

# INTERNATIONAL LAW AND PRACTICE SYMPOSIUM ON DOMESTIC COURTS AS AGENTS OF DEVELOPMENT OF INTERNATIONAL LAW

## Introduction: Domestic Courts as Agents of Development of International Law\*

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### Abstract

This introductory paper to the symposium hosted by the *Leiden Journal of International Law*, and edited by the authors, deals with the function of domestic courts as agents for the development of international law. The paper ‘sets the scene’ for the contributions to the symposium, which seek to trace the impact of domestic courts in the development of canonical areas of international law, such as jurisdiction, immunity, state responsibility, the law of international organizations/human rights, and the law of armed conflict/conduct of hostilities. It discusses the formal quality and actual influence of domestic-court decisions on the development of international-law, and introduces the concept of ‘agents’ of international-law development. This is the analytical perspective that the contributions to the symposium adopt.

### Key words

sources of international law; development of the law; domestic courts; national courts; international law-making

## I. INTRODUCTION

The role of domestic courts in relation to rules of international law remains complex and in some respects unclear. To assert the increasing relevance of international law in domestic proceedings may have become almost commonplace. Contemporary textbooks tend to engage, at times in depth, with prominent domestic decisions,<sup>1</sup> and many see ‘a certain quantitative and qualitative change’ taking place, with ‘more international law [being] applied by more national courts in a more consequential

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<sup>1</sup> See A. Roberts, ‘Comparative International Law? The Role of National Courts in Creating and Enforcing International Law’, (2011) 60 ICLQ 57, 58.

(and less parochial) way'.<sup>2</sup> In fact, there is a concerted effort to bring the wealth of domestic jurisprudence to light through projects like *International Law Reports* or *International Law in Domestic Courts*, and at least an emerging debate about the need for, and limits of, a 'comparative approach' to international law that proceeds from domestic decisions creating, in one commentator's terminology, 'hybrid international/national norms . . . worthy of study in their own right'.<sup>3</sup>

Rich though it is, the existing literature on the topic seems quite unbalanced. There is no shortage of contributions that emphasize the (potentially important) role of domestic courts as appliers, or enforcers, of international legal rules. Many studies assess broader functions of domestic courts in the international legal system, with prominent pieces, for example, stressing their contribution to the international rule of law, or to unity and coherence more generally.<sup>4</sup> But few studies so far have sought to assess the impact of domestic decisions on the formation and interpretation of broadly defined areas of international law in a systematic way. It is against this background that the present symposium assesses the role of 'Domestic Courts as Agents of Development of International Law'. The focus is not on the law-applying, but on the law-developing (perhaps even law-creating) function of domestic jurisprudence. And it is not on specific decisions – the well-known 'textbook examples' of *Ferrini* or *Pinochet* fame – but on broadly defined areas of international law. Proceeding from traditional 'textbook papers' (as opposed to textbook examples of decisions), contributions seek to clarify the role of domestic courts in the development of international law in canonical areas (or 'sectoral regimes') of the discipline. The attempt is not to re-engage with well-known debates about sources, or to trace the relevance of individual domestic decisions, but to analyse whether, en bloc, domestic jurisprudence has made an impact on the development of international law in specific areas of the discipline.<sup>5</sup>

This 'impact assessment' adds what we consider to be an important, but largely overlooked, aspect of the role of domestic courts in international law. Admittedly, it remains selective, perhaps even eclectic, in its coverage: the subsequent contributions cannot address international law in its entirety. Yet in focusing on six broad topics – jurisdiction, immunities, decisions of international organizations (especially relating to human rights), international humanitarian law (notably regulating the conduct of hostilities), and the law of state responsibility (addressed in two separate papers) – the contributions, we believe, assess relevant and broad areas

2 Y. Shany, 'National Courts as International Actors: Jurisdictional Implications' (2009) *Federalismi.it* no 15/2009, 2, available at <http://www.effective-intl-adjudication.org/admin/Reports/2af9ed4d4ao26e581437876dd1b73b87Yuval.pdf>.

3 Roberts, *supra* note 1, 60.

4 See, e.g., A. Nollkaemper, *Domestic Courts and the International Rule of Law* (2011); J. d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order', in O. K. Fauchald and A. Nollkaemper (eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (2012), 141.

5 The present symposium complements ongoing research on the development of international law by another potential 'agent of legal development', namely the International Court of Justice. See C. J. Tams and J. Sloan (eds.), *The Development of International Law by the International Court of Justice* (2013).

of the discipline. The impact assessment, it is submitted, draws on a relevant sample of evidence.

This brief introductory contribution aims to set the stage for the thematic papers that follow. It briefly sketches out the background against which the law-developing function of domestic courts is to be analysed (section 2), and it introduces the notion of ‘agents of legal development’, i.e. the analytical perspective that the authors were asked to adopt in their papers (section 3). Section 4 presents some general conclusions.

## 2. THE BACKGROUND: ROUTINE ENGAGEMENT WITH DOMESTICATED INTERNATIONAL LAW

### 2.1. Routine engagement

Writing in 1935, James Brierly noted that ‘questions of international law arise comparatively rarely, and often only incidentally, in the work of municipal courts’.<sup>6</sup> Seven decades later, in 2005, Lord Bingham would introduce Shaheed Fatima’s *Using International Law in Domestic Courts* with the following words:

Times have changed. To an extent almost unimaginable even thirty [let alone seventy] years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis, now and then, but routinely, and often in cases of great importance.<sup>7</sup>

While not everyone back then agreed with Brierly’s assessment,<sup>8</sup> Lord Bingham’s view expressed seven decades later seems generally shared today. In fact, while both quotations are attributed to writers from the same jurisdiction, the trend described by Lord Bingham is considered to be a general one. There is a sense – attested to, not least, by the voluminous materials assembled in the *International Law Reports* or in ILDC reports – that domestic courts, not only in Britain, but on all continents, increasingly, even ‘routinely’, engage with international law. In fact, many commentators today would see them, as foreshadowed more than a century ago, as ‘the trusted mouthpieces of international law as local divisions of the great High Court of Nations’.<sup>9</sup> And perhaps this is only natural. As international law branches out to cover ever-broader areas of international relations and as the boundary between international and national legal orders becomes more porous, the potential for interaction increases. In fact, more than that, not only has international law branched out, it also penetrates domestic legal systems more than before. A significant number of modern international obligations do not deal simply with relations between states on the international level, as do, for example, the traditional rules of the prohibition of the use of force, the prohibition of intervention, or the

6 J. L. Brierly, ‘International Law in England’, (1935) 51 LQR 24, 25.

7 T. Bingham, ‘Preface’, in Shaheed Fatima, *Using International Law in Domestic Courts* (2005), xi.

8 Cf. H. Lauterpacht, ‘Municipal Decisions as a Source of International Law’, (1929) 10 *British Yearbook of International Law* 65, 71.

9 T. A. Walker, *The Science of International Law* (1893), 49.

right to visit and search on the high seas. Rather, international obligations – in fields as diverse as human rights, environmental protection, investment, and trade, or the secondary law of international organizations – are becoming increasingly ‘inward-looking’ in that they demand a state to take, or refrain from, certain conduct within its domestic jurisdiction, or in that they enable certain conduct within the domestic jurisdiction, often within specific parameters.<sup>10</sup> These inward-looking obligations are imposed on the state, not specifically on its courts. International law sees the state as unitary, as one entity that has the freedom to set up its organic apparatus as it sees fit, but whose organs’ conduct is attributable to the state and may render it responsible if that conduct is not in conformity with what is required by the state’s international obligations. Even though the state is free to organize its apparatus, international law increasingly shapes the state’s ‘internal organisation’. It does so by requiring, through inward-looking norms, executive or legislative action, and by ‘using’ domestic courts to oversee the implementation of the relevant rules.<sup>11</sup> Both factors – increasing scope, and increasingly inward-oriented reach – explain why domestic courts today routinely engage with international law. It is against this background that inquiries into the law-developing function of domestic decisions are called for.

## 2.2. Domesticated international law

However, is it really ‘international law proper’ that is being engaged with? As noted above, one reason explaining the increasing potential for interaction is that national jurisdictions themselves have become more porous, have opened up to, in fact often embraced, international law. Yet the international law that is being embraced does not remain unchanged: in the embrace, it is domesticated. Forms and versions of such domestication have been studied in depth elsewhere. For present purposes, it is sufficient to draw attention to three common processes.

The first process concerns the formal linkage between the domestic and international legal orders. Depending on the applicable domestic law, international law may be automatically incorporated into domestic law, or it may need to be transformed before it is invoked before or applied by a domestic court. As is well known, many legal orders adopt mixed approaches, for example, allowing for the automatic incorporation of custom while requiring incorporation of treaties.<sup>12</sup>

At the same time, second, there are mechanisms which soften the blunt effects of both incorporation and transformation: while international law (or parts of it) may be automatically incorporated in domestic law, it may not be directly invocable before and applicable by the domestic court because it is not self-executing, or on

<sup>10</sup> See further A. Tzanakopoulos, ‘Domestic Courts in International Law: The International Judicial Function of National Courts’, (2011) 34 *Loyola of LA Int’l & Comp L Rev* 133, 138–40, with further references; and cf. A. Tzanakopoulos, ‘Preliminary Report of the ILA Study Group on Principles on the Engagement of Domestic Courts with International Law’, in International Law Association, *Report of the Seventy-Fifth Conference Held in Sofia 26–30 August 2012* (forthcoming), para. 12.

<sup>11</sup> See generally A.-M. Slaughter and W. Burke-White, ‘The Future of International Law Is Domestic (or, The European Way of Law)’, (2006) 47 *Harvard Int’l LJ* 327.

<sup>12</sup> As, for example, is roughly the case in the United Kingdom.

the basis of other ‘avoidance techniques’.<sup>13</sup> Conversely, while international law may need to be transformed before it is invoked before and applicable by the domestic court, it may still be taken into account in determining a claim before the court through the principle of consistent interpretation, requiring domestic law generally to be construed in conformity with international law. However, just as with respect to incorporation and transformation, domestic legal orders differ in their handling of ‘avoidance techniques’ and accord different weight to the the principle of consistent interpretation.<sup>14</sup>

Finally, third, domestic law will often contain rules that coincide in substance with rules of international law. In fact, many of the inward-looking rules of international law seek to ensure precisely such coincidence: while harmonization conventions envisaging uniform (national) laws constituted early examples, today’s debates (reflected in the subsequent contributions) focus on individual rights, or rules of interpretation and state responsibility.<sup>15</sup> These ‘consubstantial’ norms may lead to the ‘unconscious’ interpretation and application of the substance of international law by the domestic court.<sup>16</sup> Conversely, domestication of international law may result in ‘hybridization’, with the international norm being ‘fused’ with domestic-law concepts.<sup>17</sup>

The processes described are not mutually exclusive, but often complement each other. Taken together, they complicate the position of domesticated international law in domestic legal systems considerably. Whether an international legal rule is incorporated or transformed, whether it informs the interpretation of domestic law through the principle of consistent interpretation, or whether it has led states to codify consubstantial domestic law then invoked in proceedings – in all these instances it may be difficult to discern if and when an international norm is at bar and to what extent a domestic decision applying and interpreting a norm of international provenance is really relevant from an international legal perspective. The subsequent contributions reflect the uncertain status of ‘domesticated international law’. At times, authors stress that even though they engage with topics addressed under international law, domestic courts typically apply domestic law – and hence could not be said to have developed international law.<sup>18</sup> Others are less concerned about the formally domestic nature of legal rules; to them, ‘domestication’ does not deprive the original source of the rules applied of its character as international law.<sup>19</sup> At the present stage of the academic debate, both approaches indeed seem defensible: it is a matter of perspective and assumption, not one of ‘right or wrong’. What the

13 See generally E. Benvenisti, ‘Judicial Misgivings Regarding the Application of International Law: An Analysis of the Attitudes of National Courts’, (1993) 4 EJIL 159.

14 See Tzanakopoulos, ‘Domestic Courts in International Law’, *supra* note 10, 155–8, and ‘Preliminary Report of the ILA Study Group’, *supra* note 10, paras. 21–23.

15 See A. Nollkaemper, ‘Internationally Wrongful Acts in Domestic Courts’, (2007) 101 AJIL 760, 761–2.

16 On consubstantial rules see further Tzanakopoulos, ‘Domestic Courts in International Law’, *supra* note 10, 143–4 and 158, and ‘Preliminary Report of the ILA Study Group’, *supra* note 10, para. 29.

17 Roberts, *supra* note 1, 74–6; cf. K. Knop, ‘Here and There: International Law in Domestic Courts’, (2000) 32 NYU JILP 501, 505–6; R. van Alebeek in this symposium.

18 See notably arguments made in the contributions by R. O’Keefe and S. Olleson in this symposium.

19 See, e.g., the contribution by R. van Alebeek in this symposium; and see Lauterpacht, *supra* note 8, 75.

preceding section has hopefully made clear is that the diverse processes of domestication can obscure the position of international law in domestic proceedings. While domestic courts now routinely engage with issues addressed in international law, they often do not do so in a straightforward way. This makes it more difficult to evaluate the impact of domestic-court decisions on the development of international law.

### 3. THE ANGLE: COURTS AS AGENTS OF LEGAL DEVELOPMENT

In assessing the impact of domestic decisions on the development of international law in ‘their’ area, contributors adopt different standards and reach different results. Notwithstanding their diversity, the contributions adopt a common perspective on the role of domestic courts: throughout, the inquiries assess whether domestic courts have been relevant ‘agents of legal development’. The term – introduced by Lauterpacht<sup>20</sup> and since taken up by Sir Franklin Berman<sup>21</sup> – is meant to permit a nuanced appreciation of the role of courts in the development of international law. While Lauterpacht used it to describe the role of the Permanent Court of International Justice (and later the ICJ), the concept of ‘agency’ can be applied to all participants contributing to the process of legal development, including domestic courts. ‘Agent’ is used in a broad sense, denoting a capacity to influence processes – in this case: processes of legal development. Agents can be powerful or weak, and their strength may vary across areas – as is indeed the case with respect to domestic courts. Finally, and most importantly, agents operate within systems that empower or constrain them – in our setting, domestic courts are part of a broader process of international legal development shaped notably by the doctrine of sources of international law. All this is taken for granted in the subsequent contributions, and most of this is indeed fairly straightforward. However, two aspects, both highlighting features of the particular system within which domestic courts operate, deserve to be spelled out at the outset: first, within the regime of sources of international law, decisions by domestic courts have a very limited formal impact; and, second, this does not preclude them from exercising an important role in practice. Both assumptions need to be briefly explored.

#### 3.1. Limited formal impact

Every legal order needs to come to terms with the impact of judicial pronouncements on positive law. Is the judge merely meant to apply existing law without having any effect on it, just like Montesquieu’s ‘bouche qui prononce les paroles de la loi’?<sup>22</sup> Or does the judge have a mandate also to develop the law? These questions cause sharp divisions even when posed within one particular legal system, for example

20 H. Lauterpacht, ‘The International Court as an Agency for Developing International Law’, in *The Development of International Law by the International Court* (1958); and already H. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), 2.

21 F. Berman, ‘The International Court of Justice as an “Agent” of Legal Development?’, in Tams and Sloan, *supra* note 5.

22 Montesquieu, *De l’esprit des lois* (1748), Book XI, Chapter 6.

that of international law or of a given domestic legal order.<sup>23</sup> They become even more complicated when the organ of one legal order may have an effect on the rules of another legal order, i.e. when the domestic judge may be seen as developing the rules of international law. Perhaps not surprisingly, international law has only accepted a fairly limited formal impact of domestic-court decisions. The traditional perspective in fact sees domestic courts as ‘recipients’ of international law, called upon to apply (but not to develop) it: Walker’s statement, describing domestic courts as ‘trusted mouthpieces of International Law as local divisions of the great High Court of Nations’,<sup>24</sup> seems inspired by Montesquieu’s view. Similarly, in the PCIJ’s famous use of terminology, domestic decisions, like domestic laws, are decidedly *not international law*:

[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, *in the same manner as do [domestic] legal decisions or administrative measures*.<sup>25</sup>

In that perspective, a domestic decision is to be assessed against an existing (but purportedly separate) international legal framework, with which it can conform or which it can violate (entailing state responsibility<sup>26</sup>).

The traditional perspective embodied in the PCIJ’s statement, however, is difficult to square with the doctrine of sources of international law and with general rules of interpretation. These envisage at least a limited role for domestic decisions. Most importantly, domestic decisions can constitute an element of state practice (potentially also expressing the state’s *opinio juris*). State practice in turn may be a relevant factor in the determination of customary international law and also – as ‘subsequent practice’ in the sense of Article 31(3)(b) VCLT – affect the interpretation of treaty provisions. Clearer still, but less relevant in practice, domestic decisions also can be taken into account in the determination of general principles of law as set out in Article 38(1)(c) of the ICJ Statute. None of this seems particularly controversial; and thus it would be wrong to see domestic-courts merely as recipients or ‘mouthpieces’ without any formal impact on the development of international law.<sup>27</sup> However, for a simple reason this formal impact is clearly limited: even if they effectively determine practice, domestic court decisions reflect the position of only one state; which in and of itself is insufficient to ‘create’ a rule of customary international

23 On the law-making power of the ICJ see, e.g., C. J. Tams and A. Tzanakopoulos, ‘*Barcelona Traction* at 40: The ICJ as an Agent of Legal Development’, (2010) 23 LJIL 781, 782–6; and A. Pellet, ‘Article 38’, in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2012), mn 322–34, both with further references.

24 See Walker, *supra* note 9.

25 *Certain German Interests in Polish Upper Silesia*, [1926] PCIJ Series A No. 7, at 19 (emphasis added).

26 See Art. 4 of the Articles on the Responsibility of States for Internationally Wrongful Acts and related Commentary, reproduced in (2001) II(1) ILC Ybk 31, 40–1, para. 6; for an early treatment see C. Eustathiadès, *La responsabilité internationale de l’état pour les actes des organes judiciaires et le problème du déni de justice en droit international* (1936); in this symposium see further the contribution by Olleson.

27 On the face of it, Art. 38(1)(d) of the ICJ Statute – mentioning ‘judicial decisions’ as ‘as subsidiary means for the determination of rules of law’ – might be added. However, this assumes that ‘judicial decisions’ encompass domestic decisions (which is at best controversial); and it ignores the fact that in describing judicial decisions as a ‘means for the determination of rules of law’, Art. 38(1)(d) deals with a material, not a formal, source of law. See Pellet, *supra* note 23, mn 307 *et seq.*, esp. 321 with further references.

law, to shape treaty interpretation through subsequent practice, or to amount to a general principle of law.<sup>28</sup> What is required, in all these instances, is the joint or parallel conduct of a (large) group of states, thus satisfying requirements of general practice<sup>29</sup> or even of ‘accept[ance] by all nations *in foro domestico*’.<sup>30</sup> Put differently, while domestic decisions can be integrated into the doctrine of sources and into processes of treaty interpretation, domestic courts are formally treated just like other organs of one particular state. This severely limits their formal impact on the development of international law.

### 3.2. Potential informal influence

The formal perspective is important in that it clarifies what domestic courts cannot do: they cannot *singlehandedly* develop – let alone *make* – international law. Their pronouncements are contributions to a broader process of legal development. If they are found to be unpersuasive, or indeed if they go unnoticed (as many domestic pronouncements in the pre-ILR and pre-ILDC era did), they cannot leave a trace. However, if it is taken up and validated or endorsed by other actors, then notwithstanding its limited formal impact, a domestic decision can have an enormous influence on the development of international law. To be sure, the influence is not a formal or direct one, but informal; and as it depends on external validation, it is by no means guaranteed. But it cannot be excluded either. Quite to the contrary, where domestic courts engage with international law in specific disputes and possibly even rely on it to justify binding, coercive decisions, they are quite likely to prompt reactions and to trigger a sequence of events that may ultimately result in the development of the law.<sup>31</sup>

While processes of legal development do not follow prescribed patterns, three broad categories of domestic court influence may illustrate the point. First, domestic courts can confirm rules of international law through consistent application.<sup>32</sup> This may help consolidate, or stabilize, international legal rules and signal their general acceptance, thus contributing to legal certainty.<sup>33</sup>

Second, domestic-court decisions may put forward novel interpretations of international legal rules, extending or limiting their scope, introducing exceptions, and the like, or may rely on norms whose international legal status is doubtful. This formally remains a single instance of state practice that has no effect on the content of the rule – but, if novel, the interpretation and application of the rule call for reaction. If no such reaction is forthcoming, either by the state itself overruling its own

28 The point is made clearly in the contribution by O’Keefe.

29 See, e.g., *North Sea Continental Shelf*, [1969] ICJ Rep. 3, 41–2, paras. 71–73.

30 Cf. Lord Phillimore’s explanation of ‘general principles’: *Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists* (1920), 335.

31 As Lord Hoffmann stated in *Jones v. Saudi Arabia*, [2006] UKHL 26, para. 63, ‘[i]t is not for a national court to “develop” international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states’ (emphasis added). This concedes that it is for a national court to ‘develop’ international law through a unilateral adoption of a version of that law, should it be successful in soliciting the agreement, or at least acquiescence, of other states.

32 See e.g. the contribution by O’Keefe in this symposium.

33 Cf. the contribution by Olleson in this symposium.



court,<sup>34</sup> or by other states protesting against the novel interpretation or application of the relevant rule, acquiescence by other actors may be legally significant, and the seeds for development of the law along the lines 'suggested' by the domestic court have already been planted. Even more so if other states actually adopt the novel interpretation, including through the jurisprudence of their own courts.<sup>35</sup>

Third, by contrast, a domestic-court decision may bring about the reaction of the forum state, or of other states. It may lead to an international dispute 'maturing' and being subsequently settled, including before an international tribunal. It may thus (temporarily) throw the content of the relevant international rule into uncertainty or initiate the process that will bring about its clarification through practice or by means of an international judicial decision. The outcome of this process may confirm the novel approach of the domestic court, resulting in the development of the law, or it may reject it, stopping the attempt at development in its tracks.

The preceding paragraphs contain no more than a schematic description of how domestic courts can informally influence the process of legal development. Much more detail is provided in the subsequent contributions, which illustrate how concrete decisions have affected the law in specific areas. What the introductory discussion clarifies is the position of domestic courts within the process of international legal development: their decisions are no sources of international law, and have a limited formal impact; but they can exercise a powerful informal influence. In order to do so, they need to be engaged with, and their positions endorsed by, states, other courts, international organizations, codifying bodies, and the like. If this happens, but only then, domestic courts can indeed be seen as powerful agents of legal development.

#### 4. CONCLUDING THOUGHTS

The subsequent contributions provide examples of successful and unsuccessful, and conscious and unconscious, attempts at legal development by domestic courts. While domestic courts have exercised some measure of influence in each of the areas under review, that influence has been rather differentiated. Occasionally, domestic courts seem to have made significant contributions to a given area of law, to the point where key developments originate with them – perhaps most obviously in relation to the restrictive approach to sovereign immunity.<sup>36</sup> In a number of other

34 There have been instances where the state has appealed a decision of a domestic court in which it was not originally a party in order to avoid the breach of an international obligation: e.g., in *Tachiona v. United States*, 386 F.3d 205, 213 (2d Cir. 2004) the US Court of Appeals for the Second Circuit acknowledged the legal interest of the state to intervene in judicial proceedings between private parties, and even appeal the decision of a lower court, where that decision would result in a breach of US international obligations. The release of the *ARA Libertad* by Ghana against the decision of its own domestic court yields another example, although there an international court had definitively (if controversially) pronounced on the issue: see '*ARA Libertad*' Case (*Argentina v. Ghana*), Provisional Measures Order of 15 December 2012, available at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.20/C20\\_Order\\_15.12.2012.corr.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20_Order_15.12.2012.corr.pdf). See also the example of the Chilean MFA intervening to overrule the Supreme Court of Chile relayed by F. Orrego-Vicuña, 'Diplomatic and Consular Immunities and Human Rights', (1991) 40 ICLQ 34, 41–2.

35 See, e.g., the contribution by Van Alebeek in this symposium, especially her discussion of 'ripple effects'.

36 See the contribution by Van Alebeek in this symposium.

instances contributors identify selected instances of clear influence on discrete issues, as for example in the law of state responsibility.<sup>37</sup> Beyond that, domestic courts have shaped ‘visions’, as for example with respect to the review of decisions by international organizations affecting human rights, with significant ‘ripple effects’ on the international scene and the development of the law within international organizations.<sup>38</sup> Yet in the majority of cases, the particular influence of domestic-court decisions has been to affirm or ‘fine-tune’ international law. Read in their entirety, the subsequent contributions would seem to suggest that the influence of domestic courts depends on three factors in particular: (i) the frequency of cases raising issues of international law, (ii) the existence of general and possibly vague provisions waiting to be concretized through domestic proceedings, and (iii) the existence of ongoing codification or clarification processes in which a particular pronouncement is taken up.

In addition to illustrating the influence of domestic decisions on the development of international law, the subsequent contributions – echoing points made in Judge Keith’s recent article,<sup>39</sup> and almost *en passant* – highlight the ‘socializing’ function of domestic proceedings on international law. In engaging with international legal rules, domestic courts can and do contribute to their further domestication. That in turn would seem to promote the implementation of international law in substance, lending the powerful state enforcement mechanisms to traditionally weakly enforced international legal regulation.

The picture is not all rosy, to be sure. Most contributors identify points of concern. Perhaps the most important of those is the ‘information deficit’ that plagues international lawyers with respect to the wealth of domestic-court jurisprudence; another is the poor quality of international legal argument in some domestic proceedings. Neither problem is likely to disappear soon. However, perhaps it is not far-fetched to hope that the current interest in domestic courts will prompt international lawyers to learn more about the linkages between domestic law and to trace and scrutinize domestic decisions from countries that have hitherto not been systematically studied – just as much as it might lead domestic counsel and judges to seek familiarity with international law. This is a body of law so pervasive, and intrusive that one cannot afford to disregard it in favour of a strict focus on domestic law. What is more, as the preceding discussion shows, it is a body of law that is not strictly separated from domestic courts, but can be influenced by them. Precisely for that reason, impact assessments like those conducted in this symposium’s contributions are important in order to gauge the influence of domestic court decisions on the development of international law.

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37 See the contributions by Olleson and Wittich in this symposium.

38 See the contribution by Hovell in this symposium.

39 See the keynote of the Third ILDC Colloquium, published independently in this journal: K. Keith, “International Law Is Part of the Law of the Land”: True or False?, (2013) 26 LJIL 351.