

# COMPARATIVE INTERNATIONAL LAW? THE ROLE OF NATIONAL COURTS IN CREATING AND ENFORCING INTERNATIONAL LAW

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**Abstract** Academics, practitioners and international and national courts are increasingly seeking to identify and interpret international law by engaging in comparative analyses of various domestic court decisions. This emerging phenomenon, which I term ‘comparative international law’, loosely fuses international law (as a matter of substance) with comparative law (as a matter of process). However, this comparative process is seriously complicated by the ambiguous role that national court decisions play in the international law doctrine of sources, under which they provide evidence of the practice of the forum State as well as being a subsidiary means for determining international law. This article analyses these dual, and sometimes conflicting, roles of national courts and the impact of this duality on the comparative international law process.

## I. INTRODUCTION

In introducing *Using International Law in Domestic Courts*, Lord Bingham of the UK House of Lords observed that international law used to be seen as an ‘esoteric preserve’ that did not feature significantly in the work of ‘ordinary practitioners and national courts’, but that:

Times have changed. To an extent almost unimaginable even thirty 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>1</sup>

The growing significance of international law before national courts requires consideration of the converse trend, namely, the increasing importance of

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<sup>1</sup> Lord Bingham, ‘Foreword’ in S Fatima, *Using International Law in Domestic Courts* (Hart Publishing, Oxford, 2005).

domestic judicial decisions in the development and enforcement of international law.

Academics, practitioners and international and national courts frequently identify and interpret international law by engaging in a comparative analysis of how domestic courts have approached the issue. In explicating international law, textbooks and articles habitually draw on domestic judgments,<sup>2</sup> such as *Pinochet*,<sup>3</sup> *Eichmann*<sup>4</sup> and *Filártiga*.<sup>5</sup> The same is true of international courts like the International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>6</sup> National courts frequently look sideways to other foreign decisions when identifying custom and interpreting treaties.<sup>7</sup> Internet<sup>8</sup> and publishing<sup>9</sup> developments are also making domestic judgments on international law matters more accessible.

Scholars have long recognized the pivotal role that national courts could play in international law's enforcement—the Achilles' heel of international law—given their advantages of accessible jurisdiction and enforceable judgments.<sup>10</sup> This has resulted in calls for national courts to act as 'guardians' or

<sup>2</sup> H Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *British Ybk Intl L* 65, 67–68, fn 1.

<sup>3</sup> *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No.3)* [2000] AC 147.

<sup>4</sup> *Eichmann v Attorney-General of Israel* (1962) 36 ILR 277.

<sup>5</sup> *Filártiga v Peña-Irala*, 630 F 2d 876 (2<sup>nd</sup> Cir 1980).

<sup>6</sup> A Nollkaemper, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY,' in G Boas and W Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff Publishers, Leiden, 2003) 277 (Nollkaemper ICTY); A Nollkaemper, 'The Role of Domestic Courts in the Case Law of the International Court of Justice' (2006) 5 *Chinese J Intl L* 301, 303–311 (Nollkaemper ICJ).

<sup>7</sup> On the importance of domestic court decisions as a source of international law, see Lauterpacht (n 2) 67–71; R Jennings, 'The Judiciary, International and National Law, and the Development of International Law' (1996) 45 *ICLQ* 1, 1–4. For examples of domestic courts, and particularly common law appellate courts, looking sideways when identifying and interpreting international law, see below, Sections II.B and III.B.

<sup>8</sup> Various websites provide national decisions on particular treaties or areas of international law. For example, UNCITRAL case law <[http://www.uncitral.org/uncitral/en/case\\_law.html](http://www.uncitral.org/uncitral/en/case_law.html)>; refugee case law <<http://www.unhcr.org/refworld/category,LEGAL,,,,,0.html>>, <<http://www.refugeecaselaw.org/>>; international criminal case law <<http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Legal+Tools/>>; international humanitarian case law <<http://www.icrc.org/IHL-NAT.NSF/WebALL!OpenView>>; indigenous rights case law <<http://www.dundee.ac.uk/cepmlp/mining/indigenous/>>.

<sup>9</sup> While the International Law Reports have long included select decisions of national courts, the new *International Law in Domestic Courts* service provides wider access to domestic cases concerning the identification and interpretation of international law and its reception into domestic law. Jennings (n 7) 1–2; 'About Oxford Reports on International Law' <<http://www.oxfordlawreports.com/about#aboutilrc>> accessed 30 October 2010.

<sup>10</sup> R Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse University Press, New York, 1964) 72; H Schermers, 'The Role of Domestic Courts in Effectuating International Law' (1990) 3 *Leiden J Intl L* 77, 79; B Conforti and F Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff Publishers, Boston, 1997); T Franck and G Fox (eds), *International Law Decisions in National Courts* (Transnational Publishers, New York, 1996); B Conforti, *International Law and the Role of Domestic Legal Systems* (Martinus Nijhoff Publishers, London, 1993); H Koh, 'How is International Human

'agents' of the international legal order, impartially enforcing international law without regard for national interests.<sup>11</sup> Yet, in the past, many international lawyers have lamented this potential as unrealized due to the tendency of national courts to refuse to apply, or to skew the interpretation of, international law in order to protect national interests.<sup>12</sup>

The prevailing wind appears to be changing, however. Benvenisti now reports that national courts are increasingly using international and comparative law as a 'sword' to challenge legislative and executive actions rather than as a 'shield' to protect them.<sup>13</sup> Meanwhile Shany observes the perception of 'a certain quantitative and qualitative change' taking place, with 'more international law [being] applied by more national courts in a more consequential (and less parochial) way.'<sup>14</sup> These apparent changes require us to revisit key assumptions about the actual and proper role of national courts under international law. Taking up this challenge, this article critiques the role of domestic courts by developing two distinct, though interrelated, avenues of analysis: (1) the duality of national judicial decisions under the sources doctrine; and (2) an emerging phenomenon that I term 'comparative international law'.

Section II explores the dual, and sometimes conflicting, roles played by national courts under international law. Domestic court decisions are unique within the international law doctrine of sources because of their ability to wear two hats, representing: (1) practice of the forum State, which may be relevant to the determination of custom and the interpretation of treaties (law creation); and (2) a subsidiary means of determining international law, capable of stating international norms with more authority than attends the practice of a single State (law enforcement).<sup>15</sup> The resulting duality of domestic court decisions creates ambiguity about the actual and appropriate role of national courts,

Rights Law Enforced?' (1998–1999) 74 *Indiana L J* 1397; H Koh, 'The 1998 Frankel Lecture: Bringing International Law Home' (1998–1999) 35 *Houston L Rev* 623.

<sup>11</sup> Lauterpacht (n 2) 93; Falk (n 10); see also Institut de Droit International, *Resolution on The Activities of National Judges and the International Relations of their State*, 7 September 2003 <[www.idi-iii.org/idiE/resolutionsE/1993\\_mil\\_01\\_en.PDF](http://www.idi-iii.org/idiE/resolutionsE/1993_mil_01_en.PDF)> accessed 30 October 2010.

<sup>12</sup> E Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: an Analysis of the Attitudes of National Courts' (1993) 4 *European J Intl L* 159, 161.

<sup>13</sup> E Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *AJIL* 241, 243. See also E Benvenisti and G Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 *European J Intl L* 59.

<sup>14</sup> Y Shany, 'National Courts as International Actors: Jurisdictional Implications' (2009) *Federalismi* 1, 2 <<http://www.effective-intl-adjudication.org/admin/Reports/2af9ed4d4a026e581437876dd1b73b87Yuval.pdf>> accessed 30 October 2010.

<sup>15</sup> The former represents a step towards international law creation because the practice of individual States forms the building blocks on which international law is based. The latter can be characterized as international law enforcement because it assumes that the decisions of domestic courts accurately reflect the existing state of international law.

which I illustrate by drawing on two cases (*Ferrini*<sup>16</sup> and *Jones*<sup>17</sup>) in which domestic courts in different countries radically diverged on the content of international law, partly due to differing perceptions of their own role in relation to it.

Against this background, I challenge the frequent presumption that domestic courts should necessarily or only function as international actors that seek to impartially enforce international law instead of national actors seeking to create and shape international norms. Distinguishing between law creation and law enforcement, and aligning the former with partiality and parochialism and the latter with impartiality and internationalism, is a simplistic and often inaccurate approach. Although there are clear benefits to engaging national courts in international law enforcement, systematically privileging this role over law creation undermines the potential for national courts to engage in developing international law or inspires ‘doublespeak’ to hide judicial activism. Rather than advocating one role over the other, I contend that both have a basis in the sources doctrine and that each one has different strengths and weaknesses, depending on the issue and one’s viewpoint.

Section III explores the role of national courts under international law through an emerging practice that I call ‘comparative international law’. Lawyers are familiar with comparative law (the study of the similarities and differences between national systems and laws) and international law (the law created by States on the international plane). But academics and practitioners are yet to conceptualize an emerging combination of the two, whereby national courts and other arms of government domesticate international law in diverse ways, thereby creating a basis for comparative study. International lawyers are used to macro comparisons about how different legal systems incorporate international law through monist, dualist and intermediate approaches. But comparative international law calls for micro-comparison about how different legal systems interpret and apply substantive international norms in diverse ways.

I argue that, even when national courts attempt to impartially enforce international law, they often end up creating hybrid international/national norms that are worthy of study in their own right. These domestic decisions are then surveyed—by academics, practitioners, international courts and other national courts—as evidence of the existence and content of international law. Many assume that this union of international law (as a matter of substance) with comparative law (as a matter of process) is unproblematic because domestic courts are engaged in a common endeavour of interpreting and enforcing shared norms. However, the aim of comparative international law is open to

<sup>16</sup> *Ferrini v Federal Republic of Germany* (2006) 128 ILR 658. *Corte di Cassazione (Sezioni Unite)* (Judgment No 5044 of 6 November 2003, Registered 11 March 2004) 87 *Rivista di diritto internazionale* (2004) 539.

<sup>17</sup> *Jones v Saudi Arabia* [2006] UKHL 26.

question and its underlying methodology seethes with problems. In particular, the duality of domestic decisions gives great discretion to those engaged in comparative analysis to upgrade foreign decisions that they like (characterizing them as impartial law enforcement) and downgrade ones they dislike (dismissing them as partial State practice).

This article does not propose that national courts should be law creators instead of law enforcers or vice versa, nor does it set out a rigorous methodology for how national courts and others should undertake comparative international law assessments. Rather, it addresses a prior issue, analyzing the duality of domestic court decisions and the emerging phenomenon of comparative international law in order to unpack the complex and ambiguous role of national courts under international law. In a field often characterized by black and white approaches, this article aims to add shade and texture to existing understandings and debates.

## II. THE DUALITY OF DOMESTIC COURT DECISIONS

From a domestic law perspective, the role of national courts in relation to international law and vis-à-vis other arms of government is generally regulated by constitutional and administrative law. This article does not explore these domestic considerations and limitations, which are controversial and vary between States. Instead, working from an international law perspective only, I contend that the role of domestic courts under international law is split between law creation and enforcement, which results in ambiguity and uncertainty about the value of their decisions.

### A. *The Dual Role of National Court Decisions*

The orthodox approach to the sources of public international law is set out in article 38(1) of the Statute of the ICJ (ICJ Statute), which lists:<sup>18</sup>

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

<sup>18</sup> Although this Statute only sets out the sources that the ICJ should turn to in deciding a case, it is considered to be reflective of the sources of international law more generally. I Brownlie, *Principles of Public International Law* (6<sup>th</sup> edn OUP, Oxford, 2003) 5; R Jennings and A Watts (eds), *Oppenheim's International Law* (9<sup>th</sup> edn Longman, Harlow, 1992) vol 1, 24 (Oppenheim).

National court decisions play a distinctive dual role in the doctrine of sources: as evidence of State practice, relevant to the interpretation of treaties and the formation of custom (where domestic judgments play a role in law creation), and as a subsidiary means of determining the existence and content of international law (where domestic judgments can be characterized as law enforcement).<sup>19</sup> The resulting Janus-faced nature of domestic court decisions gives rise to conflicting approaches about their purpose and value.

First, national court decisions on matters of international law are evidence of the practice of the forum State.<sup>20</sup> A domestic court decision on international law amounts to State practice, though the weight attributed to it may depend on the court's hierarchical status. National court decisions must also be weighed against State practice generated by other branches of government. Where a court decision coincides with or does not contradict the views of the legislature and executive, it will represent strong evidence of State practice. Where inconsistencies emerge, the conflicting practice must be weighed, considering factors such as which branch of government has authority over the matter.<sup>21</sup>

National court decisions, as evidence of State practice, are relevant to the interpretation of treaties and the existence of custom under articles 38(1)(a) and (b) of the ICJ Statute. Court decisions by treaty parties amount to subsequent practice that provides evidence of how those States understand their treaty obligations, which shall be taken into account in treaty interpretation when it evidences general agreement about interpretation.<sup>22</sup> Although opinion is divided over exactly which acts and statements count for State practice and *opinio juris* in the formation of custom, there is general agreement that national court decisions are evidence of one or other element or both elements.<sup>23</sup> Custom may also be relevant to treaty interpretation.<sup>24</sup>

Second, national court decisions may provide a subsidiary means for the determination of international law under article 38(1)(d) of the ICJ

<sup>19</sup> National court decisions are also relevant in establishing general principles of law recognized by civilized nations, but due to disagreements about the nature and legitimacy of this source, this article does not deal with the issue.

<sup>20</sup> P Moremen, 'National Court Decisions as State Practice: A Transjudicial Dialogue?' (2006) 32 North Carolina J Intl L & Commercial Regulation 259, 274–284; *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) PCIJ Rep Series A No.7, 19; cited with approval in *Prosecutor v Delalic et al* (Judgment) ICTY-96-21 (20 February 2001) para 76.

<sup>21</sup> But see Committee on Formation of Customary (General) International Law, 'Statement of Principles Applicable to the Formation of General Customary International Law' in Final Report of the Committee (London 2000) (International Law Association, London, 2000) 18 <<http://www.ila-hq.org/en/committees/index.cfm/cid/30>> accessed 30 October 2010 (ILA Report).

<sup>22</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(3); R Gardiner, *Treaty Interpretation* (OUP, Oxford, 2008) 225–249; M Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, Leiden, 2009) 429–432.

<sup>23</sup> Brownlie (n 18) 6; M Shaw, *International Law* (6<sup>th</sup> edn, CUP, Cambridge, 2008) 82; Oppenheim (n 18) 26, 41–42; Moremen, (n 20) 261, 278–82; ILA Report (n 21) 14, 18.

<sup>24</sup> VCLT (n 22) art 31(3)(c).

Statute.<sup>25</sup> Article 38(1) distinguishes between three sources (treaties, custom and general principles) and two subsidiary means of determining the law (judicial decisions and academic writings). In theory, the subsidiary nature of the latter is intended to reflect the positivist notion that States, and only States, make international law. The decisions and writings of non-state actors, such as judges and academics, provide important evidence of the content of international law without being sources *per se*.<sup>26</sup>

In practice, however, the situation is quite different. Judicial decisions play an extremely important role in the identification and formation of international law.<sup>27</sup> Such decisions are routinely cited as evidence of the meaning of international law, often without States or commentators critically analyzing whether they accurately reflect existing international law.<sup>28</sup> Judicial decisions must be weighed against other evidence and practice. Where a judicial decision reflects, does not contradict, or influences State practice, it is more likely to be accepted as declaring international law. Where it has little basis in State practice and is rejected by States, it is less likely to be viewed as determinative. Nonetheless, national court decisions are often given greater weight than the practice of a single State would suggest *because* they are treated as a subsidiary means of identifying international law rather than as State practice *per se*.

This duality of national court decisions—representing evidence of State practice and a subsidiary means of determining international law—is unique in the doctrine of sources. Other practice by States, such as executive statements, military manuals and diplomatic correspondence, provide evidence of State practice only. Judicial decisions of international courts provide a subsidiary means of determining international law only. National court decisions alone have the potential to wear both hats and thus their value is often considered to be mixed, with Brownlie noting that:

Some decisions provide indirect evidence of the practice of the state of the forum on the questions involved; others involve a free investigation of the point of law and consideration of available sources, and may result in a careful exposition of the law . . . . However, the value of these decisions varies considerably, and

<sup>25</sup> Brownlie (n 18) 22; Shaw (n 23) 111–112; H Thirlway, ‘The Sources of International Law’ in M Evans (ed) *International Law* (2<sup>nd</sup> edn, OUP, Oxford, 2006) 115, 130; Restatement (Third) of the Foreign Relations Law of the United States (1987) s 103(2) and comment b, s 112; R Higgins, *Problems and Process: International Law and How We Use It* (OUP, Oxford, 1994) 218; ILA Report (n 21) 18.

<sup>26</sup> Brownlie (n 18) 19; Thirlway (n 25) 129; Oppenheim (n 18) 41; Restatement (Third) (n 25) s 102, reporter’s note 1. This is reinforced by art 59 of the ICJ Statute.

<sup>27</sup> Brownlie (n 18) 19; Shaw (n 23) 109; Thirlway (n 25) 129–30; T Meron, ‘Revival of Customary Humanitarian Law’ (2005) 99 AJIL 817, 819–20; Oppenheim (n 18) 41.

<sup>28</sup> A Nollkaemper, ‘The Independence of the Domestic Judiciary in International Law’ (2006) XVII Finnish Ybk Intl L 1, 12–13; Nollkaemper ICTY (n 6) 291–92. This is particularly true of Anglo-American approaches to international law. Brownlie (n 18) 22; Shaw (n 23) 112.

many present a narrow national outlook or rest on a very inadequate use of the sources.<sup>29</sup>

This duality, and its impact upon the comparative international law process, forms the heart of this article. To illustrate these dual and sometimes conflicting roles, the following section analyses a pair of cases (*Ferrini* and *Jones*) in which the highest courts of Italy and the United Kingdom took radically different approaches to the same international norms, partly due to different perceptions of their own role as law creators and enforcers. These decisions are currently being challenged before the ICJ and the European Court of Human Rights (ECtHR) respectively.

### *B. Case Study: Universal Civil Jurisdiction and Immunity*

*Ferrini*<sup>30</sup> and *Jones*<sup>31</sup> posed two common questions: does international law permit or require States to exercise universal civil jurisdiction over serious violations of international law; and, if so, does it permit or require an exception to State and official immunity in such cases? The Italian and UK courts both undertook comparative international law surveys in answering these questions, yet reached polar opposite conclusions. While many analyse whether these decisions were right or wrong as a matter of law, or good or bad as a matter of policy, I invoke them to illustrate different perceptions that national courts can endorse about their role as law creators or enforcers.

#### *1. Italian case: Ferrini v Germany*

*Ferrini* was an Italian national who filed a civil action in the Italian courts against the Federal Republic of Germany, claiming damages on account of his imprisonment, deportation and forced labour at the hands of German forces during the Second World War. In 2004, the Italian Supreme Court rejected Germany's State immunity plea.

On jurisdiction, the Court found that international crimes that take the form of serious human rights violations give rise to universal civil jurisdiction. All States are permitted to suppress the breach of such rights, irrespective of where the breach is committed, in accordance with the principles of universal jurisdiction. Furthermore, the Court held that 'there is no doubt that the principle of universal jurisdiction also applies to civil actions which trace their origins to such crimes.'<sup>32</sup> Although there was a territorial link (*Ferrini* was deported from Italy) and a nationality link (*Ferrini* was Italian), the Court held

<sup>29</sup> Brownlie (n 18) 22. See also Restatement (Third) (n 25) s 103, comment b; J Kelly, 'The Twilight of Customary International Law' (1999–2000) 40 *Virginia J Intl L* 449, 506.

<sup>30</sup> *Ferrini* (n 16).

<sup>32</sup> *ibid* para 9.

<sup>31</sup> *Jones* (n 17).



that it would in any event have been entitled to exercise universal jurisdiction given the nature of the international crimes alleged.<sup>33</sup>

On immunity, the Court found that Germany could not claim immunity in respect of international crimes that were subject to universal civil jurisdiction. The non-derogable rights protected by international criminal and human rights norms 'lie at the heart of the international order and prevail over other conventional and customary norms, including those relating to State immunity.'<sup>34</sup>

In reaching these conclusions, the Court undertook a comparative international law approach, drawing support from various decisions of the US courts, Greek courts (*Voiotia*<sup>35</sup>), the ICTY (*Furundžija*<sup>36</sup>) and a substantial ECtHR minority opinion (*Al-Adsani*<sup>37</sup>). The Court also considered, but either disagreed with or distinguished, opposing national and international decisions, including *Al-Adsani* (English decision<sup>38</sup> and ECtHR<sup>39</sup> majority opinion) and *Bouzari*<sup>40</sup> (Canada).

In 2008, the Italian Supreme Court delivered rulings in another 14 cases, holding that Germany did not enjoy immunity from universal civil jurisdiction cases based on international crimes committed during the Second World War.<sup>41</sup> After undertaking another comparative international law survey, the Court found that international practice did not provide evidence of either a customary rule confirming or derogating from immunity in damages claims based on international crimes. However, it upheld *Ferrini* as (1) 'a contribution to the emergence of a rule of international law (ie denial of immunity in case of *ius cogens* violations)' and (2) supporting a principle 'already inherent to the international legal order' on the basis that 'peremptory norms [including the prohibition on international crimes] enjoy a higher rank in the hierarchy of international law sources.'<sup>42</sup>

Germany has now brought proceedings against Italy before the ICJ, complaining that the Italian Court 'openly acknowledged that it did not apply international law as currently in force, but that it wished to develop the law,

<sup>33</sup> *ibid* para 11.

<sup>34</sup> *ibid* para 9.

<sup>35</sup> *Prefecture of Voiotia v Federal Republic of Germany* (Case no 11/2000) (unreported, 4 May 2000).

<sup>36</sup> *Prosecutor v Furundžija* (Judgment) ICTY-95-17/1-T (10 December 1998).

<sup>37</sup> *Al-Adsani v United Kingdom*, 35763/97 European Court of Human Rights (21 November 2001).

<sup>38</sup> *Al-Adsani v Government of Kuwait (No 2)* (1996) 107 ILR 536.

<sup>39</sup> *Al-Adsani* (n 37).

<sup>40</sup> *Houshang Bouzari v Islamic Republic of Iran*, C38295 [2004] OJ 2800 (Ont. Ct. App. 30 June 2004).

<sup>41</sup> *Germany v Mantelli & Ors*, Italian Supreme Court, 29 May 2008 (Order No. 14200–14212 and the Judgment No. 14199) <<http://www.cortedicassazione.it>> accessed 30 October 2010; C Focarelli, 'Case Report: Federal Republic of Germany v. M.G. and Others' (2009) 103 AJIL 122; A Chechi and R Pavoni, 'Germany v Mantelli & Ors' (IT 2008) International Law in Domestic Courts 1037 (*Mantelli* summary).

<sup>42</sup> *Mantelli* summary, *ibid* para 11.

basing itself on a rule “in formation,” a rule which does not exist as a norm of positive law.<sup>43</sup>

## 2. UK case: Jones v Saudi Arabia

In *Jones*, four British nationals brought claims against Saudi Arabia and Saudi officials for torture alleged to have been committed in Saudi Arabia. The Court of Appeal found that the Convention Against Torture did not require treaty parties to exercise universal civil jurisdiction over extraterritorial torture, but might permit such exercises, and that while Saudi Arabia could claim immunity for torture, its officials could not.<sup>44</sup> On appeal in 2006, the UK House of Lords took a different approach.

On jurisdiction, the Court found that neither the Convention Against Torture nor customary international law required States to exercise universal civil jurisdiction over acts of torture occurring outside their territory.<sup>45</sup> As with *Ferrini*, it is not entirely clear that this analysis was necessary given that the alleged victims were British nationals, giving rise to a nationality link. On immunity, the Court found that international treaties and practice did not create an exception to immunity for civil claims based on international crimes, such as torture. Unlike Italy, which did not have a domestic statute on immunity, the House of Lords was seeking to interpret the UK State Immunity Act in light of international law. The Court reasoned that ‘since the rule on immunity is well-understood and established, and no relevant exception is generally accepted, the rule prevails.’<sup>46</sup>

In reaching these conclusions, the Court also undertook a comparative international law approach, drawing support from decisions of the Canadian courts (*Bouzari*), Greek courts (*Voiotia*) and a slim majority of the ECtHR (*Al-Adsani*).<sup>47</sup> Members of the Court rejected contrary US authorities as not ‘express[ing] principles widely shared and observed by other nations’ and ‘represent[ing] a unilateral extension of jurisdiction by the United States which is not required and perhaps not permitted by customary international law.’<sup>48</sup> They likewise dismissed *Ferrini* as exhibiting ‘bare syllogistic reasoning’ and not being an ‘accurate statement of international law.’<sup>49</sup>

<sup>43</sup> *Jurisdictional Immunities of the State (Germany v Italy)* (Application) 23 December 2008, para 13 <<http://www.icj-cij.org/docket/files/143/14923.pdf>> accessed 30 October 2010.

<sup>44</sup> *Jones* (n 17), paras 92, 99. On the Convention Against Torture, the Court held at para 21, that: ‘[a]rticle 14(1) is not designed to require every other state (state B) to provide redress in its civil legal system for acts of torture committed in state A,’ but noted that ‘under article 14(2) it remains permissible for state B to provide [such] redress’. At para 21, the Court also noted that the Alien Tort Statute might be an example of the wider jurisdiction permitted by art 14(2) of the Convention Against Torture.

<sup>45</sup> *Jones* (n 17) paras 24–27.

<sup>46</sup> *ibid* para 27; see also paras 24–26, 44–64.

<sup>47</sup> *ibid* paras 60–62; see also *Bouzari* (n 40), *Voiotia* (n 35), *Al- Adsani* (n 37).

<sup>48</sup> *ibid* paras 20, 58. <sup>49</sup> *ibid* paras 63, 22.

Of particular note was Lord Hoffmann's response to those who argued that *Ferrini* gave priority to the values embodied in the prohibition of torture over those in the State immunity rules:

I think that this is a fair interpretation of what the court was doing and, if the case had been concerned with domestic law, might have been regarded by some as 'activist' but would have been well within the judicial function. As Professor Dworkin demonstrated in *Law's Empire* (1986), the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. *It 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.*<sup>50</sup>

The claimants have since filed an ECtHR claim against the United Kingdom for denying them their right to a court under article 6 of the European Convention on Human Rights (ECHR), though there has yet to be a ruling on admissibility.

The Italian and UK courts thus diverged not only on the content of international law but also as to their role in relation to it. The Italian Court attempted to simultaneously style its decision as a contribution to an emerging customary norm (law creation) and as the application of a position inherent within international law (law enforcement). The UK Court, by contrast, portrayed its role as a law enforcer only, denying its potential role in law creation. Both representations find a basis in the doctrine of sources and also help to explain common critiques of the decisions, with some heralding *Ferrini* as a progressive development of international law and others criticizing it for overstepping the current consensus,<sup>51</sup> while others celebrate *Jones* as an accurate statement of international law and some condemn it as regressive.<sup>52</sup>

<sup>50</sup> *ibid* para 63 (emphasis added).

<sup>51</sup> C Focarelli, 'Denying Foreign State Immunity for Commission of International Crimes: the *Ferrini* Decision' (2005) 54 ICLQ 951, 955–57 (*Ferrini* is a welcome effort to deter states from committing international crimes and represents a first step towards developing new rules of customary international law, but it does not reflect existing customary international law); A Gattini, 'War Crimes and State Immunity in the *Ferrini* Decision' (2005) 3 J Intl Criminal Justice 224, 241–42 (*Ferrini* represents judicial activism that could be seen as an appreciable contribution to international human rights law, but its unconvincing and contradictory reasoning is likely to undermine its contribution to the development of immunity law); A Bianchi, '*Ferrini v Federal Republic of Germany*' (2005) 99 AJIL 242, 245–48 (welcoming *Ferrini* as a contribution to the ongoing debate over the appropriate balance between *jus cogens* norms and immunity but criticizing some of its reasoning).

<sup>52</sup> C Bradley and J Goldsmith, 'Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation' (2009) 13 Green Bag 2d 9, 16, 21–23 (citing *Jones* as an accurate statement of international law); E Steinerte and R Wallace, '*Jones v Ministry of Interior of the Kingdom of Saudi Arabia*' (2006) 100 AJIL 901, 904–908 (criticizing *Jones* for being one-sided and not recognizing that the law is in a state of flux with various developments indicating a movement away from immunity for *jus cogens* violations).

*C. Partial Law Creation or Impartial Law Enforcement?*

Given the potential for domestic courts to act as law creators or law enforcers, is one approach to be preferred? According to Scelle, national courts have the potential to fulfil dual roles, as either national actors operating within the national order or international actors enforcing international law on behalf of the world community.<sup>53</sup> Faced with these options, many international lawyers have advocated the latter.

In the 1920s, for example, Lauterpacht called on national courts to act as ‘guardians of the international legal order’, which he described as a ‘position of trust [imposing] upon them the duty of strict impartiality’.<sup>54</sup> In the 1960s, Falk argued that domestic courts should act as impartial ‘agents of the international order,’ ‘serv[ing] the cause of world order without regard to national affiliation.’<sup>55</sup> And in the 1990s, Cassese contended that domestic courts do and should ‘play a weighty role as instruments for safeguarding the international legal order,’ which requires them to take into account ‘*metanational* considerations (protection of human rights, need to repress terrorism, need to implement international legal standards etc.) rather than being motivated by *national* short-term interests.’<sup>56</sup>

These approaches tend to associate domestic courts acting as international agents with *impartial law enforcement* and as national agents with *partial law creation*.<sup>57</sup> However, I contend that rigidly separating law enforcement and law creation, aligning these with internationalism and parochialism respectively, and privileging the former over the latter, are all problematic moves.

Courts cannot engage in law enforcement without also engaging in some level of law creation, although the balance between the two will vary between cases.<sup>58</sup> As the *Jones* and *Ferrini* examples demonstrate, one cannot necessarily equate law creation with acting in the narrow interests of the State and law enforcement with acting progressively to realize international values. Both approaches can be used for progressive or regressive ends, depending on one’s viewpoint.<sup>59</sup> Giving preference to law enforcement over law creation is

<sup>53</sup> Scelle’s *dédoulement fonctionnel* theory is discussed in A Cassese, ‘Remarks on Scelle’s Theory of ‘Role Splitting’ (*déboulement fonctionnel*) in International Law’ (1990) 1 *European J Intl L* 210 and Shany (n 14) 13–16. See also A Nollkaemper, ‘Internationally Wrongful Acts in Domestic Courts’ (2007) 101 *AJIL* 760, 799.

<sup>54</sup> Lauterpacht (n 2) 93; see also 67.

<sup>55</sup> Falk (n 10) 4, xii.

<sup>56</sup> Cassese (n 53) 228, 230–31.

<sup>57</sup> On the problem of national courts being motivated by national interests, see Nollkaemper (n 28) 39; W Friedmann, *The Changing Structure of International Law* (Columbia University Press, New York, 1964) 147.

<sup>58</sup> R Provost, ‘Judging in Splendid Isolation’ (2008) 56 *American J Comparative L* 125, 139; Nollkaemper (n 53) 799.

<sup>59</sup> Domestic courts are not necessarily *partial* law creators in the sense of being nationalistic or parochial, but their contributions are partial in the sense that national judgments are building blocks in international law’s development. J Brierly, ‘International Law in England’ (1935) 51 *LQR* 24, 25.

also problematic because international law is not a static body of rules that can straightforwardly be enforced domestically but rather is dynamic and partially constituted by domestic court decisions. International law not only percolates down from the international to the domestic sphere, but it also bubbles up. In this process, national court decisions play a crucial role in developing international law, particularly in areas that tend to be tested by domestic courts (like jurisdiction and immunities) or where courts play a role in checking overlapping self-interest of legislatures and executives (such as in separation-of-powers debates and the protection of individual liberties).

The contribution of national court decisions to the creation of international law is evident in the jurisprudence of international courts.<sup>60</sup> In the *Lotus* case, the Permanent Court of International Justice considered the role of national court decisions in the formation of the international law on jurisdiction.<sup>61</sup> In the *Arrest Warrant* case, the ICJ reviewed the UK *Pinochet* case and the French *Qaddafi* case in determining whether a Foreign Minister enjoyed immunity from prosecution for crimes allegedly committed whilst in office.<sup>62</sup> In *Furundžija*, the ICTY relied on US, UK and Israeli decisions to support the *jus cogens* nature of the torture prohibition and the link between *jus cogens* norms and universal jurisdiction.<sup>63</sup> Meanwhile the ECtHR routinely undertakes comparative reviews of European domestic decisions in reaching interpretations.<sup>64</sup>

A good example of national courts driving the development of international law can be found in the area of State immunity.<sup>65</sup> In the 1800s, several domestic courts—including US and UK courts—developed a general rule of absolute immunity out of disparate immunities accorded to ambassadors,

<sup>60</sup> In some cases, international courts use national court decisions as evidence of State practice, relevant to the formation of customary international law or the interpretation of treaties. For example, in *Jelisić and Krstić*, the ICTY looked to State practice, including legislation and case law, when interpreting the Genocide Convention, while in *Erdemović* the Court looked to national decisions in determining the existence of customary international law. *Prosecutor v Jelisić* (Judgment) ICTY-95-10-T, 14 (December 1999) para 61; *Prosecutor v Krstić* (Judgment) ICTY-98-33-T (2 August 2001) paras 541, 575, 579, 589; *Prosecutor v Erdemović* (Judgment) ICTY-95-16-A (23 October 2001) para 55. In other cases, international tribunals give domestic decisions greater weight, treating them as ‘an apparent quasi-independent authority that cannot be reduced to a constituent element’ of customary international law or treaty interpretation. Nollkaemper ICTY (n 6) 277. The use of a handful of cases as authority in *Furundžija* (n 36) is an example.

<sup>61</sup> *SS ‘Lotus’ (France v Turkey)* PCIJ Rep Series No 10, 23, 26 and 28–9.

<sup>62</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3, paras 56–58. See generally Nollkaemper ICJ (n 6) 303–11.

<sup>63</sup> *Furundžija* (n 36) paras 147, 153, 156, 254. See generally Nollkaemper ICTY (n 6).

<sup>64</sup> P Mahoney, ‘The Comparative Method in Judgments of the European Court of Human Rights: Reference Back to National Law’ in G Canivet et al (eds), *Comparative Law before the Courts* (British Institute of International and Comparative Law, London, 2004) 137.

<sup>65</sup> H Fox, *The Law of State Immunity* (OUP, Oxford, 2008) 201–11; F Francioni, ‘International Law as a Common Language for National Courts’ (2001) 36 *Texas Intl L J* 587, 589–90.

war ships and heads of State.<sup>66</sup> At the same time, national courts in other jurisdictions—most notably Italy and Belgium—were formulating a restrictive theory of immunity which sought to distinguish between State acts of a sovereign/public nature and of a private nature, according immunity to the former but not the latter.<sup>67</sup> Over time, the influence of the restrictive theory grew and it came to be adopted in other jurisdictions, including in the United States and United Kingdom,<sup>68</sup> ultimately paving the way for the 2004 UN Convention on Jurisdictional Immunities of States and their Properties. Rather than simply enforcing an existing consensus, these domestic courts forged different interpretations of international law, with some later defecting from one approach to the other in order to create more consensus.

As the English Court of Appeal recognized when switching from the absolute to the restrictive approach to immunity, '[w]henever a change is made, someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood.'<sup>69</sup> The question in *Jones and Ferrini* is whether a similar movement in international law is, or should be, underway, leading to the recognition of universal civil jurisdiction and/or an exception to immunity in cases of *jus cogens* violations. Even those who criticize the *Ferrini* judgment as being an inaccurate statement of existing law, or involving weak analysis, recognize that the real question is whether it sets a precedent that other national courts will choose to follow.<sup>70</sup>

The ICJ may well rebuke the Italian Supreme Court for overstepping the present status of international law in *Ferrini*, but that does not mean that the Italian Court was not fulfilling a 'legitimate' function in pushing for a new interpretation of international law based on its role as a law creator rather than enforcer. Customary international law is made on the back of State practice, including court decisions, and custom is changed through breaches of existing rules, coupled with emulation or acquiescence. Domestic court decisions—like other forms of State practice emanating from legislatures and executives—can constitute breaches just as they can be evidence of emulation and acquiescence. To argue otherwise, and to limit the role of national courts to impartial law enforcement only, is to deny their potential role in developing

<sup>66</sup> For example, *The Schooner Exchange v McFaddon* (1812) 11 US 116, 7 Cranch 116 (US Supreme Court); *The Parlement Belge* (1878–1879) 4 PD 129 Probate and Admiralty Division. See generally Fox (n 65) 201–211.

<sup>67</sup> For example, *Guttières v Elmilik* (1886) II Foro Italiano (Rome) 913 and *SA des Chemins de Fer Liégeois-Luxembourgeois v l'Etat Néerlandais*, Pasirisie Belge 1903, I 294, both cited in Fox (n 65) 224–225.

<sup>68</sup> 'Changing Policy Concerning the Granting of Sovereign Immunity to Foreign Governments,' Letter to US Acting Attorney-General, 19 May 1952 (1952) 26 US Department of State Bulletin 984; *Trendtex Trading Co v Central Bank of Nigeria* [1977] QB 529 (Court of Appeal). See Fox (n 65) 211–215, 220–221; Francioni (n 65) 589–590.

<sup>69</sup> *Trendtex* (n 68) 556 (Denning LJ).

<sup>70</sup> Focarelli (n 41) 130–131; Focarelli (n 51) 957; Gattini (n 51) 241–242; Fox (n 65) 156–157.

international law and to accord greater power in this regard to legislatures and executives.

#### D. *Impartial Law Enforcement as a Cloak or Shield*

If we assume that national courts are aware of their ability to shape the development of international law, why do so many cling to the fiction that they are impartial law enforcers only? I offer two answers to this question, though others are also possible. In some cases, national courts embrace the vision of themselves as impartial law enforcers as a cloak to disguise their progressive development of the law. In others, domestic courts cling to this role as a shield to justify inaction and deflect criticism for not developing the law. In this way, the mantra of impartial law enforcement may serve to obscure the real actions or motivations of domestic courts.

National courts wishing to progressively develop international law may invoke their role as impartial law enforcers as a cloak under which to extend the law. This pretence may be linked to the general judicial fiction that courts declare rather than create the law, or it may particularly relate to the State's constitutional structure if domestic courts are given the power to enforce but not create international law. It is also possible that national courts may embrace this description of their role because they believe that they will have a greater chance of influencing the development of international law if they pretend to be merely enforcing it. Consider, for example, how Germany employed some of the Italian Court's words in *Ferrini* to suggest that the Court had effectively admitted that it was not enforcing existing international law.<sup>71</sup>

Many celebrated cases of national courts enforcing international law might be better understood as national courts progressively developing international law under the guise of enforcement. Take the *Pinochet* case, for example, where the UK House of Lords found that a former head of State could not claim immunity for acts of torture. The impact of the Convention Against Torture on the customary international law position on immunity was not dealt with by an express treaty term, did not appear to have been discussed in the *travaux préparatoires*, nor were there any precedents in State practice. Yet the decision was effectively presented by the UK House of Lords as the enforcement of an implied treaty term whereby the norm of immunity was overridden by necessary implication given the prohibition on torture and the establishment of universal jurisdiction over it.<sup>72</sup>

Such development of international law should not be surprising, nor should the reluctance of courts to be upfront about it. Courts routinely create law in

<sup>71</sup> See above, text accompanying (n 43).

<sup>72</sup> *Pinochet* (n 3) 200–05 (Browne Wilkinson LJ), 243–249 (Hope of Craighead LJ), 261–265 (Hutton LJ), 266–268 (Saville of Newdigate LJ), 277–278 (Millet LJ), 289–290 (Phillips of Worth Matravers LJ).

the process of interpreting and applying it and they are used to presenting their law creation as mere enforcement. What makes a difference in the international law context is the perception that it might be wrong for the courts of one State to push the development of international law when that might then affect other States. Yet this is precisely what national legislatures and executives do when they try to influence the content of international law: they promote a certain interpretation of international law, whilst pretending it is an impartial statement of existing law.

As well as being a disguise to cloak activism, national courts may also embrace their role as impartial law enforcers as a shield to deflect criticism for inaction. This role allows domestic courts to say things akin to: a particular norm may be logical and may be good policy, it may be a positive development of the law and one that is likely to occur in the future, but it does not represent the existing state of the law and it is not the role of national courts to develop international law. In so doing, domestic courts sideline their potential as national bodies capable of generating State practice that may help develop international law.

Lord Hoffmann's statement in *Jones*—that '[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'<sup>73</sup>—represents a clear example of this approach and is all the more telling for the fact that UK House of Lords has clearly sought to develop international law under the guise of enforcement in other cases, such as *Pinochet*. It is also not an isolated example. In an earlier Canadian case dealing with similar issues, Justice Goudge of the Court of Appeal for Ontario likewise concluded that:

In the future, perhaps as the international human rights movement gathers greater force, this balance [between the prohibition on torture and immunity] may change, either through the domestic legislation of states or by international treaty. However, this is not a change to be effected by a domestic court adding an exception to the [State Immunity Act] that is not there, or seeing a widespread state practice that does not exist today.<sup>74</sup>

To suggest that international law may be changed through domestic legislation or international treaties only is to imply that executives and legislatures have an exclusive role in creating international law while domestic courts are limited to enforcing existing international norms. Not only is this inaccurate as a statement of international law, but this approach may result in domestic courts stalling the development of international law by refusing to recognize emerging norms. Norms may be undergoing a process of development or transformation that remains incomplete. In such cases, national courts that view themselves exclusively or primarily as impartial law enforcers could

<sup>73</sup> *Jones* (n 17) para 63.

<sup>74</sup> *Bouzari* (n 40) para 95.



effectively freeze or crystallize international norms at a particular moment in time, thereby entrenching old understandings and providing a drag-effect on new developments. This may be particularly worrying in areas, such as jurisdiction and immunities, which by their nature tend to come before and be developed by domestic courts.

Denying national courts a role in law creation is also problematic where executives and legislatures from different States have strong and overlapping self-interest that might need counter-balancing by courts. Benvenisti and Scheppele provide a good example of this, with their examinations of the way in which domestic courts in different States have relied on international and comparative law to provide a check on global counterterrorism efforts adopted by legislatures and executives since 11 September 2001.<sup>75</sup> Some may characterize this as domestic courts acting as international agents working to enforce international law. Yet, Benvenisti argues that these domestic courts are still acting as national agents, working to protect national democratic processes from the forces of globalization and seeking to ensure their own place in the separation-of-powers pecking order. Domestic courts were not just enforcing international law as it was created and developed by legislatures and executives, but rather were asserting their own voice in the law-creating process in order to protect certain interests.

### III. COMBINING INTERNATIONAL AND COMPARATIVE LAW

The increasing importance of national court decisions on matters of international law not only calls into question the role of domestic courts under the doctrine of sources, but also brings to light another phenomenon that I call comparative international law, which loosely fuses international law substance with comparative law methodologies. This comparative international law process can be characterized by top-down and bottom-up approaches.

In terms of a top-down approach, comparative international law focuses our attention on the fact that international law is domesticated in different ways in different legal systems. Building on the issue of whether it is possible to separate law creation and enforcement, and international and national law, I contend that, even when national courts attempt to impartially enforce international law, they often create hybrid international/national norms. The hybridity that results from domesticating international law is worthy of

<sup>75</sup> Benvenisti (n 13) 241–42, 253–258; K Scheppele, ‘The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency’ in S Choudhry (ed), *The Migration of Constitutional Ideas* (CUP, Cambridge, 2007) (tracing the migration of judicial resistance in response to anti-terrorism legislation and executive actions). See also A Roberts, ‘Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11’ (2004) 15 *EJIL* 721, 735–737 (predicting the rise of judicial attempts to check executive power in the ‘war on terror’).

comparative study in its own right, akin to comparative studies that focus on differences between legal systems.

In terms of a bottom-up approach, comparative international law captures the way in which many actors—academics, practitioners and international and national courts—engage in comparative assessments of national court decisions in order to determine the existence or meaning of international law. However, I argue that placing a premium on consistent interpretation can undermine the creative role each court may play in developing international law. The process of comparative international law is also seriously complicated by the hybridity of international and national law and the dual roles that can be attributed to domestic court decisions.

#### *A. Hybridizing International and National Law*

The idea of national courts enforcing international law suggests that international norms can be mechanically transposed from the international to the domestic sphere, with the main question being whether national courts are correctly interpreting and applying these norms. Comparative law, by contrast, encourages us to examine how various legal systems approach similar issues or functional needs in different ways. Instead of seeing national court decisions through the prism of whether they enforce or breach international law, the comparative international law lens focuses our attention on the way in which domestic courts nationalize substantive international law in diverse ways, resulting in a hybridity that is ripe for comparative analysis.

Knop represents an early example of a scholar who was uncomfortable with the idea of national courts operating as mere enforcers of international law. In her words, ‘domestic interpretation of international law is not simply a conveyor belt that delivers international law to the people’ but is instead ‘a process of translation from international to national.’<sup>76</sup> Knop’s translation metaphor reminds us that, even if national courts attempt to faithfully enforce international law, its domestication requires them to simultaneously assert their own legal language. According to Knop, ‘[j]ust as we know that translation from one language to another requires more than literalness, we must recognize the creativity, and therefore the uncertainty, involved in domestic interpretation.’<sup>77</sup>

Hybridization in the process of nationalizing international law will sometimes be obvious. It is likely to occur where, for example, international law is transformed into domestic law through the use of a statute that reformulates the obligations. In his book on the *Direct Application of International*

<sup>76</sup> K Knop, ‘Here and There: International Law in Domestic Courts’ (2000) 32 *New York University JILP* 501, 505–506. See also Provost (n 58) 126, 167–68; R Bahdi, ‘Truth and Method in Domestic Application of International Law’ (2002) 15 *Canadian J L and Jurisprudence* 255.

<sup>77</sup> Knop (n 76) 505–506.

*Criminal Law by National Courts*, Ferdinandusse gives the example of a number of States adopting the international prohibition on genocide into their domestic law after altering the definition to make it broader or narrower.<sup>78</sup> Hybridization also occurs when national judges use domestic legal concepts to supplement or qualify international obligations. For example, in *R v Safi*, the UK Court of Appeal held that the common-law defence of duress was available to hijacking charges, even though the underlying treaty was silent on defences.<sup>79</sup>

At other times, the fusion of the national and the international will be less obvious and may occur unconsciously. According to Lord Steyn of the UK House of Lords, national courts must find the true interpretation of international law ‘untrammelled by notions of [their] national legal culture.’<sup>80</sup> Yet national judges can hardly be expected to interpret international law in isolation from their domestic training as we are all products of our experiences. How international law is received and understood within a domestic system is likely to depend on ‘underlying cognitive grids’, which are shaped by domestic legal training, as well as how international materials are translated and/or abridged in particular domestic contexts.<sup>81</sup> Curran gives the example of the ECtHR decision in *Pretty v United Kingdom*, which involved significant common- and civil-law elements of reasoning but which, when translated domestically in France, was abridged to the point that all common-law aspects of the decision were removed.<sup>82</sup>

Given the varied training of national court judges, and the way in which our access to and understandings of international law is often shaped by domestic law, language filters and local access, one can only expect common international commitments to receive different domestic translations. Munday notes that the ‘uniform’ application of treaty rules is unlikely as ‘different countries almost inevitably come to put different interpretations upon the same enacted words’.<sup>83</sup> In the criminal law context, Ferdinandusse acknowledges that applying identical international legal standards does not guarantee uniform interpretation.<sup>84</sup> Concern about national courts evidencing an interpretive ‘homeward trend’, meaning that they interpret uniform treaty terms in

<sup>78</sup> W Ferdinandusse, *Direct Application of International Criminal Law by National Courts* (CUP, Cambridge, 2006) 23–25.

<sup>79</sup> *R v Safi (Ali Ahmed)* [2003] EWCA Crim 1809. See A Nollkaemper, ‘The Power of Secondary Rules of International Law to Connect the International and National Legal Orders’ in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms* (2010 forthcoming); Nollkaemper (n 53) 795.

<sup>80</sup> *R v Secretary of State for the Home Department, ex parte Adan* [2001] All E.R. 593, 617 (Steyn LJ).

<sup>81</sup> V Curran, ‘Re-Membering Law in the Internationalizing World’ (2005) 34 *Hofstra L Rev* 93, 97.

<sup>82</sup> *ibid* 115–123.

<sup>83</sup> R Munday, ‘The Uniform Interpretation of International Conventions’ (1978) 27 *ICLQ* 450.

<sup>84</sup> Ferdinandusse (n 78) 5.

light of domestic concepts, is also rife in treaties intended to unify rules for international transactions.<sup>85</sup>

The repeated application of international law by the national courts of particular countries may, over time, lead to distinct dialects developing that exist somewhere between international and national law, and between law enforcement and creation. A good example of such hybridization is the Alien Tort Statute (ATS) in the United States, which gives federal courts jurisdiction over ‘any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’<sup>86</sup> Although the ATS is often celebrated by US lawyers as a domestic mechanism for enforcing international law, non-US lawyers frequently view it as a US peculiarity, whether welcomed or disdained,<sup>87</sup> for at least three reasons.

First, by interpreting the ATS to permit victims of violations of international law to sue for damages, no matter where the injuries occurred or by whom they were committed, US courts are exercising a form of universal civil jurisdiction that is not well known under international law. Most US courts faced with ATS claims have not paused to consider whether the exercise of such jurisdiction is consistent with, or a breach of, international law. Those that have contemplated the issue have generally been content to rely on the *Restatement (Third) of the Foreign Relations Law of the United States*,<sup>88</sup> even though it represents a particular US perspective on international law and cites no authority for its conclusion that universal civil jurisdiction is permitted.<sup>89</sup> Outside the United States, some criticize the ATS as an excessive form of jurisdiction while others welcome it as a precedent for universal civil jurisdiction, but few characterize it as impartial law enforcement.<sup>90</sup>

Second, although the ATS on its face appears to permit tort claims for any ‘violation of the law of nations,’ the courts have interpreted this provision

<sup>85</sup> J Honnold, ‘The Sales Convention in Action—Uniform International Words: Uniform Application?’ (1988) 8 J of L and Commerce 207, 208; J Felemegas, ‘The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation’ <[http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html#N\\_518](http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html#N_518)> accessed 30 October 2010.

<sup>86</sup> 28 USC s 1350 (2005).  
<sup>87</sup> Contrast B Stephens, ‘Translating *Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations’ (2002) 27 Yale J Intl L 1, 10–17 with K Anderson, ‘The Rise of International Criminal Law: Intended and Unintended Consequences’ (2009) 20 EJIL 331, 350–351.

<sup>88</sup> For example, *Kadić* 70 F.3d at 240 (2d Cir. 1995); *Beanal v Freeport-McMoRan, Inc.*, 969 F.Supp. 362, 371 (ED La 1997); *Presbyterian Church v Talisman Energy*, 244 F Supp 2d 289, 306 (SDNY 2003).

<sup>89</sup> Restatement (Third) (n 25) s 404, comment b.

<sup>90</sup> *Arrest Warrant of 11 April 2000* (n 62) 77 (Joint Separate Opinion of Higgins, Kooijmans and Buergenthal); *Jones* (n 17) paras 20, 58. See generally D Donovan and A Roberts, ‘The Emerging Recognition of Universal Civil Jurisdiction’ (2006) 100 AJIL 142, 146–48; K Parlett, ‘Universal Civil Jurisdiction for Torture’ (2007) 4 European Human Rights L Rev 385, 392–94; C Ryngaert, ‘Universal tort jurisdiction over gross human rights violations’ (2007) 38 Netherlands Ybk Intl L 3, 32–41.

more restrictively, limiting it to claims based on ‘definable, universal and obligatory norms.’<sup>91</sup> This test, which is neither known under international law nor necessarily co-extensive with international legal concepts such as customary international law or *jus cogens*, creates a domestic filter that contorts the application of international law, thus limiting the precedential value of ATS case law in international law’s development.

Third, as international law does not provide a complete code that can be readily imported into domestic systems, US courts have drawn on a hodge-podge of domestic and international law analogies in order to answer secondary questions, such as whether to permit actions against corporations and what standards to use in assessing accessorial liability. For example, US courts have frequently held that corporations may be liable for violations of the law of nations under the ATS, citing each other as precedent along with various domestic and international analogies in the absence of clear international law precedent.<sup>92</sup>

Far from merely enforcing existing international law, US courts acting under the ATS are staking out an aggressive (and, depending on one’s viewpoint, a progressive or regressive) position on universal civil jurisdiction, and applying an eclectic mix of domestic and international standards in the process. My point is not to praise or criticize the ATS, but rather to invoke it as an example of a hybrid body of precedent that tends to look international to US domestic lawyers and domestic to non-US international lawyers. What we are witnessing is something that cannot easily be categorized as domestic or international law, or as law creation or enforcement, but rather is some hybrid in between each set of poles.<sup>93</sup>

The attempt to undertake a comparative assessment of the ATS throws this issue into sharp relief. In civil law States, for example, victims of crime can attach civil claims for compensation to criminal prosecutions, which are

<sup>91</sup> *Sosa v Alvarez Machain* 542 US 692, 732 (2004).

<sup>92</sup> When looking to international law for support, US courts often reason that, with the advent of international criminal law, international law permits liability of State and non-state actors. Arguments that international law creates criminal liability for natural persons rather than civil liability for juridical persons are dismissed on the basis that domestic US law does not recognize a distinction between natural and juridical persons for the purposes of civil liability and, in any event, distinguishing between individuals and corporations in this way would lack normative justification. See *Presbyterian Church v Talisman Energy*, 244 F Supp 2d 289 (SDNY 2003); *Vietnam Association for Victims of Agent Orange v Dow Chemical Co*, 373 F Supp 2d 7 (EDNY 2005). See also Anderson (n 87) 350–351. The Second Circuit recently took a different approach, however, finding that whether a corporation could be held liable under the ATS depended on whether corporations could be held liable under international rather than US law. *Kiobel v Royal Dutch Petroleum*, 2<sup>nd</sup> Circuit Court of Appeals, Decision, 17 September 2010.

<sup>93</sup> This may be understood as arising from the existence of plural sources of legal norms combined with plural sites for law creation and enforcement: L Antonioli, ‘Taking Legal Pluralism Seriously: the Alien Tort Claims Act and the Role of International Law before US Federal Courts’ (2005) 12 *Indiana J of Global Legal Studies* 651; C Ochoa, ‘Access to US Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claim Act’ (2005) 12 *Indiana J of Global Legal Studies* 631.

known as *action civiles*.<sup>94</sup> A number of States permit universal criminal jurisdiction or extraterritorial jurisdiction over serious crimes of international law and allow victims to seek monetary compensation in criminal proceedings.<sup>95</sup> Without making the same distinction between criminal and civil jurisdiction as in the United States, these countries may indirectly permit a form of universal civil jurisdiction that is somewhat analogous to the ATS.<sup>96</sup> This comparison led Justice Breyer of the US Supreme Court to conclude that universal civil jurisdiction under the ATS was unproblematic because the existence of universal criminal jurisdiction implies acceptance of ‘a significant degree’ of civil liability.<sup>97</sup>

But do *action civiles* represent a close enough analogy to support an international norm of universal civil jurisdiction? While some argue that these simply represent different national mechanisms for translating international norms,<sup>98</sup> these differences have substantive implications, resulting in distinct hybridizations of international and national law in the different systems. For instance, as an *action civile* is based on a criminal action, there is more scope for State control of the main action than in independent tort claims, though some civil law States permit victims to initiate prosecutions. Many States do not permit criminal actions against legal persons, such as corporations and States, which would also limit the potential defendants in *action civiles* compared to tort claims. And an *action civile* will not be successful unless the defendant is found guilty in the underlying criminal prosecution, resulting in the imposition of a higher standard of proof than in an independent tort claim. This hybridization of international and national law in different legal systems seriously complicates any search for an international law principle based on a comparative assessment of domestic approaches.

The fact that international law may be domesticated in diverse ways is starting to be recognized in the literature. Judge Greenwood of the ICJ,

<sup>94</sup> Donovan and Roberts (n 90) 154; International Bar Association, *Report of the Task Force on Extraterritorial Jurisdiction* (IBA, 2009) 120–121.

<sup>95</sup> For example, France: Code de Procédure Pénale, arts 689–2 – 689–10 (universal jurisdiction), arts 2–3 (*action civile*); Germany: Völkerstrafgesetzbuch [Code of Crimes Against International Law], 30 June 2002, s 1 (universal jurisdiction); Strafprozessordnung [Federal Criminal Procedure Code], ss 403–406c (*action civile*); Spain: Ley Orgánica del Poder Judicial (Organic Law of the Judiciary), art 23(4) (universal jurisdiction); Ley de Enjuiciamiento Criminal (Criminal Proceedings Law), art 112 (criminal complaint also a civil claim unless victim expressly states otherwise).

<sup>96</sup> These cases are starting to occur. For example, in the *Ntuyahaga* case, a major in the Rwandan army was charged with killing 10 Belgian blue helmets, Rwandan Prime Minister Uwilingiyimana and an ‘undetermined’ number of Rwandans. An *action civile* was constituted on behalf of 164 victims and heirs. Ntuyahaga was sentenced to 20 years imprisonment and ordered to pay €540,000 to 21 civil parties: *The Case of the Major*, Cour d’Assises de Bruxelles, 5 July 2007 <<http://www.hirondellenews.com/content/view/9907/274/>> accessed 30 October 2010.

<sup>97</sup> *Sosa* (n 91) 762–763 (Breyer, J concurring).

<sup>98</sup> Stephens (n 87); B Van Schaack, ‘In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention’ (2001) 42 *Harvard Intl L J* 141.

formerly an active barrister before the UK courts, likens litigating international law before national courts to looking at one's reflection in a fair-ground mirror—the reflection is there, but it is stretched, contorted and sometimes (almost) unrecognizable.<sup>99</sup> In *The Europeanisation of International Law*, Wouters, Nollkaemper and de Wet ask whether we are witnessing the emergence of 'Europeanised' international law and what consequences such 'Europeanisation' might have on the unity and coherence of international law.<sup>100</sup> Likewise, Pauwelyn identifies differences between European and American judicial approaches to international law, leading him to question whether these differences might threaten the unity of international law or result in fragmentation.<sup>101</sup>

This phenomenon is related to, but distinct from, developments with respect to regional or bilateral treaties or customs that might carve out distinct rules that are applicable in certain regions. In that case, international law is itself fragmented as diverse rules apply to different States and in different regions. Here, however, we are examining different interpretations that individual States or groups of States place on the same international norms. One approach concerns different rules, the other different interpretations of the same rules.

The idea that we might witness the emergence of US international law, UK international law and European international law etc in their respective domestic courts goes to the essence of comparative international law, namely that international law might take on different qualities as it is domesticated in particular States or regions. This phenomenon has received little attention in the international sphere, but has been observed in the European context, with Joerges noting that:

European law is often perceived as an autonomous body of law, striving for the harmonization, and often even the uniformity, of rules. Such a perception, however, is overly simplistic and incomplete . . . . Since the uniformity of its meaning cannot be ensured through the adoption of a common text (as translated in so many languages), one could argue there is no such thing as a common European law . . . . What we have instead (and have learned to live with) are Belgium, Dutch, English, French, German, Italian, and many more versions of European law. In essence, there are as many European laws as there are

<sup>99</sup> J Crawford and M Young, 'International Law in National Courts: Discussion' in *The Function of Law in the International Community: An Anniversary Symposium* (2008), Proceedings of the 25<sup>th</sup> Anniversary Conference of the Lauterpacht Centre for International Law <[http://www.lcil.cam.ac.uk/25th\\_anniversary/book.php](http://www.lcil.cam.ac.uk/25th_anniversary/book.php)> accessed 30 October 2010.

<sup>100</sup> J Wouters, A Nollkaemper and E de Wet, 'Introduction: The "Europeanisation" of International Law' in J Wouters, A Nollkaemper and E de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (CUP, The Hague, 2008) 1.

<sup>101</sup> J Pauwelyn, 'Europe, America and the "Unity" of International Law' in Wouters, Nollkaemper and de Wet (eds), *ibid* 205.

relatively autonomous legal discourses, organized mainly along national, linguistic and cultural lines. How could it be otherwise?<sup>102</sup>

This hybridization of international and national law through domestication may be seen as analogous to ‘glocalization’, whereby products or services are developed and distributed globally, but are tailored for particular local markets, resulting in hybrid products that exhibit global and local influences.<sup>103</sup> And, like with the process of ‘glocalization’, the influence of the international and national go both ways, with the global influencing the local and local influencing the global in a top-down and bottom-up dynamic. The result in international law is a ‘co-constitutive’ relationship that is ‘mutually constraining and mutually reinforcing’ as both the international and national systems shape and discipline each other, albeit in different ways.<sup>104</sup>

If we accept that national courts act as both norm internalizers and norm creators,<sup>105</sup> then international law may be somewhat lost in translation from the international to the domestic, but international law is also found in translation as domestic court decisions help to constitute international law. This frame of reference demonstrates the problem with assuming that a neutral, objective international law exists that sits above States, ready to be impartially enforced by their courts. International law might better be viewed as an area of contestation between different visions of international law articulated by many different actors, including domestic courts. There is no universal, only a collection of particularities from which we attempt to infer a universal.<sup>106</sup> In Koskenniemi’s words:

[T]he universal has no voice, no authentic representative of its own. It can only appear through something particular; only a particular can make the universal known.... [But if] the universal has no representative of its own, then particularity itself is no scandal.<sup>107</sup>

<sup>102</sup> C Joerges, ‘The Challenge of Europeanization in the Realm of Private Law’ (2004) 14 *Duke J of Comparative and Intl L* 149, 159–160. See also Curran (n 81) 97; P Legrand, ‘European Systems Are Not Converging’ (1996) 45 *ICLQ* 52, 61–62.

<sup>103</sup> R Robertson, ‘Glocalization: Time-Space and Homogeneity-Heterogeneity’ in M Featherstone, S Lash and R Robertson (eds) *Global Modernities* (Sage Publications, Thousand Oaks, California, 1995); K Knop, ‘State Law Without Its State’ in A Sarat, L Douglas and M Umphrey (eds) *Law Without Nations* (Stanford University Press, Stanford, 2010).

<sup>104</sup> M Waters, ‘Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law’ (2005) 93 *Georgetown L J* 487, 490.

<sup>105</sup> *ibid.* See also P Berman, ‘A Pluralist Approach to International Law’ (2007) *Yale J Intl L* 301, 311.

<sup>106</sup> Without focusing on the role of domestic courts, Bradford and Posner contend that all major powers take ‘exceptionalist’ approaches to international law that reflect their own values and interests and that international law might reflect the overlapping consensus of otherwise exceptionalist positions. A Bradford and E Posner, ‘Universal Exceptionalism in International Law’ <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1551355](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551355)> accessed 30 October 2010.

<sup>107</sup> M Koskenniemi, ‘International Law in Europe: Between Tradition and Renewal’ (2005) 16 *EJIL* 113, 115.



The greater the number of national courts engaging in the interpretation and application of international law, the higher the prospects for conflicting interpretations to emerge and multiple dialects to develop. Some celebrate this under the banner of legal pluralism, with its advantages of norm contestation, space for innovation and greater possibilities for error correction, while others consider it a price worth paying for increased enforcement of international law.<sup>108</sup> We presently fixate on different national court interpretations of particular international norms, but perhaps tomorrow we will start to sketch out judicial theories about ‘Canadian international law’, ‘South African international law’ or ‘English international law.’ Either way, by focusing on the diversity of ways in which different States nationalize international law, and the hybridity that typically results, we are engaging in some form of comparative international law study.

### *B. A Comparative Practice in Search of a Methodology*

Along with the increase in national courts finding and applying international law, we are seeing the development of a comparative approach whereby domestic courts and others are seeking to identify and interpret international law in part by surveying national judicial decisions.

Comparative international law is a unique phenomenon that has not received distinct treatment in the literature, though instances of it surface in related debates about transjudicial dialogue and comparative constitutional law. Transjudicial dialogue concerns conversations among and between national and international courts on a variety of topics, including international law.<sup>109</sup> Comparative constitutional law concerns national court decisions on constitutional law, which may overlap, but are not coextensive, with domestic judgments on international norms.<sup>110</sup> Comparative international law, by contrast, focuses on comparative assessments of national court decisions only (unlike transjudicial dialogue) as a means of identifying and interpreting international law only (unlike comparative constitutional law).

Many view this union of substantive international law and comparative law methodologies as simple and uncomplicated, with domestic courts often

<sup>108</sup> Compare W Burke-White, ‘International Legal Pluralism’ (2005) 25 Michigan J Intl L 963, 965–66 with Pauwelyn (n 101) 208–13. On global legal pluralism, see R Michaels, ‘Global Legal Pluralism’ (2009) 5 Annual Review of Law and Social Sciences 243; P Berman, ‘Global Legal Pluralism’ (2007) 80 Southern California L Rev 1155; Berman (n 105).

<sup>109</sup> A Slaughter, ‘A Global Community of Courts’ (2003) 44 Harvard Intl L J 191; A-M Slaughter, ‘A Typology of Transjudicial Communication’ (1994–1995) 29 University of Richmond L Rev 99 (Slaughter Typology).

<sup>110</sup> S Choudhry, ‘Migration as a New Metaphor in Comparative Constitutional Law’ in S Choudhry (n 75); E Posner and C Sunstein, ‘The Law of Other States’ (2006) 59 Stanford L Rev 131; C Saunders, ‘The Use and Misuse of Comparative Constitutional Law’ (2006) 13 Indiana J of Global Legal Studies 37; D Barak-Erez, ‘The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue’ (2004) 2 Intl J of Constitutional L 611; S Breyer, ‘Keynote Address’ (2003) 97 American Society of Intl L Proceedings 265.

turning to foreign comparisons to facilitate uniform and harmonized interpretation in order to avoid or minimize the diversity and hybridity discussed above. Yet, beyond having a common ‘other’ of domestic law, international and comparative law are different fields with distinct aims and methodologies.<sup>111</sup> Comparative international law appears to be a growing practice without a clear theory, and those engaged in it frequently overlook the difficulties that arise from the dual roles of national courts and the tendency of such courts to create hybrid national-international jurisprudence. Developing a genuine comparative international law theory would require concentrated engagement by scholars on both sides of the divide—a task more ambitious than the aim of this article. Instead, my more modest goal is to identify this phenomenon and explore some of its limitations and complexities.

### *1. Case study: comparative treaty interpretation*

The existence of comparative international law is nowhere more evident than in national court approaches to treaty interpretation. In a recent comparative study of treaty enforcement, Sloss found that many national courts refer to decisions of the domestic courts of other treaty parties, though the frequency of such citations and the persuasiveness attributed to them were uneven.<sup>112</sup> The contributors for South Africa and Israel reported extensive use of comparative international law,<sup>113</sup> while the Canadian and Polish contributors accepted the relevance of such a method but found few examples of it.<sup>114</sup>

Certain treaties are more likely to be litigated before national courts, thus increasing the likelihood of comparative treaty interpretation. Treaties that create inter-state rights and obligations are less frequently interpreted by national courts due to doctrines such as State immunity and non-justiciability. Treaties or implementing domestic statutes are more likely to be litigated before domestic courts if they create rights for private parties vis-à-vis the State (such as the 1954 Refugees Convention and human rights treaties), create rights for private parties vis-à-vis each other (such as the 1929 Warsaw Convention on Air Transportation or the 1980 Convention on the International Sale of Goods (CISG)), or impose obligations on private parties (such as domestic statutes implementing the Rome Statute for the International Criminal Court).

<sup>111</sup> D Kennedy, ‘New Approaches to Comparative Law: Comparativism and International Governance’ (1997) 2 *Utah L Rev* 545, 546–551; K Zweigert and H Kotz, *Introduction to Comparative Law* (3rd edn, OUP, Oxford, 1998) 2, 7.

<sup>112</sup> D Sloss, ‘United States’, in D Sloss (ed) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (CUP, Cambridge, 2009) 504, 591.

<sup>113</sup> J Dugard, ‘South Africa’ in Sloss (n 112) 470; D Kretzmer, ‘Israel’ in Sloss (n 112) 291.

<sup>114</sup> G van Ert, ‘Canada’ in Sloss (n 112) 185; L Garlicki, M Masternak-Kubiak and K Wojtowicz, ‘Poland’, in Sloss (n 112) 398.

In some cases, the treaty will expressly call for uniform interpretation, such as the CISG which provides that '[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity of its application and the observance of good faith in international trade.'<sup>115</sup> These sorts of provisions are common in treaties that seek to harmonize private law as they represent an accommodation of different domestic concepts,<sup>116</sup> engendering self-consciousness that similar language can have diverse meanings in different national contexts. Such treaties are often originally derived from a comparative law process, so it is not surprising to see sensitivity to the problems of diverse interpretations.

The comparative international law approach is not limited to treaties that expressly call for a uniform interpretation, however. Domestic courts interpreting the Warsaw Convention on Air Transportation, for example, frequently cite foreign court interpretations of relevant provisions.<sup>117</sup> The same is true of national courts interpreting the Refugees Convention, which have engaged in extended cross-citation in resolving controversial issues about the definition of refugee, such as the requirements for establishing a particular social group in the context of gender-based violence.<sup>118</sup> A body has even been established to encourage uniform national interpretations of the Refugee Convention.<sup>119</sup> These treaties were not derived from comparative approaches, but they are now being interpreted in light of them.

## 2. *The aim of and methodology underlying comparative international law*

The aim of comparative treaty interpretation is generally treated as unproblematic. Treaties typically create common and reciprocal obligations for treaty parties. When these obligations are subject to decentralized enforcement by national courts, there is a significant risk that they will be interpreted and applied in dissimilar ways. To minimize this risk, national courts frequently look to the case law of other treaty parties in order to ensure that common obligations are interpreted in a consistent way. Thus, Lord Hope of the UK House of Lords states that 'international treaties should, so far as

<sup>115</sup> CISG (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 art 7(1).

<sup>116</sup> For example, the 1974 Convention on the Limitation Period in the International Sale of Goods (adopted 12 June 1974, entered into force 1 August 1988) 1511 UNTS 2 art 7 and the 1978 United Nations Convention on the Carriage of Goods by Sea (adopted 31 March 1983, entered into force 1 November 1992) 1695 UNTS 3 art 3. See P Schlechtriem, 'Article 7' in I Schwenzer (ed), *Slechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (3<sup>rd</sup> edn OUP, Oxford, 2005) 93, 95–97.

<sup>117</sup> For example, Canada: *Recchia v KLM Lignes Aériennes Royale Néerlandaises* [1999] RJQ 2024 (Que SC); *Connaught Laboratories Ltd v British Airways* (2002) 61 OR (3d) 2004 (Ont SC); *Plourde v Service Aérien FBO (Skyservice)* 2007 QCCA 739 (Que SC); Israel: FH 36/84 *Tiechner v Air France* 41 PD (1) 589; VM 1818/03 (Naz), *El Al v David PM*, 5763 (1) 737; South Africa: *Potgieter v British Airways*, 2005 (3) SALR 133 (C).

<sup>118</sup> Benvenuti (n 13) 263–65.

<sup>119</sup> International Association of Refugee Law Judges <<http://www.iarjlj.org/general/>> accessed 30 October 2010.

possible, be construed uniformly by the national courts of all states',<sup>120</sup> while Munday notes that the most effective way to achieve a 'modicum of uniformity' in interpretation is for 'all States concerned to pay serious heed to one another's case law.'<sup>121</sup>

Despite the obvious advantages of uniform interpretation of treaties, we should be cautious about treating this as the sole or even primary aim of treaty interpretation. The Vienna Convention on the Law of Treaties does not require consistent interpretation, instead calling for treaties to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'<sup>122</sup> The primary obligation is to interpret a treaty in the best manner possible, rather than to do so consistently with other interpreters. Certainly, decisions by domestic courts of States that are parties to the treaty provide evidence of how those States understand their obligations and, where sufficient uniformity is evident, might demonstrate a subsequent agreement as to interpretation.<sup>123</sup> But, absent such an agreement, domestic courts are entitled to assert their own, good faith, interpretations of treaty commitments, even if this results in a lack of interpretive uniformity.

The call for domestic courts to engage in consistent treaty interpretation, without similar demands being placed on legislatures and executives, says something about perceptions of the appropriate roles of these arms of government. Judge Simma of the ICJ argues that the growing importance of domestic jurisprudence for international law's development brings with it an 'increasing responsibility on the part of these courts to maintain the law's coherence and integrity.'<sup>124</sup> But similar expectations are rarely placed on other arms of government: contrary and contradictory interpretations of international law by legislatures and executives are generally accepted as part of the rough and tumble of opposing views from which international law is formed or an impasse is reached. The fact that many people accept that legislatures and executives can defend different interpretations of international law, but feel uncomfortable when domestic courts do so, seems to stem from and reinforce assumptions about legislatures and executives being law creators and domestic courts being mere law enforcers.

<sup>120</sup> *Pinochet* (n 3) 244 (per Hope LJ). German comparative law scholars note that German courts are likely to engage in comparative analysis when interpreting major international treaties. B Markesinis, 'The Judge as Comparatist' (2005) 80 *Tulane L Rev* 11, 107 (citing studies conducted by Ulrich Drobing). Likewise, the Italian courts frequently engage in comparative treaty interpretation, as occurred in *Tribunal di Vigevano*, 12 July 2000 (interpreting the CISG in light of 40 foreign court decisions).

<sup>121</sup> Munday (n 83) 458–59. See also Zweigert and Kotz (n 111) 27–28.

<sup>122</sup> VCLT (n 22) art 31(1).

<sup>123</sup> *ibid* art 31(3)(b).

<sup>124</sup> B Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 *European J Intl L* 265, 290. See also J d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' (unpublished paper, 2009) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1401019](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401019)> accessed 30 October 2010.

It is also not always clear that States have agreed upon a particular interpretation even when they have entered into a treaty. Lord Steyn of the UK House of Lords contends that national courts must search for ‘the true autonomous and international meaning of the treaty. And there can only be one true meaning.’<sup>125</sup> But even when States agree on a treaty text, they may have adopted vague or ambiguous wording precisely to permit conflicting interpretations to be maintained, as captured by Allott’s description of a treaty as a ‘disagreement reduced to writing.’<sup>126</sup> Even when this is not the case, it would be wise for national courts to remain cognisant of the possibilities of productive normative contestation as well as the virtues of harmonization and unification.<sup>127</sup> A good example of constructive disagreement might be found in a pair of recent cases concerning the interaction between the Vienna Convention on Consular Relations and national law: the US Supreme Court rejected the argument that a failure to provide consular notification violated the right to a fair trial, while the German Constitutional Court held the opposite after considering but rejecting the US approach.<sup>128</sup> Neither judgment is binding on other domestic courts, but both may be turned to as persuasive authorities in future debates.

Although national courts and others frequently articulate the aim of comparative interpretation, they rarely discuss its underlying methodology. Most accept that foreign decisions on international law are persuasive rather than binding and some avert to the idea that the more foreign decisions there are, and the more consistent their approach, the more persuasive those judgments will be.<sup>129</sup> Yet few articulate any quantitative or qualitative limits that might serve more firmly to guide or constrain this comparative approach. Under the VCLT, subsequent practice of the treaty parties (including decisions of their national courts) may provide evidence of an agreement on interpretation.<sup>130</sup> The threshold for establishing such an agreement is meant to be high, requiring ‘concordant, common and consistent’ practice that ‘is sufficient to establish a discernible pattern implying the agreement of the parties regarding its interpretation.’<sup>131</sup> However, not all treaty parties

<sup>125</sup> *Adan* (n 80) 617 (Steyn LJ).

<sup>126</sup> P Allott, ‘The Concept of International Law’ (1999) 10 *European J Intl L* 31, 43.

<sup>127</sup> R Wai, ‘The Interlegality of Transnational Private Law’ (2008) 71 *L and Contemporary Problems* 107, 108–109.

<sup>128</sup> *Sanchez-Llamas v Oregon*, 548 US 331 (2006); Bundesverfassungsgericht, 19 September 2006, Case Nos. 2 BvR 2115/012, BvR 2132/01 and 2 BvR 348/03, discussed in K Garditz, ‘Case Nos. 2 BvR 2115/01, 2 BvR 2132/01 & 2 BvR 348/03 (Vienna Convention on Consular Relations case): German Federal Constitutional Court decision on failure to provide consular notification’ (2007) 101 *AJIL* 627, 634.

<sup>129</sup> S O’Connor, ‘Keynote Address’ (2002) 96 *American Society of Intl L Proceedings* 348, 350; Breyer (n 110) 266; *Roper v Simmons* 543 US 551, 578 (2005); Slaughter Typology (n 109) 124–125.

<sup>130</sup> VCLT (n 22) art 31(3)(b).

<sup>131</sup> Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 12–13, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted 1 November 1996) (quoting, 1st quote, I Sinclair, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> edn, Manchester University Press,

are required to have engaged in such a practice; it may be sufficient for some to have done so and others to have assented to or acquiesced in the practice.<sup>132</sup>

Despite this international law framework, few domestic courts engaging in comparative treaty interpretation reference this provision, let alone justify whatever threshold they find sufficient or insufficient for establishing an agreement. A good recent illustration is the US Supreme Court decision in *Abbott v Abbott*, which turned on the interpretation of the Hague Convention on the Civil Aspects of International Child Abduction and its implementing statute.<sup>133</sup> The majority of that Court held that the views of national courts of other contracting States evidenced broad acceptance of the interpretation it adopted.<sup>134</sup> Whilst acknowledging that the Supreme Court of Canada had arguably reached a contrary view and the French courts were divided, the majority held that legal authorities from England, Israel, Austria, South Africa, Germany, Australia and Scotland supported its view and represented an emerging international consensus. In dissent, Justices Stevens, Thomas and Breyer argued that the Court should not ‘substitute the judgment of other courts for [its] own’, particularly when the foreign decisions were at best in ‘equipoise’.<sup>135</sup> This disagreement vividly illustrates the tension between a domestic court asserting its own interpretation versus following the decisions of other national courts, as well as the uncertainty that exists over the generality and consistency of views required to tip the balance from one approach to the other.

Even some of the most vocal opponents of the citation of foreign decisions in other contexts seem willing to embrace comparative international law when interpreting treaties, despite the absence of a clear methodology. Justice Scalia of the US Supreme Court, for example, leads the charge against US courts citing foreign decisions in constitutional interpretation on the grounds of irrelevance (that foreign decisions have no bearing on US originalist constitutional interpretation or the determination of modern day American views) and illegitimacy (that references to foreign decisions are likely to be selective, self-serving and ripe for manipulation).<sup>136</sup> He cautions that judges may not be given comprehensive evidence of foreign law, leaving them likely to rely haphazardly on readily available

Manchester, 1984) 137; Gardiner (n 22) 225; A McNair, *The Law of Treaties* (Clarendon Press, Oxford, 1961) 424.

<sup>132</sup> Gardiner (n 22) 227, 235–39; McNair (n 131) 427; Villiger (n 22) 431; ILC, ‘Report of the International Law Commission on the work of its 18th Session’ (4 May–19 July 1966) UN Doc A/CN.4/191, para 15.

<sup>134</sup> *ibid* 12–15 (slip opinion).

<sup>133</sup> *Abbott v Abbott* 560 US (2010).

<sup>135</sup> *ibid* 22–25 (slip opinion).

<sup>136</sup> N Dorsen, ‘The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer’ (2005) 3 *Intl J of Constitutional L* 519; A Scalia, ‘Keynote Address: Foreign Legal Authority in the Federal Courts’ (2004) 98 *American Society of Intl L Proceedings* 305.

sources.<sup>137</sup> Even if widespread evidence is available, judges may cherry pick, citing foreign judgments with which they agree and ignoring others.<sup>138</sup> In this way, judicial discretion as to whether and how to rely upon foreign decisions may lead to ‘judicial fig-leafing’<sup>139</sup> as judges are likely to reach for such laws to cover their own value judgments.<sup>140</sup>

Despite his vociferous objections to the use of foreign decisions in constitutional interpretation, Justice Scalia states that ‘[w]hen federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories’ because ‘[o]therwise the whole object of the treaty, which is to establish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated’.<sup>141</sup> In *Olympic Airways v Husain*, for example, Justice Scalia dissented on the ground that the US Supreme Court’s interpretation of the Warsaw Convention was contrary to (and no more convincing than) the interpretation previously offered by English and Australian courts.<sup>142</sup> Although quick to criticize the use of a smattering of foreign decisions in other contexts, he deferred here to an interpretation adopted by intermediate appellate courts of just two other States, which were both decided within the previous 18 months and after the US Court of Appeal’s decision in that case. His reasoning? ‘We should defer to the views of other signatories, much as we defer to the views of agencies—that is to say defer if it’s within the ballpark, if it’s a reasonable interpretation, though not necessarily the very best.’<sup>143</sup>

In terms of the aim of comparative international law, Justice Scalia cites no international law authority for the high level of deference he concludes is owing to the decisions of a handful of other national courts. He shows little or no appreciation that foreign court decisions might be characterized as attempts at law creation rather than law enforcement, just as he fails to assert his own court’s potential role in the law creation process. As for following a rigorous methodology, Justice Scalia is forthright in his criticisms of the use of foreign decisions in other contexts due to the lack of any serious methodological constraints, but he embraces the persuasiveness paradigm here and finds himself easily convinced by the decisions of two States out of more than

<sup>137</sup> R Alford, ‘Misusing International Sources to Interpret the Constitution’ (2004) 98 AJIL 57, 64–67; M Ramsey, ‘International Materials and Domestic Rights: Reflections on Atkins and Lawrence’ (2004) 98 AJIL 69, 77.

<sup>138</sup> *Roper v Simmons* 534 US 551 (2005) (Scalia); Dorsen (n 136) 521–22, 531; see also Confirmation Hearing on the Nomination of John G Roberts, Jr, 13 September 2005; Alford, *ibid* 67–69; Ramsey *ibid* 76–77.

<sup>139</sup> R Posner, ‘No Thanks, We Already Have Our Own Laws: The Court Should Never View a Foreign Legal Decision as a Precedent in Any Way’ (July/August 2004) Legal Affairs <[http://www.legalaffairs.org/issues/July-August-2004/feature\\_posner\\_julaug04.msp](http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp)> accessed 30 October 2010.

<sup>140</sup> Dorsen (n 136) 531; Scalia (n 136) 309.

<sup>141</sup> Scalia (n 136) 305; see also Dorsen (n 136) 521.

<sup>142</sup> *Olympic Airways v Husain* 540 US 644, 658 (2004) (Scalia, J dissenting).

<sup>143</sup> Dorsen (n 136) 521.

150 treaty parties. It is unclear how Justice Scalia reconciles the lack of any comparative international law methodology with his strong complaints about the discretionary use of foreign decisions as persuasive authority in other contexts.

### 3. *International law constraints or duality and discretion?*

It might be that those who object to foreign law citation in other areas accept it in the international sphere on the basis that international law provides its own constraints on the persuasiveness paradigm. For example, Ramsey compares the use of ‘fragments of international practice and international opinion’ in comparative constitutional law with international law’s serious ‘prerequisites of sustained widespread custom followed out of a sense of legal obligation.’<sup>144</sup> Likewise, Sitaraman argues that references to international law may be less problematic than comparative constitutional citation on the basis that, *inter alia*, international law poses ‘fewer concerns in terms of accuracy’ and ‘contextual complexities.’<sup>145</sup>

However, comparative international law is beset with many of the same methodological difficulties as comparative law in other contexts.<sup>146</sup> Domestic decisions dealing with international law issues are not necessarily easier to find than other national judgments. This is particularly true across language barriers and different types of legal systems, meaning that most references to comparative law draw on a limited range of countries with familiar language or legal systems, meaning that such references are usually not truly representative of the full range of systems and approaches. While problems of access are most acute for mono-linguists, even multi-linguists will rarely (if ever) have the ability to do anything close to a comprehensive survey, resulting in an almost inevitably partial approach. And even when we find foreign judgments, we need to be conscious of the problems of fully understanding decisions that originate in unfamiliar legal systems.<sup>147</sup> *Ferrini* provides a good illustration as the Italian Supreme Court relied on a Greek decision that had since been effectively overturned.<sup>148</sup>

<sup>144</sup> Ramsey (n 137) 71.

<sup>145</sup> G Sitaraman, ‘The Use and Abuse of Foreign Law in Constitutional Interpretation’ (2009) 32 *Harvard J of L and Public Policy* 653, 656 fn 12.

<sup>146</sup> On general approaches to and difficulties with comparative methodologies, see R Michaels, ‘The Functional Method of Comparative Law’, in M Reimann and R Zimmerman (eds), *The Oxford Handbook of Comparative Law* (OUP, Oxford, 2006) 339; Zweigert and Kotz (n 111); HP Glenn, ‘Comparative Legal Reasoning and the Courts: A View from the Americas’, in Canivet and others (eds) (n 64) 217; B Markesinis, *Foreign Law and Comparative Methodology: A Subject and a Thesis* (Hart Publishing, Oxford, 1997); B Markesinis, ‘The Judge as Comparatist’ (2005) 80 *Tulane L Rev* 11.

<sup>147</sup> J Stapleton, ‘Benefits of Comparative Tort Reasoning: Lost in Translation’ (2007) 1 *J of Tort L* 1, 30–37.

<sup>148</sup> *Ferrini* (n 16) para 8. See discussion in *Jones* (n 17), paras 22, 55, 62.



Comparative international law is also not immune from the difficulties of transplanting principles from one domestic system to another, with all of the attendant risks of misunderstandings and alterations. Arvind has recently noted the ‘transplant effect’ in harmonization treaties where single texts are interpreted in diverse ways that often undermine the very point of harmonization.<sup>149</sup> If we accept that domestic court decisions often hybridize national and international law, then it can become difficult to undertake comparative assessments because we have no real theory of which differences matter. Consider the comparison between the ATS and *action civiles* outlined above: these are simultaneously similar and different, meeting some but not all of the same functions.<sup>150</sup> We cannot be too rigorous in requiring exact equivalents as that would undermine the possibility of comparative international law given that domestic translations will inevitably produce differences. But when such differences are sufficient to undermine the ability to engage in meaningfully comparisons is uncertain.

In addition, it is not clear that international law provides the necessary guidance and constraints on the comparative international law process, contrary to what many commentators and judges seem to assume. To begin with, the rigorous international law standards suggested for identifying custom and finding an agreement on treaty interpretation sound good in theory but are so stringent as to be rarely adhered to in practice, even by international courts. Further, the duality of domestic court decisions may augment rather than constrain the discretion accorded to those engaged in comparative international law analysis.

The VCLT speaks of subsequent practice of the treaty parties from which an agreement on interpretation might be inferred. But there will almost never be circumstances in which a particular issue has been considered by all or even most of the treaty parties and in some cases, such as *Pinochet*, the issue may truly be one of first impression. Often the question will be whether a smattering of cases can be coupled with notions like acquiescence to constitute sufficient subsequent practice or whether those cases should be downplayed as the practice of a handful of States only.<sup>151</sup> Given the likely absence of sufficient practice either way, the relevance of subsequent practice will often depend on the way in which the search is framed. For instance, in finding that ICJ judgments should not be accorded domestic effect in the United States, the US Supreme Court considered it relevant that the courts of only one treaty party had found that an ICJ judgment was dispositive.<sup>152</sup> Yet the

<sup>149</sup> TT Arvind, ‘The “Transplant Effect” in Harmonization’ (2010) 59 ICLQ 1, 65.

<sup>150</sup> See above Section III.A.

<sup>151</sup> Gardiner (n 22) 225–49; Villiger (n 22) 429–432. Thus *Jones* and *Ferrini* made determinations about the content of international law based on case law from a handful of jurisdictions, while *Olympic Airways* shows that the existence of numerous treaty parties does not necessarily translate into a wealth of case law on specific points.

<sup>152</sup> *Medellín v Texas* 552 US 491, 516 (2008); *Sanchez-Llamas* (n 128) 343–344.

Supreme Court did not ask the opposite question of how many national courts had considered the issue and found that ICJ judgments were not binding.<sup>153</sup>

As for customary international law, a national court decision should not be considered to represent custom, as a matter of theory, unless it is supported by widespread and consistent State practice, possibly including other national court decisions.<sup>154</sup> However, it is virtually impossible to accurately assess the customary status of almost any norm given the number of States, the myriad forms of State practice, the existence of language barriers, and disputes about what counts as State practice and *opinio juris*. The result is that many actors, including international courts, routinely assert the existence of custom based on a handful of examples of State practice, with contrary practice being discounted as a breach and the absence of other practice being explained through concepts such as acquiescence.<sup>155</sup>

Whether dealing with treaty interpretation or customary international law, surveys of national court decisions are likely to turn up insufficient evidence to ever truly be quasi-determinative, so the issue is when they are treated as persuasive. Here, the duality of national court decisions becomes important. If a comparative survey produces cases that the decision maker likes, the temptation will be to characterize these judgments as impartial evidence of the existence or meaning of international law. If the survey produces cases that the decision maker dislikes, these decisions are likely to be discounted as unpersuasive on the basis that they reflect the practice of only a few States. Unlike the use of foreign decisions in constitutional interpretation, which at most are persuasive, the sources doctrine provides cover for the ultimate

<sup>153</sup> I Wuerth, 'Transnationalizing Public Law' (2009) 10 German L J 1337, 1339.

<sup>154</sup> *Asylum (Colombia/Peru)* [1950] ICJ Rep 266, 276; *North Sea Continental Shelf (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3, 42, para 73; Thirlway (n 25) 124; Restatement (Third) (n 25) s 102(2).

<sup>155</sup> In the *Nicaragua* case, for example, the ICJ found customary prohibitions on the use of force and intervention by citing General Assembly resolutions, noting that it was sufficient for conduct to be generally consistent with these statements, provided that instances of inconsistent practice had been treated as breaches of the rule concerned rather than as generating a new rule. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14, para 186. In *DRC v Belgium*, the ICJ stated that it had 'carefully examined State practice, including national legislation and those few decisions of national higher courts' and, from that, it was unable to find a customary international law exception to the immunity of incumbent ministers of foreign affairs. *Arrest Warrant of 11 April 2000* (n 62) para 52. Yet it did not cite widespread and consistent practice on the immunity of foreign ministers in the first place, nor explain why the State practice in favour of an exception was insufficient. Nor is the ICJ the only international court to fall short of the professed approach to establishing custom. For example, in *Tadic*, the Appeals Chamber of the ICTY found that customary international law imposes individual criminal liability for certain violations in internal armed conflicts based on a single Nigerian judgment, military manuals from a handful of States (Germany, New Zealand, America and the United Kingdom), limited legislation (Yugoslavia and Belgium) and two Security Council resolutions (that applied to Somalia and were not specific on the point). *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-A (5 October 1995), paras 128–134. See R Schondorf, *A Theory of Supra-National Criminal Law* (unpublished JSD thesis).

interpretive 180 degree manoeuvre of accepting foreign decisions on international law as almost binding or dismissing them as entirely unpersuasive.

#### IV. CONCLUSION

Many contributions in international law focus on the benefits of national courts acting as impartial law enforcers, without recognizing their dual potential as law creators. The aim of this article is not to argue that national courts should adopt one role over the other, but rather to demonstrate that both roles have a basis in the doctrine of sources, with each giving rise to distinct advantages and disadvantages, depending on the issue and one's viewpoint. Any account of the role of national courts under international law must confront this tension as it creates an ambiguity that pervades both domestic case law and critiques of such decisions.

The duality of national court decisions also complicates the growing practice of comparative international law. On one level, the idea of comparative international law may help us to identify diversity and hybridity by focusing our attention on the way that international law is domesticated differently by various national courts. Instead of simply mechanically enforcing international law, domestic courts frequently produce hybrid international/national norms through the process of nationalization, which provides fertile ground for comparative study.

On a different level, attempts to use comparative methodologies to identify and interpret international law by surveying national court decisions raise distinct problems. The aim of comparative international law is often assumed to be problem free as one is simply surveying the decisions of different national courts interpreting common norms. Yet the tendency to emphasize the importance of consistent interpretation may have the effect of overplaying the role of domestic courts as law enforcers and undermining their potential as law creators. As for methodology, comparative international law is beset with many of the same problems as comparative law more generally, including the difficulty of finding and understanding decisions in unfamiliar languages and legal systems which often results in only limited comparisons being undertaken. In addition, the ability to characterize domestic judgments as impartial law enforcement or partial law creation gives enormous discretion to those engaged in comparative international law to upgrade or downgrade the status of these decisions to suit their own purposes.

It would be a mistake to conclude from these difficulties that the comparative international law process is not worthwhile. It is important to be cognisant of its potential whilst remaining mindful of its limits. There is a case for recognizing the benefits of national courts engaging in a dialogue and looking for common interpretations, whilst still valuing normative contestation and the role of each national court in creating and developing international law. Although national courts should look for reasonable evidence of

consensus, rather than being easily persuaded by a handful of authorities, the requirements for finding an agreement should not be so stringent as to be counterproductive, particularly as many issues will receive treatment from a handful of courts only, and hybridization and differences will inevitably arise in the nationalization of international law. Above all, academics, practitioners and international and national courts should acknowledge the dual role of domestic courts under international law and recognize the impact that this duality may have on the comparative international law process.