

Human Rights' Adjudication as Transnational Adjudication: A Peripheral Case of Domestic Courts as International Law Adjudicators

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I. INTRODUCTION

THE ROLE DOMESTIC courts should play in the adjudication of international law, not only in its enforcement, but also in the interpretation and hence the 'development' of international law is of increasing interest to international lawyers.¹

This chapter contributes to this most recent and normative turn in the discussion of the role of domestic courts in international law. It does not aim to do so generally, however, but looks at the adjudication and hence interpretation of international human rights law by domestic courts. It argues that international and domestic human rights adjudication processes are best understood together as one single process: transnational human rights adjudication. After explaining the specificities of that process, the contribution argues that international human rights law and adjudication should not be taken too readily as a core case or example in the general discussion of domestic judicial law-making in international law, or at least not without serious qualifications.

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¹ On the 'enforcement' and 'interpretation' or 'development' functions of international adjudication and their tensions, see Samantha Besson, 'International Judges' Function(s) between Dispute-Settlement and Law-Enforcement—From International Law without Courts to International Courts without Law' (2012) 34 *Loyola Law Review* 33; Samantha Besson, 'Legal Philosophical Issues of International Adjudication—Getting Over the *amour impossible* between International Law and Adjudication' in Karen Alter, Cesare Romano and Yuval Shany (eds), *Oxford Companion to International Adjudication* (Oxford University Press, 2014).

The proposed argument is four-pronged. Section II maps the discussion of international law adjudication by domestic courts and explains how it is becoming more normative. Against the background of those discussions, Section III identifies where the puzzle of international human rights adjudication lies. In Section IV, the argument explores the specificities of international human rights adjudication by international and domestic courts, before articulating, in Section V, a transnational interpretation of those unique features and functions.

Methodologically, the contribution approaches the question of international human rights adjudication from the perspective of human rights theory, and, more precisely, from the perspective of a legal theory of human rights. It aims to provide the best interpretation and justification of the existing practice of international human rights law, that is, one that puts the practice in its best light.² To that extent, the contribution does not merely aim to propose a moral theory of the legitimacy of domestic adjudication in the human rights context that could then be used to reform existing practice. Nor, however, is it about reconstructing the practice as a theory and hence merely about justifying it. There is a space between utopia and apology. The practice of international human rights law entails its own immanent justifications and critiques, and those are the justifications and critiques that need to be identified and interpreted in the proposed theory of human rights adjudication so as to best fit the practice while at the same time justifying and criticising it.³

For reasons of scope, the argument advanced focuses mostly on the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (ECHR)). While this may be criticised for falling prey to a regionalist bias as well as to a judicial one, both critiques may be countered. As I will explain in the conclusion, much of what I will argue may be transposed *mutatis mutandis* to the universal level and to the future World Court of Human Rights if it ever comes into existence. The same may be said, albeit with some fine-tuning, about United Nations (UN) human rights treaty bodies that are non-judicial in their reasoning and interpretation of international human rights law.⁴ One may argue, indeed, that they have jurisdiction to monitor and not to interpret international human rights law,⁵ but that this provides for even more scope for interpretation by domestic courts in human rights adjudication in the end. In any case, it is actually quite common for human rights scholars to include all those judicial and non-judicial international bodies in the same discussion.⁶

² See eg Samantha Besson, *Human Rights as Law* (forthcoming, manuscript on file with author).

³ Of course, this assumes that judges are moral reasoners (albeit of a special kind), and that their motivation is to develop the best interpretation of international human rights law in their democratic domestic context and, when necessary, to convince the ECtHR to change its consolidated European interpretation as well.

⁴ See eg Birgit Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' in Helen Keller and Geir Ulfstein (eds), *Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012).

⁵ On this distinction in international adjudication in general, see Besson, 'Legal Philosophical Issues of International Adjudication' (n 1).

⁶ See eg Schlütter (n 4).

II. INTERNATIONAL LAW ADJUDICATION BY DOMESTIC COURTS

After a summary of the discussion of the role of domestic courts in the adjudication of international law to date, I will introduce what one may take as a recent normative turn in the discussion.

A. The Discussion to Date

To date, international legal scholars' discussions of the role of domestic courts in the adjudication of international law have been largely descriptive and of a sociological kind. Most authors have sought to assess the 'effects' of domestic courts on international law, and more generally, to explain the 'role' domestic courts' decisions have played in the interpretation and hence development of international law.⁷ This has been done mostly in general terms, but also, recently, within specific regimes of international law where the role of domestic courts has been greater, such as international responsibility law or international immunities law.⁸

In a nutshell, those discussions may be said to have branched out in three directions. Authors have identified and discussed: the legal bases for domestic courts' engagement with international law and the various types of engagement therewith; the variables in the international law framework that affect that engagement in practice; and the various effects domestic courts' decisions have had in international law.

⁷ See eg Antonios Tzanakopoulos, 'Domestic Judicial Law-Making' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Law-Making* (Edward Elgar, 2016 forthcoming); Antonios Tzanakopoulos and Christian Tams, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 *Leiden Journal of International Law* 531; Shaheed Fatima, *Using International Law in Domestic Courts*, 2nd edn (Hart Publishing, 2013); Antonios Tzanakopoulos, 'Domestic Courts as the "Natural Judge" of International Law: A Change in Physiognomy' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law*, vol 3 (Hart Publishing, 2012); Study Group: Principles on the Engagement of Domestic Courts and with International Law, 'Principles on the Engagement of Domestic Courts with International Law' in International Law Association Preliminary Report (2012); Jean d'Aspremont, 'The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order' in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing, 2011); André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, 2011); Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International & Comparative Law Quarterly* 57; Yuval Shany, 'National Courts as International Actors: Jurisdictional Implications' (2009) 15 *Federalismi.it*, available at www.federalismi.it/nv14/articolo-documento.cfm?artid=13810; Eyal Benvenisti and George Downs, 'National Courts, Domestic Democracy and the Evolution of International Law' (2009) 20 *European Journal of International Law* 59; Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts* (Oxford University Press, 2007); Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and Politics* 501, and before them: Hersch Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *British Yearbook of International Law* 65; Lassa Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 *American Journal of International Law* 313; Robert Jennings, 'The Judiciary, International and National Law and the Development of International Law' (1996) 45 *International & Comparative Law Quarterly* 1.

⁸ See eg the various contributions in the special issue of the (2013) 26 *Leiden Journal of International Law* edited by Antonios Tzanakopoulos and Christian Tams.

i. The Legal Bases for Domestic Courts' Engagement with International Law and the Types Thereof

Some of the legal bases or grounds for the duty or, at least, for the right or power of domestic courts to apply, and hence to interpret international law in their decisions have been clarified in the literature.⁹ The first distinction one has to draw in this regard is between international and domestic legal bases.

With respect to *international* legal bases, one should mention the following in particular. First of all, the principle of primacy of international law binding the state (and its courts as agents of the responsible state in case of violation of international law), and the principle of consistent interpretation of international law that derives from it (in monist and dualist orders alike). This duty of compliance extends to a duty of domestic courts to abide by the international framework of interpretation of international law (and in particular to comply with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT)).^{10,11} Second, one should mention the principle of exhaustion of local judicial remedies that applies in some cases in order for an international court to then acquire jurisdiction.¹² This principle implies a primary obligation for states to set up domestic judicial remedies in case of violation of international law. This may be connected, thirdly, to the explicit duty of states under international human rights law to guarantee a judicial remedy for any violation of international law, including a domestic judicial remedy.¹³ Fourth, the principle of 'substantive' subsidiarity¹⁴ applies in some cases, mostly in the context of international human rights law,¹⁵ and governs the ability of an international court to impose a new interpretation. As we will see, this principle requires that international courts observe a 'consensus' or 'common approach'¹⁶ among states before identifying a new interpretation of international law on that basis, thus implying that

⁹ See in particular, Tzanakopoulos, 'Domestic Judicial Law-Making' (n 7); Tzanakopoulos and Tams (n 7).

¹⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

¹¹ See d'Aspremont (n 7).

¹² See below section IV.B, in the international human rights context. See also Yuval Shany, 'Towards a General Margin of Appreciation Doctrine in International Law?' (2006) 16 *European Journal of International Law* 907 on subsidiarity in international law in general.

¹³ See Council of Europe, High Level Conference on the Future of the European Court of Human Rights 'Interlaken Declaration' (19 February 2010), available at wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2045095&SecMode=1&DocId=1547616&Usage=2 and, more recently, Council of Europe, *Dialogue between Judges 2012: 'How Can We Ensure Greater Involvement of National Courts in the Convention System?'* (European Court of Human Rights Publications, 2012).

¹⁴ See Samantha Besson, 'The "Erga Omnes" Effect of Judgments of the European Court of Human Rights—What's in a Name?' in Samantha Besson (ed), *La Cour européenne des droits de l'homme après le Protocole 14—Premier bilan et perspectives* (Schulthess, 2011) on the three forms of subsidiarity in international human rights law: procedural, substantive and remedial.

¹⁵ See below sections IV.B and D.

¹⁶ On the use of this other term, privileged recently by some judges, see *Christine Goodwin v the United Kingdom* ECHR 2002-VI, para 85.

domestic courts in particular are the actors responsible for changes in the interpretation of international law. Finally, one can allude to the requirement of domestic judicial enforcement in some cases. This makes domestic courts the main agents of the *restitutio in integrum* following a violation of international law and the condemnation by an international court.¹⁷

As to the *domestic* legal bases for domestic courts' engagement with international law, one should mention the following bases. First of all, the constitutional requirement of incorporation or transposition of international law into domestic law (for example, whether the domestic legal order is monist or dualist), and hence into the corpus of valid domestic law applicable by domestic courts and their material jurisdiction. Second, the principle of separation of powers, and that of judicial review of the executive and the legislature based on any valid law under the jurisdiction of the domestic court and that may include international law. Finally, constitutionalism, and the related principle of (internationalised) constitutional review of other domestic institutions and their decisions.

Three remarks are in order with respect to these various legal bases and in particular to the types of engagement with international law they justify or require. First of all, while some of these legal bases are legal grounds for *duties* of domestic courts to apply and interpret international law, others give rise to mere *rights* or powers for them to do so. Only a few of them ground both rights and duties. This is a factor that needs to be taken into account in the discussion of the legitimacy of domestic courts' engagement with international law and of the authority of their interpretations. Secondly, while some of those legal bases cover the right or duty to both enforce *and* interpret international law, not all of them do so. This should also be kept in mind later on when considering the legitimacy of domestic courts' decisions. Finally, some of these legal bases and the various duties/rights they foresee may enter into conflict, and this makes things complicated. There may in particular be tensions between the *domestic* and *international* legal duties and/or rights of domestic courts. One may, for instance, think of tensions between the courts' duty of constitutional fidelity, on the one hand, and the identification of a customary rule on state immunities, on the other.¹⁸

ii. The International Framework Variations in Domestic Courts' Engagement with International Law

Various factors in the international law framework, which affect the engagement of domestic courts with international law in practice, have been uncovered in the literature.¹⁹ One could mention the following in particular.

First of all, there are the sources of international law at stake. When the international law norms interpreted stem from customary international law or general

¹⁷ For a discussion, see Besson (n 14).

¹⁸ Of course, one could argue that those conflicts may also be internal to the international legal bases themselves.

¹⁹ See in particular, Tzanakopoulos, 'Domestic Judicial Law-Making' (n 7); Tzanakopoulos and Tams (n 7).

principles, the effects of domestic courts' judicial interpretations on the interpreted norm are greater than they are in the case of treaties. This has to do with the validating role of the judiciary with respect to norms stemming from those sources of international law. This is as true for domestic courts as it is for international courts.²⁰ Secondly, there are the norms of international law at stake. When the norms of international law interpreted are indeterminate, there is more scope for their interpretation and contextualisation, and hence there is a greater role for any interpreter, including a domestic court. Thirdly, there are the duties of international law at stake. When the norms of international law at stake give rise to interstate duties, it is less likely that domestic courts will be called to enforce and hence interpret them. Even when they do, they are not usually alone in doing so. Things are different when the norms applied generate intra-state duties, as is the case with international immunities law or international human rights law, for instance. Fourthly, there may be an international court with jurisdiction. The existence of one or many international courts with (compulsory or non-compulsory) jurisdiction affects the leeway given to domestic courts in the interpretation of international law. This is clear from areas such as international humanitarian law and international environmental law, for instance, where there are few or no international courts exercising jurisdiction. Finally, there is the monist or dualist nature of the domestic legal order at stake. This feature of the relevant domestic legal order affects the scope of its domestic courts' jurisdiction and hence whether and how they interpret international law. This point has, however, become largely moot in practice, especially with respect to customary international law and general principles.²¹

iii. The Effects of Domestic Courts' Engagement with International Law

With respect to the effects of domestic courts' engagement with international law, the primary distinction to draw is between their legal effects (that is, whether or not domestic decisions have some kind of legal authority for subjects of international law based on the existing sources of international law) and their non-legal effects (that is, whether or not domestic decisions trigger other kinds of reaction on the part of subjects of international law, international institutions and courts or other domestic institutions and courts).²²

When assessing the legal effects of domestic courts' decisions pertaining to international law, it is important to distinguish between the role of domestic courts as enforcers of international law (*qua* organs of their respective states) and the corresponding (relative) decisional authority of their decisions, on the one hand, and their

²⁰ On this question, see Donald Regan, 'International Adjudication: A Response to Paulus—Courts, Custom, Treaties, Regimes, and the WTO' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010); Besson, 'Legal Philosophical Issues of International Adjudication' (n 1).

²¹ See Giorgio Gaja, 'Dualism: A Review' in Janne Nijman and André Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press, 2007).

²² On those various 'formal' and 'informal' reactions, see Tzanakopoulos, 'Domestic Judicial Law-Making' (n 7).

role as interpreters and hence as judicial law-makers of international law and the corresponding (general) interpretative authority of their decisions, on the other.²³ This is a key distinction mentioned above by reference to the legal bases for domestic courts' engagement with international law, and hence to the different powers or duties of domestic courts with respect to either the enforcement or the interpretation of international law. Note that I am not considering the legal effects of domestic courts' interpretations of international law in domestic law *qua* (source of judicial) domestic law. Those effects are obvious, and are only of indirect interest within international law (for example, for the establishment of state nationality for the purpose of diplomatic protection).

If one focuses exclusively on the *legal authority* of domestic courts' *interpretations* of international law from the perspective of the *sources of international law*, different ways for these courts to exercise legal authority can be identified by reference to different sources of international law.

First of all, domestic courts' interpretations of international law may be considered as evidence of or even as the content of either one of the two constitutive elements of customary international law (either *opinio juris* or general practice²⁴), but also of treaty law (Article 38(1)(a) and (b) of the Statute of the International Court of Justice (ICJ Statute)).²⁵ This might be evidence provided to an international court or another domestic court, or to any subject of international law. This has been confirmed by the practice of the ICJ in the context of intra-state duties in particular, for instance in decisions pertaining to the international law of immunities.²⁶ Such sources of legal authority are sometimes referred to as material sources of international law.

Secondly, domestic courts' interpretations of international law may also be considered as evidence or as content of the general principles of law recognised by civilised nations and, most of the time, by domestic courts in those civilised nations (Article 38(1)(c) ICJ Statute).²⁷ This might be evidence provided to an international court or another domestic court, or to any subject of international law. Again, such sources of legal authority are referred to as material sources of international law.

Thirdly, domestic courts' interpretations of international law may also be considered as a process of validation of another source of international law such as customary international law or general principles, or treaty law (Article 38(1)(d)

²³ On this distinction, see Besson (n 14).

²⁴ On these two elements, see ILC, 'First Report on Formation and Evidence of Customary International Law by Special Rapporteur Sir Michael Wood' (17 May 2013) UN Doc A/CN.4/663; and ILC, 'Second Report on Identification of Customary International Law by Special Rapporteur Sir Michael Wood' (22 May 2014) UN Doc A/CN.4/672.

²⁵ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute).

²⁶ See eg Peter Tomka, 'Custom and the International Court of Justice' in Council of Europe (ed), *The Judge and International Custom* (Council of Europe, 2013); *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99.

²⁷ See Samantha Besson, 'General Principles in International Law—Whose Principles?' in Samantha Besson and Pascal Pichonnaz (eds), *Les principes en droit européen—Principles in European Law* (Schulthess, 2011).

ICJ Statute).²⁸ Here, one refers to domestic courts' interpretations as an auxiliary or subsidiary formal source of international law. Indirectly, this acknowledges international judicial law-making as a process of international law-making.²⁹ It is rarer for domestic courts to be recognised as such than for international courts, however.³⁰ This would be even more controversial with respect to domestic courts.³¹ And thus, fourthly, when domestic courts' interpretations of international law are considered as a process of validation of international law, they are usually taken to so operate only in a gradual and collective fashion: it requires many simultaneous domestic courts' interpretations for them to validate a norm stemming from a formal source of international law applicable to all of them.³² This is due to the principle of 'self-interpretation' by states that prevails in international law. In this context, the interpretation by one of those self-interpreting state's domestic courts cannot claim any authority outside that state's legal order. If it does, then it is as one among many states' practices constitutive of the general 'subsequent practice' of states which establishes the agreement of those states according to Article 31(3)(b) VCLT, and hence as a constitutive element of some form of interpretative custom.³³ Of course, domestic courts' interpretation of international law may be trumped by that of an international court with the ultimate authority to interpret (provided there is such an ultimate international interpreter in the case at hand, which is rare).

Interestingly, in all four types of legal authority of domestic courts' interpretations of international law, but especially in the first two, interpretations of international law may be taken not only for what they are formally (that is, domestic courts' decisions) with the legal authority that goes with it, but also, more substantially, as epistemic emulations of what the international courts' interpretations of that same norm of international law could look like.³⁴ When this is the case, what is at stake is some form of theoretical or epistemic authority distinct from the practical legal authority discussed so far. Furthermore, the self-referential dimension of the judicial law-making process may be worth emphasising. While the self-referential nature of the reasoning of international courts which know that, when they interpret

²⁸ On this question, see Regan (n 20); Besson, 'Legal Philosophical Issues' (n 1).

²⁹ See Besson, *ibid*; Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking—On Public Authority and Democratic Legitimation in Global Governance* (Springer, 2012); Marc Jacob, 'Precedents: Lawmaking Through International Adjudication' (2011) 12 *German Law Journal* 1005; Alain Pellet, 'Article 38' in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2006).

³⁰ See eg Pellet (n 29); Roberts (n 7).

³¹ See Besson, 'Legal Philosophical Issues' (n 1).

³² See Roberts (n 7).

³³ I am not deciding here between considering subsequent practices of domestic courts as customary law in itself, and considering them as mere interpretations of treaties and hence between a new interpretation of the same treaty norm and its modification, for the difference is largely moot and a new interpretation implies a new norm even when its source is a treaty. See also ILC, 'Second Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties by Special Rapporteur Georg Nolte' (26 March 2014) UN Doc A/CN.4/671, 51. See also *Al-Saadoon and Mufdhi v the United Kingdom* ECHR 2010, paras 119–20 for an interpretation of Art 3 ECHR that goes against the wording of Art 2 para 1 ECHR.

³⁴ See also ILC, 'First Report by Sir Michael Wood' (n 24).

international law, their interpretation will become part of the law they are interpreting is a well-known and inescapable difficulty, it is more problematic in the case of domestic courts. Indeed, the latter courts' impact on their object of interpretation is less immediate and the concurrent interpretation by other domestic courts largely indeterminate for them. This is particularly the case as, along the lines discussed above, their rights and duties to engage with international law under international and domestic law may enter into conflict.

B. A Normative Turn

Most recently, the discussion about the role of domestic courts in international law seems to have been taking a normative turn, leaving previous sociological considerations aside, but also providing more than the usual passing reference to Scelle's *dédoublement fonctionnel*.³⁵ Authors have started to focus on the evaluation of the impact, but also of the justification of the authority of domestic courts' decisions in international law.³⁶

In short, the questions one should be asking now are: How can the authority of the decisions by domestic courts be justified in international law? How should the decisions be issued or reasoned, that is, what are the applicable principles, standards or criteria? What priorities can be justified in cases where they conflict?

Various positions could be defended. Some authors have mentioned, for instance, a duty of 'systemic integration' based on a systemic argument about the international legal order.³⁷ Others have proposed an argument drawing from the international rule of law.³⁸ But there could be many others. Whatever they are, it is important that their discussion is conducted with sufficient precision and rigour.

At this stage, the main difficulty seems to be that adjudication as a source and function in international law is the least mature of all sources and functions. Without entering into too much detail, it is sufficient to remember that most of the time there is no single court of international law, but many of them. In fact, there is not always a court and, when there is one, their jurisdiction is not always compulsory. Moreover, judicial law-making still sits uneasily with the original sources of international law, and in particular with state-made international law and especially the self-interpretation of international law. It is no wonder that international law adjudication remains one of the most difficult questions from the perspective of international

³⁵ Georges Scelle, 'Le phénomène juridique du dédoublement fonctionnel' in Wolfgang Schätzel and Hans-Jürgen Schlochauer (eds), *Rechtsfragen der internationalen Organisation—Festschrift für Hans Weberg zu seinem 70. Geburtstag* (Klostermann, 1956).

³⁶ See eg Massimo Iovane, 'Domestic Courts Should Embrace Sound Interpretative Strategies in the Development of Human Rights-Oriented International Law' in Antonio Cassese (ed), *Realizing Utopia—The Future of International Law* (Cambridge University Press, 2012); d'Aspremont (n 7); Nollkaemper (n 7).

³⁷ See eg d'Aspremont (n 7).

³⁸ See eg Shany, 'National Courts' (n 7).

legal philosophy today.³⁹ In turn, this uncertainty necessarily hampers the discussion of the legitimate authority of domestic courts' decisions in international law. Secondly, a connected legal theoretical difficulty is the distinction between domestic and international law, and the way one should best conceive of their relationship in one or many legal orders. Clarity on those issues is a pre-condition to any discussion of the relationship between domestic judicial law-making and international law.

Finally, whatever the duties of domestic courts and the standards applied, there are also important practical issues to consider. For instance, the problem of resources and the sheer difficulty for domestic courts to work with international law, hence the enhanced risk of selectivity in the choice of the international law applied or interpreted (for instance, many domestic courts focus on international courts' decisions only and not on primary sources of international law) or even some of the strategic biases present (for instance, there is a lot of cherry-picking of the international legal norms that best suit the domestic court's purpose or argument). This is especially problematic in the context of the interpretation of general international law (for example, of international law rules on sources, interpretation and responsibility). Of course, whether these practical difficulties, and especially the strategic risk, are greater for domestic courts than they are for international courts remains to be demonstrated.

This chapter contributes to this most recent and normative turn in the discussion of the role of domestic courts in international law. It does not aim to do so generally, however, but looks at the adjudication and hence interpretation of international human rights law by domestic courts.

III. THE PUZZLE OF INTERNATIONAL HUMAN RIGHTS ADJUDICATION BY DOMESTIC COURTS

There is a very simple puzzle about the role of domestic courts in international human rights adjudication which anyone familiar with both international human rights law and international dispute settlement will recognise. It has to do with the sources of international human rights law, on the one hand, and with the international courts in place to monitor its application, on the other.

To start with, the sources of international human rights law are largely conventional. There are countless international and regional human rights treaties in place, and at least most of them are ratified very broadly. Thus, the sources of international human rights are not only or mainly customary international law. To that extent, they differ from other areas of international law where domestic courts have contributed effectively to the interpretation of international law in practice (including to the latter's identification as exemplified in the law of international responsibility or of international immunities).

³⁹ See Besson, 'Legal Philosophical Issues' (n 1); Samantha Besson, 'The Egalitarian Dimension of Human Rights' (2012) *Archiv für Sozial- und Rechtsphilosophie Beiheft* 19.

Moreover, international human rights law is one of the few international law regimes with international courts in place (though only regional so far) that exercise compulsory jurisdiction. In this respect again, it is unlike other areas of international law where the impact of domestic courts has been important in the absence of an ultimate international law interpreter (in lieu of self-interpretation). In areas such as the law of international responsibility or the international law on immunities, indeed, domestic courts have gradually contributed to the development of an interpretative custom in the absence of an international court's authoritative interpretation.

Still, and this is the puzzle, domestic courts' decisions do actually contribute to a high degree to the interpretation of international human rights law in practice. Furthermore, their interpretations of international human rights law are granted, at least by international human rights courts, a form of legal authority that goes further than any of the four types of legal authority of domestic courts' interpretations of international law mentioned before.

In response to this puzzle, this contribution makes two claims: one is substantive and the other is methodological.

First of all, international human rights law, and hence its adjudication, are special because human rights are special. Based on their special nature, I would like to argue that domestic courts should be understood as the primary adjudicators of human rights, and that this should in turn be reflected in the way international human rights adjudication works in relation to domestic courts. To reflect this, I defend the view that both levels of human rights adjudication are best referred to as forms of 'transnational' human rights adjudication.

Secondly, and as a result, international human rights law and adjudication should not be taken too hastily as a core example in the general discussion of the role of domestic courts in international law, or at least not without serious qualifications. It is confusing to take international human rights law as a central example, besides international investment law or trade law, and then to consider the specificities of international human rights law (in particular, as giving rise to inter-state and non-reciprocal duties) as generalisable and then transferrable into other areas of international law.⁴⁰

IV. THE SPECIFIC FEATURES OF INTERNATIONAL HUMAN RIGHTS LAW ADJUDICATION

The specific features of international human rights adjudication in practice, and especially the role of domestic courts, are best justified by reference to the democratic argument of mutual validation between domestic and international human rights law. More specifically, this argument fits and justifies three dimensions of our contemporary human rights practice: the kinds of norms, sources and adjudication one encounters in international human rights law.

⁴⁰ See eg Tzanakopoulos and Tams (n 7); Tzanakopoulos, 'Domestic Judicial Law-Making' (n 7).

A. The Mutual Validation of Domestic and International Human Rights Law

Given the mutual relationship between human rights *qua* equal rights and (basic moral) equality, and in turn between (basic moral) equality and political equality and hence democracy,⁴¹ human rights ought to be mutually identified and their duties specified, allocated and fulfilled in a democratic community and through democratic processes.⁴² In the current state of international relations, this means in the relevant state having jurisdiction over the individual in question. Of course, because human rights and democracy are in mutual tension and constitution, human rights should also constrain those democratic communities in return, and cannot merely be defined by democratic procedures. This mutuality between human rights and democracy is one of the many complexities of human rights.⁴³

Interestingly for our purpose, the egalitarian and hence democratic dimension of human rights, but also the mutuality between them, is actually reflected in the way in which international human rights law developed: through the practice of democratic states, but in a way of transnational consolidation that has gradually constrained their practice in return. Historically, indeed, much of the content of international human rights treaties was drawn from domestic bills of rights existing in 1945, and many of the latter were then revised post 1945 to be in line with the former. So, international human rights law consolidated out of that practice and constrained that practice in return.

No wonder then that in the current human rights law system one can no longer figure out domestic or internal human rights without their international or external counterparts and, of course, vice versa. This virtuous circle has been perpetuated since then in the way in which domestic and international legal norms pertaining to human rights have been interpreted and developed together. This is what I have referred to elsewhere as the mutual validation and legitimation of domestic and international human rights law.⁴⁴

B. The Mutuality of Human Rights Norms, Sources and Adjudication

The argument about the mutual validation and legitimation between domestic and international human rights law helps account for at least three dimensions of

⁴¹ On the egalitarian dimension of human rights, see Allen Buchanan, 'The Egalitarianism of Human Rights' (2010) 120 *Ethics* 679; Besson, 'The Egalitarian Dimension of Human Rights' (n 39).

⁴² See for a confirmation in the European human rights practice, *Ždanoka v Latvia* ECHR 2006-IV, para 98.

⁴³ See Samantha Besson, 'Human Rights and Democracy in a Global Context—Decoupling and Recoupling' (2011) 4 *Ethics & Global Politics* 19; Samantha Besson, 'Human Rights and Constitutional Law: Mutual Validation and Legitimation' in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015); Samantha Besson, 'The Legitimate Authority of International Human Rights: On the Reciprocal Legitimation of Domestic and International Human Rights' in Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes* (Cambridge University Press, 2013); Besson (n 2).

⁴⁴ See Besson (n 2); Besson, 'Human Rights and Constitutional Law' (n 43) 288-9; Besson, 'The Legitimate Authority of International Human Rights' (n 43).

international human rights law and its practice: the type of norms, sources and, most importantly for us in this contribution, adjudication one encounters in international human rights law.⁴⁵

First of all, the argument for the mutual validation and legitimation between domestic and international human rights law accounts for the special type of *norms* one encounters in international human rights law. To start with, in a very unusual fashion for international law norms, international human rights law gives rise to (inter-state and even *erga omnes*) duties to incur (intra-state) human rights duties vis-à-vis individuals under the given state's jurisdiction. Those duties to recognise human rights correspond, I have argued elsewhere, to the international right to have (domestic) human rights.⁴⁶ Thus, international human rights have to be matched by corresponding domestic human rights, which they then complement as minima both in content and with respect to their (personal and territorial) scope. Despite sharing the same content and structure (albeit minimally), international human rights are therefore not redundant alongside domestic human rights.⁴⁷ Nor, however, are they merely about filling the latter's gaps. On the contrary, they fulfil complementary functions that make them interdependent with domestic human rights, and necessarily arise and function together. Furthermore, international human rights norms are (abstract) rights, and, as such, their corresponding duties need to be specified every time anew. This can only be done in the relevant domestic and political context by domestic institutions. The corresponding international duties can only be abstracted therefrom *ex post* by international courts.

Secondly, the mutual validation between domestic and international human rights law also accounts for the special type of *sources* of international human rights law and their relation to domestic sources of human rights law. First of all, international human rights have long been guaranteed by treaties that developed out of domestic human rights guarantees. International human rights are also, however, concurrently of a customary nature⁴⁸—and not only additionally so when there are gaps in the conventional protection of human rights.⁴⁹ Indeed, international human

⁴⁵ Much of the argument below has been developed elsewhere, and in particular in Besson, 'Human Rights and Constitutional Law' (n 43); Besson, 'The Legitimate Authority of International Human Rights' (n 43); Besson, 'Human Rights and Democracy in a Global Context' (n 43).

⁴⁶ See eg Besson, 'Human Rights and Constitutional Law' (n 43); Besson, 'Human Rights and Democracy in a Global Context' (n 43); Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011); Stephen Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 *European Journal of International Law* 749; Gerald Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stanford Law Review* 1863.

⁴⁷ Unlike Tzanakopoulos, 'Domestic Judicial Law-Making' (n 7), I am not referring to the 'constituentality' of international human rights norms for the term is a theological one that is out of place in the human rights context, and more importantly, it glosses over the minimality of the content of international human rights law and its complementarity to domestic human rights law. On the latter, see Besson, 'Human Rights and Constitutional Law' (n 43).

⁴⁸ See Jean-François Flauss, 'La protection des droits de l'homme et les sources du droit international' in Société Française Pour Le Droit International (ed), *La protection des droits de l'homme et l'évolution du droit international* (Pedone, 1998); Besson (n 27).

⁴⁹ As claimed by Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1988–1989) 12 *Australian Yearbook of International Law* 82.

rights law, even when primarily of a conventional nature, also actually includes the interpretation of international human rights treaties that is constitutive of an evolutive and subsequently consolidated practice and *opinio juris*, that is, of an international human rights custom. Such a custom may be assessed in the traditional way—involving both practice and *opinio juris* and not in a diluted fashion only (for example, based on *opinio juris* only).⁵⁰ As to objections to the existence of customary international law in the human rights context, they may all be met by reference to the type of state practice required (for example, intra-state and not only interstate practice, and including omissions, not only actions) and the kind of consistency it should display (for example, justifications of violations count towards consistency).⁵¹ Last but not least, international human rights may also be regarded as general principles of international law, although here the intimate relationship between principles as norms and principles as sources in international law does not make for much clarity.⁵²

All three sources work as bottom-up processes of international human rights law-making drawing from domestic practices of human rights and constraining them in return. This combination of sources in international human rights law explains why international human rights treaties themselves are often regarded as sources of general (non-party relative) and objective (non-consent-based) international law.⁵³ It also explains how international human rights treaties can relate directly to domestic human rights in practice. International human rights are, for instance, the only treaty norms that are immediately valid in domestic law independently of whether the domestic legal order endorses monism or dualism. Of course, one may wonder in those conditions why one should still hold onto human rights treaties as the main source of international human rights law. This may be explained by the need to set interpretative minima and constraints. The latter may evolve in practice, as demonstrated by the adoption of protocols to the ECHR, for instance.

Finally, and centrally for this contribution, the mutual validation between domestic and international human rights law also accounts for the specific kind of adjudication one encounters in international human rights law, both at the international and the domestic levels.

Internationally, human rights protection has long been monitored by *international* (although mostly regional so far) courts (or bodies) that guarantee the respect of the minima consolidated in international human rights law. Importantly, however, those courts may only proceed with their monitoring function once domestic judicial

⁵⁰ See also Besson (n 27); Simma and Alston (n 49); contra see John Tasioulas, ‘*Opinio Juris* and the Genesis of Custom: A Solution to the “Paradox”’ (2007) 26 *Australian Yearbook of International Law* 199.

⁵¹ See also Besson (n 27); Simma and Alston (n 49); and more generally on customary international law, ILC, ‘Second Report by Sir Michael Wood’ (n 24).

⁵² See eg Besson (n 27).

⁵³ See more generally, Samantha Besson, ‘The Sources of International Human Rights Law’ in Samantha Besson and Jean d’Aspremont (eds), *Oxford Handbook on the Sources of International Law* (Oxford University Press, 2017 forthcoming).

remedies have been exhausted ('procedural subsidiarity').⁵⁴ In turn, their review⁵⁵ decisions are declaratory (albeit binding, of course), thus most of the time calling for some form of domestic remedial enforcement ('remedial subsidiarity').⁵⁶ Finally, and most importantly, those courts may and should only offer new interpretations of international human rights law in the course of their monitoring activity when those are based on an existing transnational human rights practice ('substantive subsidiarity').⁵⁷ They also have to adapt their past interpretations when those no longer correspond to the existing transnational human rights practice.

In short, therefore, international human rights courts do not work as ultimate interpreters or umpires. To that extent, they are really unlike other international law courts whose interpretative authority derogates from the principle of self-interpretation that prevails in international law (for example, the Court of Justice of the European Union (CJEU) for European Union law or the ICJ for international law). Instead, international human rights courts are facilitators of the self-interpretation of their human rights law by states: they help crystallise and consolidate states' interpretations and practices of human rights and the custom stemming from their subsequent practice of human rights treaties. Once identified and entrenched as international law, the minimal human rights interpretation can then be re-imposed on domestic authorities. This is often referred to as the interpretative authority or *erga omnes* effect of an international human rights interpretation or decision, an authority very different from an autonomous and ultimate supranational interpretative authority.⁵⁸ This mode of adjudication and its interpretative authority actually fit the customary nature of international human rights law itself: international human rights courts work as custom-identifiers and -validators.⁵⁹

⁵⁴ See Besson (n 14).

⁵⁵ On the adequacy of the term 'review' in the context of the ECtHR's decisions, see Samantha Besson, 'European Human Rights, Supranational Judicial Review and Democracy—Thinking outside the judicial box' in Patricia Popelier, Catherine Van den Heyning and Piet Van Nuffel (eds), *Human Rights Protection in the European Legal Order: Interaction between European Courts and National Courts* (Cambridge University Press, 2011); Başak Cali, 'Towards a Responsible Domestic Courts Doctrine? The European Court of Human Rights and the Variable Standard of Judicial Review of Domestic Court Judgments' (manuscript on file with author).

⁵⁶ See Besson (n 14).

⁵⁷ *Ibid.* There are fluctuations in the ECtHR's decisions and in the literature on the meaning of subsidiarity and on related concepts like states' margin of appreciation or European consensus, see eg Luzius Wildhaber, Arnaldur Hjartarson and Stephen Donnelly, 'No Consensus on Consensus? The Practice of the European Court on Human Rights' (2013) 33 *Human Rights Law Journal* 248; Dean Spielmann, 'Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2011–2012) 14 *Cambridge Yearbook of European Legal Studies* 381; George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705. The key is to distinguish between the justifications of individual restrictions by a given state and its margin of appreciation in that context, on the one hand, and the interpretation of ECHR rights for the future and states' margin of appreciation as a whole in that context, on the other.

⁵⁸ See Besson (n 14) on the specificities of that authority and the inapplicability of international and constitutional analogies.

⁵⁹ *Ibid.*; Besson, 'Human Rights and Constitutional Law' (n 43).

All this in turn explains why the interpretation methods used by international human rights courts are often described as being specific by comparison to those that apply within other regimes of international law:⁶⁰ their interpretation should evolve with their subsequent transnational practice which the international human rights courts identify and validate (Article 31(3)(b) VLCT). This is how the European Court of Human Rights (ECtHR) approaches what it refers to as the ‘European consensus’,⁶¹ that is, a form of interpretative custom among states parties.⁶² It is based on states’ general practice (based on an average ratio of 6 out of 10 states)⁶³ and their *opinio juris* verified by reference, for instance, to domestic and international courts’ decisions and to other international human rights law norms.⁶⁴ The evolutive nature of this joint or transnational interpretative process by reference to consensus in practice is sometimes also referred to as the ‘dynamic interpretation’ of international human rights law. Interestingly, it is then used as a basis for either a systemic

⁶⁰ See eg Schlütter (n 4); Başak Cali, ‘Specialised Rules of Treaty Interpretation: Human Rights’ in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2012); George Letsas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (2010) 21 *European Journal of International Law* 509; Laurence Burgorgue-Larsen, ‘Les méthodes d’interprétation de la Cour interaméricaine des droits de l’homme—Justice in Context’ (2014) 97 *Revue trimestrielle des droits de l’homme* 31; contra see Jonas Christoffersen, ‘Impact on General Principles of Treaty Interpretation’ in Menno Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009).

⁶¹ On ‘European consensus’ in the case law of the ECtHR, see eg Samantha Besson and Anne-Laurence Graf-Brugère, ‘Le droit de vote des expatriés, le consensus européen et la marge d’appréciation des Etats—Un commentaire de l’arrêt *Sitaropoulos et Giakoumopoulos c. Grèce*’ (2014) 100 *Revue trimestrielle des droits de l’homme* 937; Wildhaber, Hjartarson and Donnelly (n 57); Spielmann (n 57); Andrew Legg, *The Margin of Appreciation in International Human Rights Law—Deference and Proportionality* (Oxford University Press, 2012); Besson (n 14); Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System—An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Intersentia, 2011); Kanstantsin Dzehtsiarou, ‘Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights’ (2011) 3 *Public Law* 534; Catherine Van de Heyning, ‘No Place Like Home: Discretionary Space for the Domestic Protection of Fundamental Rights’ in Patricia Popelier, Catherine Van de Heyning and Piet Van Nuffel (eds), *Human Rights Protection in the European Legal Order: Interaction between European Courts and National Courts* (Intersentia, 2011); Laurence Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’ (2008) 19 *European Journal of International Law* 125; Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002).

⁶² See eg Ineta Ziemele, ‘Customary International Law in the Case Law of the European Court of Human Rights’ in *The Judge and International Custom* (Council of Europe, 2013); Paul Mahoney, ‘The Comparative Method in Judgements of the European Court of Human Rights: Reference Back to National Law’ in Guy Canivet, Mads Andenas and Duncan Fairgrieve (eds), *Comparative Law Before the Courts* (British Institute of International and Comparative Law, 2004).

⁶³ Wildhaber, Hjartarson and Donnelly (n 57) 258.

⁶⁴ See *Demir and Baykara v Turkey* ECHR 2008-V, paras 85–86; *Sitaropoulos and Giakoumopoulos v Greece* ECHR 2012-II, para 66. Note that this broadening of the assessment of the existence of a state practice and of *opinio juris* confirms the customary and hence general (and not regional only) reading of the reasoning of the ECtHR in its identification of a European consensus. See also Besson and Graf-Brugère (n 61); Ziemele (n 62) for a defence of this general international law approach to regional human rights law.

or a teleological interpretation; dynamic interpretation does not therefore amount to a distinct method of interpretation, but only to a tool in any of the latter.⁶⁵ European states' common approach or consensus constrains the Court's dynamic interpretation and guides it. According to the ECtHR, the reference to consensus and the evolution of state practice amounts to a duty, and not just a possibility.⁶⁶

In turn, the special features of human rights adjudication by international human rights courts also imply an enhanced role for *domestic* courts. This is what all three types of subsidiarity require. It is also a consequence of the democratic contextualisation of international human rights law given the crucial role of the judiciary in post-1945 constitutional democracies and the entrenchment of conventional judicial review in international human rights law. As a matter of fact, international institutional and procedural standards for the implementation and monitoring of human rights have been developed internally in cooperation between democratic states, transnationalised and internationalised bottom-up, and then imposed top-down again as external constraints on domestic institutions and procedures.

This explains in turn why international courts work in priority with domestic courts in the interpretation and development of international human rights law, and only indirectly with domestic legislative or executive authorities.⁶⁷ It is rare, for instance, to find an international human rights court refer, in its assessment of a new consensus between states, to state practices outside of the decisions of domestic courts and their interpretations of international human rights law.⁶⁸ Their legal authority (for international human rights courts, in particular) is much greater than that of domestic courts' other interpretations of international law. It is with respect to the fourth kind of authority described previously, in particular, that their authority seems to be enhanced: domestic courts' custom-identifying and custom-validating role is largely recognised in international human rights law.

V. DOMESTIC AND INTERNATIONAL HUMAN RIGHTS ADJUDICATION AS TRANSNATIONAL ADJUDICATION

The proposed argument and reading of international human rights law has various implications for international human rights adjudication in practice: some general, pertaining to its transnational nature, and others more specific, pertaining to the respective functions of international and domestic courts.

⁶⁵ See also Schlütter (n 4); contra see Julian Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9 *The Law and Practice of International Courts and Tribunals* 443. This is in line with ILC, 'Second Report by Special Rapporteur Georg Nolte' (n 33) 49ff.

⁶⁶ See *Sitaropoulos and Giakoumopoulos v Greece* ECHR 2012_II, para 66; Besson and Graf-Brugère (n 61).

⁶⁷ See eg *Von Hannover v Germany (No 2)* ECHR 2012-I, paras 105–107; Cali (n 55).

⁶⁸ See also Besson (n 27); Dworkin (n 46).

A. Transnational Human Rights Adjudication

The mutual regime of international human rights law-making I have just argued for and its anchoring in state practice I have presented, are best referred together to as ‘transnational’,⁶⁹ and not merely as domestic and international respectively.⁷⁰ The transnational nature of human rights law has implications for the role of human rights adjudication in transnational human rights law-making and the relations between domestic and international human rights courts in that process.

First of all, adjudication plays a specific role in the transnational development of human rights law. Judicial interpretations are sufficiently flexible to evolve with the practice of states and the customary nature of international human rights law. Judicial distinction and overruling may always be possible either way.⁷¹ Moreover, the ‘judicial custom’ that stems from international courts’ decisions⁷² can in turn be incorporated into the customary corpus of international human rights law. Finally, more substantive justifications for the role of adjudication in the development of human rights law may be put forward, including the kind of moral reasoning that characterises judicial reasoning when contrasted with other forms of legal reasoning.⁷³

Secondly, transnational human rights adjudication implies its mutuality, and this in turn means that neither domestic nor international interpretations should take priority in case of conflict. Since international and domestic human rights law complement each other and are in productive tension, their interpreting institutions should be understood as situated in a joint albeit complementary interpretative endeavour over the same human rights⁷⁴ and not as mutually exclusive interpretative authorities.⁷⁵ There is no clear priority of either judicial body in case of conflicting

⁶⁹ The term ‘transnational’ is used here to refer to horizontal and accretive processes of law-making between domestic institutions from different states as opposed to international processes and sources that do not necessarily include domestic institutions in their domestic capacities. Transnational law and adjudication should be distinguished from the transnational or extra-territorial jurisdiction of domestic courts, on the one hand, and from hybrid law-making processes that integrate domestic public and private actors, on the other.

⁷⁰ See also for the term ‘transnational’ human rights law, Christopher McCrudden, ‘A Common Law of Human Rights: Transnational Judicial Conversations on Human Rights’ (2000) 20 *Oxford Journal of Legal Studies* 499, 530; Kristen Hessler, ‘Resolving Interpretive Conflicts in International Human Rights Law’ (2005) 13 *Journal of Political Philosophy* 29, 37; Jeremy Waldron, ‘Rights and the Citation of Foreign Law’ in Tom Campbell, Keith D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights—Sceptical Essays* (Oxford University Press, 2011) 423.

⁷¹ See also Van de Heyning (n 61) 91–94; Jonas Christoffersen, ‘Individual and Constitutional Justice: Can the Power of Adjudication Balance be Reversed?’ in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011) 198–200.

⁷² On judicial law as customary law, see Besson (n 27).

⁷³ See eg Jeremy Waldron, ‘Judges as Moral Reasoners’ (2009) 7 *International Journal of Constitutional Law* 2.

⁷⁴ This may be exemplified by *Hirst v the United Kingdom (No 2)* ECHR 2005-IX and *Scoppola v Italy (No 3)* ECHR 2012-I.

⁷⁵ See Hessler (n 70); Samantha Besson, ‘Human Rights Pluralism in Europe’ in Kaarlo Tuori and Miguel Maduro (eds), *Transnational Law—Rethinking Legal Thinking* (Cambridge University Press, 2014).

interpretations of the corresponding human rights duties, unlike in other regimes of international law. This differs from the way they would relate if they belonged to different political communities and corresponding legal orders.⁷⁶ This is because their respective claims to legitimate authority are not distinctly justified on different bases and in an exclusive fashion, but, on the contrary, share a mutually reinforcing democratic justification. Thus, it is the international human rights institutions' potential contribution to democratic processes or compensation for the lack thereof domestically that helps justify its legitimate authority in those cases in which they impose certain human rights interpretations on domestic authorities.⁷⁷ Just as international human rights contribute to protecting the right to democratic membership and the right to have human rights in a democratic polity, international human rights institutions protect domestic democratic institutions and guarantee their ability to respect human rights.

All this explains in turn how domestic courts are sometimes justified when diverging from international human rights courts' interpretations, while, on the other hand, having to comply with them in other cases. The transnationality of the system may lead to a significant amount of levelling-up, but it also allows for some levelling-down if most states change their practice together. On an individual state level too, saving clauses are usually in place in international human rights treaties to protect higher domestic protection (for example, Article 53 ECHR). One should also mention the possibility of a persistent objection to the transnational practice of states and their consensus, for instance in a sensitive moral context.⁷⁸ Conversely, if the state practice shows that a given interpretation and type of human rights duties are to be entrenched and should not be restricted for any reason, then the high degree of protection of those core duties should be regarded as ensuing from state practice and a prior consensus of states parties, and not as being imposed top-down by the international human rights court.

Note that the idea of 'pluralism' of human rights' interpretations is not an adequate model to capture the way in which complementary and distinct human rights' interpretations relate in case of conflict.⁷⁹ It is perceptive with regard to the immediate validity and lack of hierarchy among international or regional and domestic human rights norms, but misses the mutuality and reciprocal validation and legitimation process at stake. There is, in fact, much more than judicial politics and judicial dialogue at work here, if one is to explain the process of mutual interpretation and reasoning at play. There are reasons, in other words, behind international or European judges' and domestic judges' cooperation, reasons that go beyond judicial attitudes and strategies and their mutual respect for each other's beliefs.

⁷⁶ See eg Neuman (n 46) 1873–74.

⁷⁷ See also Hessler (n 70) 45ff.

⁷⁸ See eg in the context of abortion, *A, B and C v Ireland* ECHR 2010-VI, and despite the existence of a contrary European consensus.

⁷⁹ See Besson (n 75); Hessler (n 70); contra see Nico Krisch, 'The Open Architecture of European Human Rights Law' in *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010).

B. The Transnational Functions of Domestic and International Human Rights Courts

Specific normative implications of the proposed transnational reading of international human rights law ensue for the respective functions of domestic and international human rights courts.

With respect to *international* human rights adjudication, one should mention the following. International human rights courts should not behave as ultimate interpreters and authorities unlike other international courts interpreting international law (and, actually, unlike domestic constitutional courts in any constitutional system),⁸⁰ but merely help in identifying and validating a general subsequent state practice that has turned, or is turning, into a custom.

This is particularly important for the way international human rights courts themselves approach the authority of their decisions, with respect to both their interpretative and their decisional authority.⁸¹ More specifically, in terms of reasoning and method, international human rights courts should focus more openly on the customary nature of international human rights law and adjudication. This means a more consistent and systematic reference to state consensus (and related concepts such as subsidiarity, states' margin of appreciation, evolutive interpretation and so on),⁸² and clarity about the ways to identify that consensus *qua* subsequent practice and agreement of states and interpretative custom.⁸³ Specifically, this may imply adopting a comparative human rights law method.⁸⁴ Of course, it would have to be adapted to international law for it to be sufficiently transnational and reciprocal.⁸⁵ It should not only be unilateral, therefore, and merely applied as a way to ascertain other sources of theoretical or epistemic authority as opposed to practical or legal authority. Nor should it exclude international law from its scope. More resources and more rigour with respect to the scope and depth of the comparative survey (for example, how many states, which practice in those states, and what degree of variation) are required to do so effectively in practice.

With respect to *domestic* human rights adjudication, the following implications of the transnational endeavour may be identified. Domestic courts should engage with international human rights law more strongly than they usually do with other

⁸⁰ Against the constitutional analogy, see Besson, 'Human Rights and Constitutional Law' (n 43); Besson (n 14); contra see Gardbaum (n 46).

⁸¹ For this critique, see eg Besson (n 14).

⁸² See eg Dean Spielmann, 'Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2011–2012) 14 *Cambridge Yearbook of European Legal Studies* 381; Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324.

⁸³ See also Besson and Graf-Brugère (n 61); Wildhaber, Hjartarson and Donnelly (n 57); Ineta Ziemele, 'Other Rules of International Law and the European Court of Human Rights: A Question of a Simple Collateral Benefit?' in Dean Spielmann, Marialena Tsirli and Panayotis Voyatzis (eds), *La Convention européenne des droits de l'homme, un instrument vivant—Mélanges en l'honneur de Christos L. Rozakis* (Bruylant, 2011).

⁸⁴ See eg Mahoney (n 62); Arai-Takahashi (n 61).

⁸⁵ See eg Roberts (n 7) on this kind of 'international comparative law'.

regimes of international law. They should make the most of the procedural, substantive and remedial subsidiarity that are protected by international human rights law. Specifically, this means engaging with international human rights courts' past decisions and reasoning, but also with other domestic courts. Through constant distinguishing of and reasoning with those decisions, they can contribute to the development of their transnational human rights law.⁸⁶

Of course, there is no duty of integrity or consistency with international courts' decisions or other domestic decisions, and no obligation to consider transnational human rights decisions as precedents: this would jeopardise the dynamic development of a democratic consensus on human rights. It is the role of international human rights courts to identify and validate that consensus but only once it has occurred, and not to trigger it. Otherwise, the democratic dimension of the contextualisation and allocation of human rights would not be respected, and the consensus would become a strategic one. Of course, once transnational decisions have become a general subsequent practice and a new consensus or transnational custom is validated by a given international human rights court, they bind domestic courts *qua* new international human rights custom. To that extent, domestic courts' duties when interpreting international human rights law differs from their duties in other fields of international law adjudication: there is no maximal international standard to be interpreted uniformly out there, but that standard is moulded and developed through concurrent domestic interpretations.

At the same time, however, engaging effectively with other international and domestic human rights courts means treating transnational precedents as at least persuasive.⁸⁷ Local circumstances may be comparable and domestic human rights interpretations could be consciously 'boiler-plated', to borrow Jeremy Waldron's terms,⁸⁸ in real time as it were and before being constrained by international interpretations based on their transnational consensus. Paying attention to those transnational decisions helps domestic courts contribute more quickly and more efficiently to the development of a consensus and state practice that will become binding for them in return. It also enables them to make an argument of change with respect to the transnational interpretative consensus of a given human right and to hope to trigger a judicial dialogue with international human rights courts and maybe bring about a new international interpretation of that right, as I have argued above. This interpretation actually fits and justifies the new advisory procedure under ECHR Protocol 16. That procedure provides domestic courts which request it with a non-binding interpretation of the state of the European consensus or, at least, the emerging consensus⁸⁹ on any human rights question, thus enabling the domestic court to decide by reference to that consensus.

⁸⁶ See eg Van de Heyning (n 61).

⁸⁷ See McCrudden (n 70) 513; Besson, 'Human Rights and Constitutional Law' (n 43).

⁸⁸ Waldron (n 70) 423.

⁸⁹ On the importance of those emerging trends in states' human rights practice and their identification by international human rights courts before identifying a consensus *stricto sensu*, see Ziemele (n 83).

Interestingly, an important argument against this kind of one-to-one practice of comparative human rights law is that using human rights' interpretations stemming from other domestic institutions than those of one's own country would be a clear violation of the democratic principle.⁹⁰ It follows from the argument in this chapter about the mutual validation and legitimation of domestic and international human rights law, however, that comparative constitutional law may not only provide the best way to grasp the interpretative content of the transnational human rights practice at stake.⁹¹ It also means that transnational human rights may be vested with some indirect democratic legitimation through the respective democratic processes by which they have gradually been recognised.

VI. CONCLUSIONS

There are three conclusions one may draw from the proposed argument.

First of all, international and domestic human rights adjudication are best understood together as one single process: transnational human rights adjudication. One cannot and should not work without the other, and this has implications for the way domestic and international human rights courts should respectively apply and interpret international human rights law. This first conclusion also applies outside the jurisdiction of the ECtHR and other regional human rights courts. It is the case for a future World Court of Human Rights, although the identification and consolidation of the subsequent state practice and agreement may be far more difficult to achieve on a global scale.⁹² It also matters for non-judicial human rights treaty-bodies. Although they do not have the judicial authority to function directly as international custom-validators,⁹³ they can contribute to the clarification of a subsequent state practice and are part of the transnational adjudication process (for example, through general comments collating and systematising domestic case law).

Secondly, international human rights law and adjudication should not be taken too readily as a core example in the general discussion of domestic judicial law-making in international law, or at least not without serious nuancing. This would imply, for instance, bearing in mind the lack of ultimate authority of international human rights courts' interpretations, the international and domestic courts' duties to consider other domestic decisions and international decisions and law, and the joint custom-validating function of domestic courts' interpretations. The norms, sources and adjudication of international human rights law are very different from laws which prevail in other regimes of international law. No wonder then that the types

⁹⁰ On those critiques, see McCrudden (n 70) 501ff, 529ff; Waldron (n 70) 412ff.

⁹¹ See Besson, 'Human Rights and Constitutional Law' (n 43).

⁹² For a similar critique, see Philip Alston, 'Against a World Court of Human Rights' (2014) 28 *Ethics & International Affairs* 197.

⁹³ See also André Nollkaemper and Rosanne van Alebeek, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in Helen Keller and Geir Ulfstein (eds), *Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012).

and grounds of domestic courts' powers and duties to engage with international law differ a lot between international human rights law and other regimes of international law. And so does their legal authority. This second conclusion should be a concern both for future scholarship on domestic courts and international law, and for future scholarship on human rights. Of course, one cannot exclude the possibility that more international law will develop on the model of international human rights law in the future and become transnational in this way, especially in the remaining constitutional areas that have not yet been covered by international law, where intra-state duties are at stake and where judicial reasoning is central. If this happened, then the same implications for the engagement of domestic courts with international law would probably ensue. But it is too early to say and there is too much to lose in the way we conceive of the rights and duties of domestic courts engaged in the interpretation of international law, on the one hand, and of domestic human rights adjudication, on the other, if we continue to merge the two discussions.

Last but not least, politically speaking, the proposed transnational reading of human rights adjudication has important implications for the way we deal with the growing resistance to international human rights courts and bodies in democratic and non-democratic states alike. The message that academics should convey is that those courts and bodies cannot be identified with other international courts, and cannot and should not claim ultimate interpretative authority over domestic courts. More importantly, provided they comply with the duties stemming from their complementary and mutual functions with domestic courts, those international human rights courts and bodies should not be disparaged from a democratic perspective. Quite the contrary: they contribute to the consolidation and development of our democratic values and principles. Nor should domestic judges fear to engage with international human rights law and courts for this is the only way international human rights law can develop and be interpreted transnationally and hence democratically. In this respect, and contrary to what many human rights scholars have been saying, recent restatements of the principle of subsidiarity and the margin of appreciation in major international human rights instruments, like the new ECHR Protocol 15, are a step in the right direction.

