1945 BGE 106 Ib 154, at 3.
1946 Eg BGE 110 Ib 173, at 2; BGE 120 Ib 189, at 2 b).
case of 1994, for instance, the Court noted that no treaty between Switzerland and Egypt was applicable and that no ‘general principles of supranational rank’ governed the issue. The law of immunities consisted largely in domestic law, apart from the minimal protection which CIL accorded to foreign States. The Court concluded that the question at stake had to be resolved ‘in light of the general principles of public international law as they can be derived from case law, scholarly writings, and the solutions that have been retained in international treaties governing interstate jurisdictional conflicts’. In another ruling on the law of immunities, the Court considered that given that the European Convention on State Immunity was not applicable, it had to decide the case based on the general principles of international law. Confirming courts’ tendency to rely on written law, the Court added that these principles had been codified in the UNCSI which, though not yet in force, ‘purports to be a codification of CIL’. The language the Court uses indicates that general principles of international law are conflated with other sources of international law.

Third, the Court sometimes mentions general principles of international law loosely to refer to international law in general. In an extradition case involving Italy, the Court (in a way that is symptomatic of the self-referential tendency of the domestic case law) stated that ‘based on Swiss conceptions, general principles of international law are directly applicable qua domestic law; when they are of ordre public (jus cogens), they trump contrary positive treaty law’. Another example in which the notion of general principles of international law is used loosely is a case pertaining to the Free Trade Agreement between Switzerland and the EEC. The Court held that the Agreement had to be interpreted based on (general principles of) international law, as opposed to EU law. Similarly, the Court has stated that cases pertaining to

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1948 BGE 132 II 400, at 2.
1949 BGE 135 III 608, at 4.2.
1950 BGE 134 III 122, at 5.1.
1951 Ibid.
1953 BGE 118 Ib 367, at 6 b).
immunity from execution must be decided based on the general principles of international law. In a series of cases, the Court has noted that when assessing a request for mutual legal assistance in criminal matters, general principles of international law must be taken into account regardless of whether a treaty has been concluded between the States concerned.

Fourth, and as previously mentioned, general principles of international law are sometimes conflated with other sources of international law, or with specific types of international legal acts, such as *jus cogens*. This ambiguity is, once again, problematic from the perspective of the quality (and especially the clarity) of judicial reasoning. In a ruling of 1995, the Court left open whether the treaty provisions invoked by the appellant qualified as a general principle of international law pursuant to art. 53 VCLT and could, ‘qua norm of the international *ordre public*,’ motivate the refusal to extradite an individual to the United States. Yet art. 53 refers to a ‘peremptory norm of general international law,’ and not to general principles of international law as stated by the Court. Another example, this time of the Court’s tendency to amalgamate general principles and other sources, is provided by a case of 2014 pertaining to the UNCSI, in which the Court stated that the Convention codifies general principles of international law.

In spite of this language, the Court likely intended to refer to *CIL*, which it considers to be reflected in the UNCSI (see also supra, 2.2.1). The Court has also considered that the prohibition of torture codified in art. 3 ECHR is a general principle of international law which must be taken into account in a request for extradition. In this ruling, which refers to general principles several times, the Court relied on a previous case allegedly pertaining to the same issue. However, in this earlier case, the Court had mentioned *jus cogens* and not general principles of international law. The Court has sometimes more neatly distinguished general principles of international law from other sources of international law.

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1956 BGE 121 II 296, at 3 c).
1959 BGE 101 la 533, at 7 b).
1960 BGE 117 la 233, at 4 b); BGE 118 la 195, at 4 b) aa).
Fifth, in a number of cases, keywords referring to ‘general principles of international law’ appear in the title of scholarly pieces cited by the Court, but whether they influence the Court’s reasoning is unclear.\(^\text{1961}\) In one such case, the Court noted that it is a ‘principle of the law of nations’ that a State can expel foreign nationals who endanger peace and public order, or whose presence constitutes a danger or an inconvenience. It then cited, \textit{inter alia}, Louis Delbez’s \textit{Principes généraux du droit international public}, a book pertaining to IHL.\(^\text{1962}\) In this case, the Court also stated that the European Convention on Extradition ‘expresses general principles common to a number of States’\(^\text{1963}\) Given the laconism of the Court’s remarks, whether it is indeed referring to (and seeking to identify) a general principle of international law properly called is unclear.

Sixth, and last, the Court sometimes identifies specific general principles, yet without mentioning their recognition by States pursuant to art. 38(1)(c) ICJ Statute.\(^\text{1964}\) It has for example noted that it is a general principle of international law that in a war, reprisals are in principle allowed within certain limits.\(^\text{1965}\) To substantiate this statement, the Court exclusively relied on scholarship. The same approach – ie, a focus on scholarship – can be found in a remarkably detailed case of 2016 pertaining to competition law, the \textit{Gaba} judgment. In this ruling, the Court stated that according to a principle of international law, States can regulate foreign situations to which they have a genuine link.\(^\text{1966}\) In another case, the Court, based on its own case law, stated that reciprocity is a general principle of international law.\(^\text{1967}\) In an earlier ruling, the Court had indeed qualified reciprocity as such, yet without elaborating on this statement.\(^\text{1968}\) While general principles do not require evidence of State practice and \textit{opinio juris}, as is the case with CIL, their existence depends on their recognition by States. Judicial economy obviously precludes courts from engaging in a full-fledged comparative analysis of domestic legal practices, unless the general principle occupies a central place in their reasoning. Such a comprehensive analysis seems especially redundant for general principles that are well established, such as good faith\(^\text{1969}\) or sovereign equality. However, not

\begin{footnotesize}
\begin{itemize}
\item \(^{1961}\) Eg BGE 100 II 200, at 3; BGE 106 Ib 400, at 10 a).
\item \(^{1962}\) BGE 106 Ib 400, at 10 a).
\item \(^{1963}\) Ibid, at 5 c).
\item \(^{1964}\) Eg BGE 100 II 200, at 2.
\item \(^{1965}\) BGE 92 I 108, at 3 a).
\item \(^{1966}\) BGE 143 II 297, at 3.5.
\item \(^{1967}\) BGE 110 Ib 173, at 3 a). See also BGE 111 V 302, at 5 a).
\item \(^{1968}\) BGE 109 Ib 165, at 5.
\item \(^{1969}\) BGer, judgment 2C_806/2011 of 20 March 2012, at 5.2; see also BGE 143 II 224, at 6.3 (with a reference to the ICJ) and 6.5.
\end{itemize}
\end{footnotesize}
all general principles can be taken as axiomatic: some are controversial, and their existence must be demonstrated.

3.2.2 Other Federal Courts

3.2.2.1 The Swiss Federal Administrative Court

Unsurprisingly, few decisions of the Swiss Federal Administrative Court (SFAC) mention general principles of international law. In a ruling of 2011, for instance, the SFAC agreed with the lower court’s statement that reciprocity was a general principle of international law.\textsuperscript{1970} Most of the SFAC’s decisions confirm the trends noted with regard to the Swiss Federal Tribunal (\textit{supra}, 3.2.1). Three trends will be discussed here. The first concerns self-referential, repetitive reasoning. Judgments can be considered repetitive when relevant paragraphs are used from one judgment to the other without any adjustment. Another trend is the neglect of the domestic recognition of general principles of international law. The third trend is the use of imprecise terminology.

Many repetitive rulings pertain to the good faith requirement which, under Swiss statutory law,\textsuperscript{1971} applies to requests for international administrative assistance in tax matters. In several highly similar cases, the Court has stated that this principle is found in domestic law and (based on its own case law) in the general principles of international law.\textsuperscript{1972} The Court has made the same observation when relying on the analogous good faith requirement of the Ordinance on International Administrative Assistance Pursuant to DTAS.\textsuperscript{1973} These decisions are all identical in their wording, in line with the repetitive tendency noticed in the context of treaty interpretation (\textit{supra}, Chapter 7, 3.3.1.1). Of course, when cases raise highly similar legal issues, and \textit{a fortiori} for joined cases, it is misguided and unrealistic to require courts to reinvent the wheel in every ruling. On the other hand, an uncritical reliance on analogous cases without questioning the underlying reasoning can create difficulties in terms of the legality and quality of judicial reasoning.

\begin{itemize}
\item \textsuperscript{1970} SFAC, judgment B-8732/2010 of 22 September 2011, at 4.3.2.
\item \textsuperscript{1971} Art. 7(c) of the Federal Act on International Administrative Assistance in Tax Matters of 28 September 2012 (SR 651.1) states that a request for assistance will not be considered if it violates the principle of good faith.
\item \textsuperscript{1973} SFAC, judgment A-6983/2014 of 12 January 2016, at 5.
\end{itemize}
The Court almost never establishes the international recognition of general principles. One exception is a ruling of September 2015, in which the Court first referred to good faith in a case of international administrative assistance. In this decision, it stated that general principles of international law are ‘an autonomous source of international law’, before observing that good faith was such a general principle. To support this conclusion, the Court mentioned decisions of the SFCC and of the Swiss Federal Tribunal, scholarly writings, and a circular of the Federal Office of Justice.\textsuperscript{1974} While the ruling is relatively well documented, the Court merely used the Swiss practice and auxiliary means to establish the existence of a general principle. This confirms, once more, the self-referential tendency of domestic courts interpreting international law.

As has been observed for the Swiss Federal Tribunal (\textit{supra}, 3.2.1), some rulings of the SFAC show that the expression ‘general principles of international law’ is used loosely. In a decision of 2010, for instance, the SFAC, based on the case law of the ECtHR, stated that art. 8 \textit{ECHR} must not be interpreted in a vacuum, but in light of the general principles of international law. It thereby referred to general principles as a shorthand for international law. Such imprecise terminology should be avoided, as it jeopardizes predictability, clarity, and consistency.

### 3.2.2.2 The Swiss Federal Criminal Court

Most rulings of the SFCC on general principles of international law follow the case law of the Swiss Federal Tribunal and the SFAC. In a series of identical cases, the Court, based on the practice of the Swiss Federal Tribunal, has stated that reciprocity is a general principle of international law.\textsuperscript{1975} It has noted, like the Swiss Federal Tribunal, that ‘based on Swiss conceptions, general principles of international law are directly applicable \textit{qua} domestic law; when they are of ordre public (\textit{jus cogens}), they trump contrary positive treaty law’.\textsuperscript{1976} The SFCC has also observed (again, like the Swiss Federal Tribunal) that the general principles of international law and reasons of international \textit{ordre public} can preclude extradition.\textsuperscript{1977} In other instances, the Court has noted, in line with the SFAC’s practice, that general principles of international law are

\textsuperscript{1974} SFAC, judgment A-6843/2014 of 15 September 2015, at 7.4.3.
\textsuperscript{1977} SFCC, judgment RR.2010.132 of 4 October 2010, at 6.2.1.
‘an autonomous source of international law’.\footnote{1978 The deference of the SFCC on these specific issues can be explained by its narrow jurisdiction, and by the fact that it does not routinely apply international law. However, it can also, at times, suggest a lack of genuine, in-depth engagement with these issues when they do arise.} The deference of the SFCC on these specific issues can be explained by its narrow jurisdiction, and by the fact that it does not routinely apply international law. However, it can also, at times, suggest a lack of genuine, in-depth engagement with these issues when they do arise.

The SFCC has relied on treaty law to ascertain general principles of international law. It has for example used art. 26 and 31 VCLT and scholarly writings to support its statement that good faith is a general principle of international law.\footnote{1979 Yet in none of these cases did the Court explain how such principles were to be ascertained. Again, laconism is understandable when a general principle of international law is undisputed, but it can become problematic as soon as the general principle at stake is less established.} Yet in none of these cases did the Court explain how such principles were to be ascertained. Again, laconism is understandable when a general principle of international law is undisputed, but it can become problematic as soon as the general principle at stake is less established.

\section*{3.2.3 Cantonal Courts}

\subsection*{3.2.3.1 The Supreme Court of the Canton of Geneva}

Decisions of the Court mentioning general principles of international law are extremely rare, and evaluating its practice based on such a small sample is difficult. Still, its case law confirms trends observed in the case law of other Swiss courts, namely terminological imprecision, the use of general principles as a fallback source, and self-referentiality. It is also worth noting that the Court often cites the Swiss Federal Tribunal. While this deference can be explained by the Tribunal’s role as an appellate judicial body, it may preclude a thorough engagement of lower courts with the interpretative issue at stake.

In a decision of 2009, the Court concluded that Taiwan ‘possesses the elements proper to a State based on the general principles of public international law, ie, a territory, a population, and an effective government’.\footnote{1980 Besides relying on scholarship, the Court derived these general principles from the Swiss Federal Tribunal’s case law. 1981 It is doubtful that the Court was indeed referring to general principles in the sense of art. 38(1)(c) ICJ Statute. The terminology it uses must hence be taken with a grain of salt. Another example of terminological imprecision is a ruling of 2016 in which the Court listed} Besides relying on scholarship, the Court derived these general principles from the Swiss Federal Tribunal’s case law.\footnote{1981 It is doubtful that the Court was indeed referring to general principles in the sense of art. 38(1)(c) ICJ Statute. The terminology it uses must hence be taken with a grain of salt. Another example of terminological imprecision is a ruling of 2016 in which the Court listed} It is doubtful that the Court was indeed referring to general principles in the sense of art. 38(1)(c) ICJ Statute. The terminology it uses must hence be taken with a grain of salt. Another example of terminological imprecision is a ruling of 2016 in which the Court listed
The self-referential character of the practice, courts’ preference for written international law, and their use of general principles as a fallback source, are illustrated by a labor law dispute in which the defendant invoked her jurisdictional immunity. Based on the Swiss Federal Tribunal’s case law, the Court considered that utmost care was warranted when applying the European Convention on State Immunity of 1972 qua CIL. The claim was therefore to be appraised based on the general principles of international law. The Court then applied the UNCSI with the understanding, following the Swiss Federal Tribunal’s case law and a statement of the Federal Council, that it codified principles accepted by Switzerland.

3.2.3.2 The High Court and the Administrative Court of the Canton of Zurich
Courts in the canton of Zurich hardly ever refer to general principles of international law. Almost no case was found in the online database of the High Court, except for a ruling in which the Court refers to the ‘principles of international law’ according to which States must respect each other’s sovereignty. A search in the database of the Administrative Court did not yield any results either.

3.2.3.3 The Court of Appeals of the Canton of Basel-Stadt
The case law search did not locate any decision in which the Court of Appeals explicitly mentioned general principles of international law. While these results are partly due to the fact that the Court’s case law is only available online from 2014, it is plausible that general principles of international law, if they are used at all, are of marginal importance in the Court’s decisions.

3.2.3.4 The High Court and the Administrative Court of the Canton of Bern
A search in the case law of the High Court and Administrative Court did not yield any results. The Courts sometimes refer to domestic general principles of

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1985 Ibid.
1986 Oger-ZH, judgment SB160062 of 15 December 2016, at 1.2.
domestic law\textsuperscript{1987} (like courts in other cantons), but not to general principles of international law.

3.2.4 Military Courts
Given the few rulings of the MCC pertaining to treaty law (\textit{supra}, Chapter 7, 3.3.4) and CIL (\textit{supra}, 2.2.4), it is likely that judgments pertaining to general principles of international law are of minor importance, if they exist at all. A survey of the MCC's recent case law\textsuperscript{1988} did not make it possible to identify relevant rulings, nor did a search based on other auxiliary means and resources.\textsuperscript{1989}

3.2.5 Relationship With Interpretative Methods under Swiss Law
In this subsection, and similar to what I did for other sources of international law (\textit{supra}, Chapter 7, 3.4) and CIL (\textit{supra}, 2.2.5), I focus on the case law of the Swiss Federal Tribunal. The fact that its practice on general principles of international law is not as scarce as that of other Swiss courts makes it easier to compare the methods it uses to interpret both general principles of Swiss law and general principles of international law.

As previously noted, the Court acknowledges that domestic methods govern the interpretation of all norms of the domestic legal order (\textit{supra}, Chapter 7, 3.4). Given the monism of the Swiss legal order (\textit{supra}, Chapter 3, 2.2.1), this arguably entails a convergence of the methods governing the interpretation of general principles of Swiss law and those applicable to general principles of international law. However, this similarity is not as apparent in the case law as in the context of treaty interpretation. General principles of Swiss law are typically mentioned in passing.\textsuperscript{1990} Moreover, the Court's inflationary use of the word 'principle' makes it more complicated to establish a convergence of methods.\textsuperscript{1991}

Still, this continuity becomes salient in some instances. The Court has for example alluded to the recognition of general principles of domestic law,\textsuperscript{1992} eg by scholars and constant case law,\textsuperscript{1993} which is reminiscent of the recognition required by art. 38(1)(c) \textit{ICJ Statute}. The Court has also acknowledged that

\textsuperscript{1987} VwGer-BE, judgment 200 2014 1185 of 19 October 2015, at 6.3; VwGer-BE, judgment 100 2015 218 of 15 March 2016, at 5.1.

\textsuperscript{1988} \textless www.oa.admin.ch/de/entscheidungen-militaerjustiz.html\textgreater .

\textsuperscript{1989} See the resources mentioned in Chapter 7, 3.3.4 (\textit{supra}).

\textsuperscript{1990} \textit{bge} 120 IV 107, at 2 c); \textit{bge} 112 II 118, at 5 e); \textit{bge} 102 Ib 198, at 2.

\textsuperscript{1991} Eg \textit{bge} 117 II 290; \textit{bge} 138 II 191.

\textsuperscript{1992} \textit{bge} 92 I 350, at 4.

\textsuperscript{1993} \textit{bge} 89 I 483, at 6 e). See also \textit{bge} 123 I 63, at 4 b) (regarding the constitutional general principles 'developed by the case law of the Swiss Federal Tribunal'), and \textit{bge} 99 Ib 371.
The Interpretation of Unwritten International Law

315

some general principles of federal law are also general principles of cantonal law,\textsuperscript{1994} which resembles the two levels of general principles in international law, where general principles of domestic law can also be general principles of international law. When interpreting general principles of Swiss law, the Court has used the four interpretative methods. It has engaged in textual interpretation (by pointing to codified expressions of general principles),\textsuperscript{1995} teleological interpretation (by emphasizing the point or function of the principle or through evolutive interpretation),\textsuperscript{1996} and systematic interpretation (eg by mentioning analogous norms in the legal order).\textsuperscript{1997} Occasionally, it uses historical arguments to interpret general principles.\textsuperscript{1998}

3.2.6 Comparing the Practice of Swiss Courts

Given the few cases in which general principles of international law are mentioned, it is difficult to reliably identify variations in the practice of different courts. There is virtually no cantonal or military court practice. Nonetheless, except for some minor differences, relevant rulings display a range of shared features.

Common traits of Swiss courts’ practice pertaining to general principles of international law are: the use of these principles as a fallback source, when no other source of international law (and especially no written international legal act) is applicable; the absence of remarks as to the recognition and methods of ascertainment of these general principles; the self-referential character of the practice; the imprecise terminology employed by courts; and, finally, repetitive tendencies in the case law, due to the fact that the existence of many general principles is asserted based on previous rulings.

In terms of differences, the subject matters of cases dealing with general principles of international law vary from one court to another (and especially

\textsuperscript{1994} BGE 140 III 636, at 3.5.
\textsuperscript{1995} BGE 138 II 346, at 7, 9; BGE 138 II 191, at 4.3.2; BGE 134 II 117, at 7; BGE 132 V 127, at 6.1.1; BGE 130 II 113, at 4.2; BGE 120 II 243, at 3 d); BGE 118 II 435, at 2 b); BGE 117 V 399, at 4 b); BGE 113 IV 101, at 2 c); BGE 107 II 189, at 3; BGE 98 II 221, at 4 a); BGE 98 Ia 281, at 3; BGE 97 IV 205, at 1; BGE 93 I 666, at 2; BGE 91 I 4, at 2; BGE 84 I 209, at 5; BGE 86 II 365, at 1; BGE 83 II 231, at 2 c).
\textsuperscript{1996} BGE 134 II 117, at 7; BGE 126 V 143, at 2 b); BGE 116 V 298, at 4 c), d); BGE 98 Ia 460, at 5 a). See also BGE 115 V 347, at 1 d) (concluding that there was no general principle).
\textsuperscript{1997} BGE 139 V 297, at 3.3.3; BGE 139 V 82, at 3.3.2; BGE 132 V 127, at 6.1.1; BGE 127 V 252, at 4 a); BGE 126 V 244, at 4 a); BGE 124 II 570, at 4; BGE 121 IV 10, at 3 a); BGE 119 Ib 311, at 4 a); BGE 108 V 109, at 2 c); BGE 93 I 666, at 2.
\textsuperscript{1998} BGE 128 III 370, at 4 b).
from one federal court to another, depending on these courts’ jurisdiction). The SFAC adjudicates more cases dealing with tax matters, for instance, and the SFCC is, of course, faced with criminal legal issues. Still, the main subject areas in which general principles are cited are relatively similar across the board. They include the law of immunities, extradition cases, legal assistance in criminal matters, administrative assistance in tax matters, and treaty law. Some cases pertain to the principle of good faith and reciprocity. Besides slight variations in terms of subject matter, one difference is that the SFCC closely follows the case law of the other federal courts, while these other judicial bodies are less deferential in their reasoning. Cantonal courts typically follow the Swiss Federal Tribunal, although their jurisdiction does not prevent them from interpreting general principles.

3.2.7 Putting the Swiss Judicial Practice into Perspective

The small number of relevant cases dealing with general principles makes it difficult to draw meaningful conclusions as to how the Swiss judicial practice fits into the broader practice of domestic courts. What can be noted is that the use of imprecise terminology, the confusion of general principles with other sources and norms of international law, and the mention of general principles jointly with written international law are observed both in Switzerland and abroad.

The only salient difference pertains to the subject matter of cases dealing with general principles. While in other jurisdictions, courts have used general principles in connection with IHRL and international environmental law, for instance, these subject areas are absent in the Swiss judicial practice. On the other hand, the Swiss practice is relatively developed in the law of immunities and administrative assistance in tax matters, two areas that reflect some features of Swiss foreign relations law (supra, Chapter 3, 2.1).

4 Evaluation

Based on this survey of the Swiss judicial practice pertaining to unwritten international law (ie, CIL and general principles of international law), several characteristics of the case law can be considered problematic.

1. **Neglect of unwritten law.** First, there is little judicial practice pertaining to unwritten international law. Courts seem biased against it, even though CIL and general principles of international law are autonomous sources of international law. Of course, the scarce practice regarding unwritten international law may also – and *inter alia* – reflect litigants’ reluctance
to invoke it in court. Still, the small number of cases (especially as regards cantonal cases and cases decided by military courts) in which unwritten international law is applied suggests that it is neglected when it would be relevant. CIL is only mentioned in some substantive areas of international law, and general principles of international law tend to be used as a fallback source, when no other international legal norm applies. This neglect of unwritten international law may undermine the legality of judicial decisions.

2. **Selective reliance on auxiliary means and insufficient substantiation.** The case law also reveals a generous resort to auxiliary means (especially scholarship) and other resources (such as treaty law) to identify unwritten international law. Granted, reliance on auxiliary means is explicitly allowed by art. 38(1)(d) ICJ Statute, and the ILC explicitly authorizes the use of treaty law, resolutions of IOs, case law, and scholarship to identify CIL.\(^{1999}\) However, a lack of rigor in the use of this material to interpret international legal acts is problematic from the perspective of the sources of international law and of high-quality judicial reasoning. Another potentially problematic aspect is that legal scholarship often suffers from a geographic (and national) bias. Of course, such preferences are partly due to linguistic considerations, resources, and ease of access, and the use of Swiss scholarship may be warranted when the relationship between international law and domestic law is at stake. However, these reasons do not justify a systematic neglect of other works of scholarship. Finally, a further difficulty is that auxiliary means tend to be used as proxies or shortcuts that replace direct manifestations of State practice (eg official statements or governmental reports). Ryngaert and Hora Siccama rightly talk about domestic courts’ tendency to ‘outsource the determination of custom to treaties, non-binding documents, doctrine or international judicial practice’.\(^{2000}\) The existence of custom and general principles is often asserted without much substantiation. Courts provide little evidence (if any) of State practice and *opinio juris* or, in the case of general principles, of their recognition by States. They have asserted the customary character of some international legal norms even when this customary nature is debated on the international plane, and they almost never mention the two constitutive elements of CIL. The fact that these two constitutive

\(^{1999}\) See draft conclusions 11–14, in ILC, ‘Draft Conclusions on Identification of Customary International Law, With Commentaries’ (n 891).

\(^{2000}\) Ryngaert and Hora Siccama (n 229) 22.
elements are highlighted at least occasionally in the context of domestic custom shows that there is room for improvement with regard to CIL. Analogous remarks apply to general principles of international law.

3. **Circularity and self-referentiality.** The highly self-referential and even circular character of the case law is also problematic from the perspective of the legality and quality of judicial reasoning. Courts tend to refer to the practice of the Swiss authorities in general (or even, more loosely, to ‘Swiss conceptions’ about international law), and especially to the Swiss judicial practice and to their own case law to identify unwritten norms of international law, as if this domestic practice were decisive in this context. This feature is troubling from the perspective of legality, since international law is generated by interstate lawmaking practices. Ascertaining its meaning requires that courts consult the practice of other States as well. Yet Swiss court cases contain few references to international and to foreign domestic judicial decisions, even though these judicial decisions are as important as domestic ones from the perspective of art. 38(1)(d) ICJ Statute.

4. **Imprecision, irregularity, superficiality, and repetitive reasoning.** Courts’ terminology to interpret unwritten international law is imprecise. Both CIL and general principles of international law tend to be conflated with other sources and norms of international law. The practice is also characterized by its uneven level of detail regarding the methods by which unwritten international law is ascertained. Textual, systematic, teleological, and historical interpretative tools are not emphasized in the case law, nor are the constitutive elements of unwritten law. The generally superficial treatment of these issues is particularly salient if one considers the relatively detailed remarks courts have sometimes made regarding unwritten domestic law. Finally, a large number of cases are highly repetitive. Such repetitions partly result from the fact that some cases address highly similar issues, or are even joined cases. However, in other instances, this repetitive practice may indicate courts’ lack of genuine engagement with the sources and interpretative methods of international law.

As has become apparent, the main clusters of problems raised by Swiss courts’ practice of CIL and general principles roughly mirror those highlighted in the context of treaty interpretation (*supra*, Chapter 7, section 4). Of course, the practice leads to specific difficulties in each case, due to differences between written and unwritten law. Swiss courts’ application of CIL also leads to specific difficulties compared to those pertaining to general principles. In spite of these idiosyncrasies, the basic issues encountered are similar for all sources
of international law, be it from the perspective of the legality of the practice, or from the perspective of its quality.

To summarize, in at least four important respects, Swiss courts' interpretation of unwritten international law fails to observe the law's interpretative methods and the virtues of predictability, clarity, and consistency.