

The Influence of the Two Covenants on States Parties Across Regions

Lessons for the Role of Comparative Law and of Regions in International Human Rights Law

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I. Introduction

To celebrate the fiftieth anniversary of the adoption of the International Covenant on Civil and Political Rights (ICCPR)¹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR),² the organizers of the present volume commissioned five comparative legal studies of the influence of the two Covenants in the (States parties belonging to) five regions of the world: Africa, Asia, Europe, Latin America, and the Middle East.

This is a welcome contribution to the new and fast-growing field of comparative international human rights law,³ but also a novel way to celebrate the coming of age of the two Covenants. It departs from the approach to Covenant law used in most commentaries,⁴ which barely mention domestic law and domestic practice concerning the Covenants, but also, more generally, from many international human rights lawyers' top-down treatment of domestic compliance with Covenant law.⁵

¹ International Covenant on Civil and Political Rights (ICCPR) (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

² International Covenant on Economic, Social and Cultural Rights (ICESCR) (opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

³ See eg Christopher McCrudden, 'Why Do National Court Judges Refer to Human Rights Treaties?: A Comparative International Law Analysis of CEDAW' (2015) 109 AJIL 534; Christopher McCrudden, 'Comparative International Law and Human Rights: A Value-Added Approach' in Anthea Roberts and others (eds), *Comparative International Law* (OUP 2018) 439.

⁴ See eg Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (3rd edn, OUP 2013); Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (OUP 2014).

⁵ See eg Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Brill 1997); Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012).

Actually, even from a comparative international human rights law perspective, the present project is unprecedented in its global scope, its broad focus, and its comparative legal method.

Scope-wise, first of all, while comparative international human rights studies have lately become common on the regional plane, either for a given regional human rights instrument⁶ or among them,⁷ they have been much rarer with respect to universal human rights instruments. Moreover, the latter studies have not focused on the two Covenants in a comparative fashion,⁸ but have either encompassed all international human rights treaties⁹ or, in a more recent and more nuanced vein,¹⁰ addressed one of them only, like the ICCPR¹¹ or the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹² in particular. On the domestic law side of the comparison, most of the existing studies have started by selecting the States compared according to a preliminary assessment of the effectiveness of international human rights law's protection domestically in order to reach a more fine-grained understanding of the causes of its 'success'.¹³ This has often led these studies to privilege democratic and unitary States and leave aside, as a result, States, or even entire regions, where the human rights record has not been so good. This is not a criterion of selection used by the reports in this project, which cover all kinds of States in each region. In terms of focus, secondly, existing studies have often concentrated only, on the one hand, on the influence of the Committees' guidance in general (ie their concluding observations, Views, General Comments, and provisional measures) or of some types of guidance only,¹⁴ or, on the other hand, on their influence on some domestic institutions only, such as courts in particular.¹⁵ The five reports discussed here, by contrast, address the entire range of Covenant law, from

⁶ See eg Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008).

⁷ See eg Gerald L. Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 EJIL 101; Gerald L. Neuman, 'The External Reception of Inter-American Human Rights Law' [2011] Quebec J of Intl L 99.

⁸ As a matter of fact, none of the regional reports in this project have done so comparatively either.

⁹ See eg Helen Keller and Geir Ulfstein, *Treaty Bodies* (n 5).

¹⁰ See Daniel W. Hill, 'Estimating the Effects of Human Rights Treaties on State Behavior' (2010) 72 J of Politics 1161, 1172; McCrudden, 'National Judges' (n 3) 549.

¹¹ See eg Christopher Harland, 'The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of States Parties: An Initial Global Survey Through UN Human Rights Committee Documents' (2000) 22 Human Rights Q 187.

¹² See eg Christopher McCrudden, 'CEDAW in National Courts: A Case Study in Operationalizing Comparative International Law Analysis in a Human Rights Context' in Anthea Roberts and others (eds), *Comparative International Law* (OUP 2018) 459.

¹³ See Başak Çali, 'Influence of the ICCPR in the Middle East', Chapter 7 in this volume. See also Jasper Krommendijk, 'The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies: The Case of the UN Human Rights Treaty Bodies' (2015) 10 Rev of International Organizations 489.

¹⁴ See eg Rosanne van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in Keller and Ulfstein, *Treaty Bodies* (n 5) 356; Helen Keller and Leena Grover, 'General Comments of the Human Rights Committee and their legitimacy' in Keller and Ulfstein, *Treaty Bodies* (n 5) 116.

¹⁵ See eg Gábor Halmai, 'Domestic Courts and International Human Rights' in Anja Mihr and Mark Gibney (eds), *The SAGE Handbook of Human Rights* (SAGE 2014) 749.

treaties through the Committees' concluding observations or Views to their General Comments, and their influence on all dimensions of State practice, including legislative or administrative aspects of domestic law. Finally, from a methodological perspective, existing comparative international human rights studies have been either conducted by international human rights organizations, non-governmental organizations, or professional associations,¹⁶ or single-authored by academics.¹⁷ The five reports discussed here, by contrast, have been drafted separately by individual human rights specialists from each region and are compared to one another in the present chapter. Moreover, most of the existing comparative studies have endorsed quantitative methods¹⁸ and actually stem from political science or international relations scholars.¹⁹ The reports discussed here are, but for one exception, written by human rights lawyers resorting to comparative human rights law methodology (in all its variety).

In all of these respects, in contrast to past comparative international human rights studies, the five reports discussed here provide the first opportunity for a global or universal comparison of the influence of the two Covenants in domestic law. As a companion to these five reports, this chapter has a double aim: first, to bring the comparison one rung up, to the regional level, in order to assess the influence of the Covenants on domestic law across regions and identify emerging trends; and, second, to develop a pattern of analysis comprising the set of (international and) domestic institutions, procedures, and mechanisms that can affect how any international human rights law instrument influences domestic law.²⁰ The study should therefore be read as much as a study in comparative international human rights law as a contribution to its methodology.

The study's structure is four-pronged. Section II—after this introduction—clarifies the aim, object, and method of the proposed comparison. Section III presents a comparative assessment of the domestic influence of the Covenants across regions and, to do so, develops a grid of comparative analysis. Section IV addresses the classical issue of the authority of the Committees' interpretations of the Covenants, albeit from a bottom-up approach and relying on a comparative law

¹⁶ See eg International Law Association (ILA), Committee on International Human Rights Law and Practice, 'Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies' (ILA 2004); David C. Baluarte and Christian de Vos, 'From Judgment to Justice: Implementing International and Regional Human Rights Decisions' (Open Society Justice Initiative 2010); Venice Commission, 'Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts' (8 December 2014) Doc No CDL-AD (2014) 036.

¹⁷ See eg Christof Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' (2001) 23 Human Rights Quarterly 483; Krommendijk, 'Domestic Effectiveness' (n 13).

¹⁸ Universal datasets pertaining to international law in domestic legal settings remain too general in focus (eg Oxford Reports on International Law in Domestic Courts <<http://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts>> accessed 3 June 2016).

¹⁹ See eg Hill, 'State Behavior' (n 10); Heyns and Viljoen, 'The Impact' (n 17); Krommendijk, 'Domestic Effectiveness' (n 13); Mila Versteeg, 'Law versus Norms: The Impact of Human Rights Treaties on Constitutional Rights' (2015) 171 J of Institutional and Theoretical Economics 87.

²⁰ For a regional example, see Keller and Stone Sweet, *Europe of Rights* (n 6). For a universal example, see Venice Commission, 'Implementation' (n 16).

argument. Finally, Section VI discusses the role of human rights comparison and of regional human rights law in enhancing the legitimacy of the Committees' future interpretations.

II. A Framework for the Proposed Regional Human Rights Comparison

Comparative law studies differ significantly in their aims (why compare?), objects (what is compared?), and methods (how is it compared?).²¹ Comparative international human rights studies are no exception, and it is therefore important to clarify the present chapter's comparative framework.

The *aim* of the comparison, first of all, is the assessment, through a region-by-region comparison, of the extent to which the Covenants—and their interpretation by the Committees—have influenced domestic law, and the identification of the institutions, procedures, and other mechanisms that have contributed to that influence. The main characteristic of the analysis is that it amounts to a 'comparison of a comparison': it compares the influence of the Covenants on domestic law across regions, but relies on a first-level State-by-State comparison of that influence in each region. Even if the interest in a State-by-State comparison under comparative international human rights law is beyond question (after all, States are the duty-bearers of international human rights law), one may wonder about the relevance of the regional unit of reference and, accordingly, about the interest in a regional comparison in this respect.

The notion and role of regions in international human rights law have rarely been addressed as such.²² Regions are not the subjects of rights or duties under international human rights law. More generally, they do not amount to an explicit legal concept in international human rights treaties and practice. At the same time, it is clear that they are much more than a scholarly reconstruction of geographical vicinity; they sometimes match the boundaries of regional legal communities or organizations pursuing political or economic integration or those of a common legal culture or system. Importantly, these regions may be either vindicated by States

²¹ See Christopher McCrudden, 'What Does Comparing (Law) Mean and What Should It Mean?' in Samantha Besson, Lukas Heckendorn Urscheler, and Samuel Jubé (eds), *Comparing Comparative Law* (Schulthess 2017) 61.

²² With some exceptions (eg Christof Heyns and Magnus Killander, 'Universality and the Growth of Regional Systems' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 670), most discussions have focused on human rights regionalism as yet another case of fragmentation in international human rights law. See eg Eva Brems, 'Should Pluriform Human Rights Become One?: Exploring the Benefits of Human Rights Integration / Intégrer le droit des droits de l'homme: une exploration' (2014) 4 *Journal européen des droits de l'homme / European J of Human Rights* 447; Mehrdad Payandeh, 'Fragmentation within International Human Rights Law' in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (CUP 2015) 297; Yuval Shany, 'International Human Rights Bodies and the Little-Realized Threat of Fragmentation' (2016) Hebrew University of Jerusalem Legal Research Paper 16/06 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2722663> accessed 31 March 2017.

situated within them or labelled as such from the outside.²³ Some States in different regions may also share commonalities, but without belonging to a third common region as a result.²⁴

What international human rights lawyers know about regions, however, is, first, that there are regional human rights treaties (and bodies) in Africa, the Americas, Europe, and the Middle East, but not in Asia,²⁵ and, second, that the United Nations (UN) human rights system is organized (especially with respect to membership and representation in human rights treaty bodies or at the Human Rights Council) according to the five UN regional groups. The latter regions are different from the former: they regroup African States, Asian-Pacific States, Eastern European States, Latin American and Caribbean States, and Western European and Other States.²⁶ While there are overlaps between the two sets of regions applicable under international human rights law, the most striking mismatches are that, in the latter set, the Middle East is divided between Asia and Eastern Europe and Europe is divided into two regions.²⁷

The tensions between the two understandings of regions applicable under international human rights law can be sensed in the UN General Assembly's Resolution 64/173,²⁸ wherein the 'five regional groups established by the General Assembly' (para 4(a)) are mentioned for membership purposes, but reference is also made 'to equitable geographical distribution of membership and to the representation of the different forms of civilizations and of the principal legal systems' (para 1).²⁹ Unsurprisingly, therefore, UN regional groups have been reorganized a few times since 1945 to reflect changes in UN membership, but also political realignments; the latest regrouping dates back to May 2014. There are many other causes for discontent with the UN regions, and one may mention the lack of proportionate demographic representation, but also of proportionate representation of cultural diversity. Attempts to sidestep the UN regional division in the Human Rights Council and in other UN human rights treaty bodies have failed, however. This may be due to the sheer difficulty of finding a consensual replacement unit—these groupings being necessary for practical political reasons—and in particular for fear of the other, necessarily more diverse and especially fluctuating ways of regrouping State interests in the world (eg along religious lines, such as in the Organisation of Islamic Cooperation).³⁰ The first set of human rights regions persists, moreover, because of

²³ See Çali, 'Middle East' (n 13).

²⁴ See eg the common law tradition and the Commonwealth, which includes States in Europe, Asia, and the Middle East. See especially the Asian report (Yogesh Tyagi, 'Influence of the ICCPR in Asia', Chapter 9 in this volume).

²⁵ See Tyagi, 'Asia' (n 24).

²⁶ See eg UNGA (United Nations General Assembly) Res 60/251 (3 April 2006) UN Doc A/RES/60/251, para 7; UNGA Res 64/173 (24 March 2010) UN Doc A/RES/64/173, para 4.

²⁷ See Tyagi, 'Asia' (n 24) and Çali, 'Middle East' (n 13), which feature a discussion of their respective geographical boundaries. See also the European report (Amrei Müller, 'The Influence of the ICESCR in Europe', Chapter 10 in this volume) on the East–West divide.

²⁸ UNGA Res 64/173 (n 26).

²⁹ See also ICCPR art 31(2).

³⁰ See Richard Gowan and Franziska Brantner, 'Regionalism and Human Rights at the UN' in Philippe Lombaerde, Francis Baert, and Tânia Felício (eds), *The United Nations and the Regions: Third World Report on Regional Integration* (Springer 2012) 243, 246–48.

existing regional human rights instruments and the many political and legal implications of these regional forms of human rights integration in the corresponding areas. Of course, these are contingent arguments that beg the question of the actual role of regions in international human rights law and of the justification of a region-based approach given the universal scope of international human rights law. The chapter will come back to these questions in Section V.C.

Secondly, the *object* of this study in comparative international human rights law is the influence of Covenant law on domestic law. The chapter is not interested in how other non-legal features of the Covenants influence States in the non-legal dimensions of their domestic orders. Even within these legal boundaries, it is important to specify further what (i) 'Covenant law', (ii) 'domestic law', and (iii) 'influence' actually mean.

The 'Covenants', first, refers to the two actual international human rights treaties, but also to their interpretation by their respective Committees. The latter may be found in concluding observations, Views, General Comments, or provisional measures. In order to contribute to the discussion of their authority in Section IV, it is important to assess how much respect they are actually granted in domestic law, independently from their claim to bind. What is meant by Covenant 'law' in this study is therefore quite loose; it entails binding as much as non-binding decisions by the two Committees.

Second, the 'influence' of the Covenants on States is assessed only by reference to their influence on States' legal structure and institutions, that is, 'domestic law', and not domestic politics, culture, or society more generally. This assessment includes any kind of domestic law and the interpretation thereof, but also any kind of domestic legal institutions and procedures, such as legislation, administration, or adjudication. Importantly, legal influence may be formal, as in legislation or adjudication, but it may also be material, as in administrative practice or governmental policy. This way, the study hopes to escape the referential blind spot that makes comparatists assume that there is no influence when there is no textual or formal reference to Covenant law to point to as evidence.³¹ This should also prevent us, conversely, from taking the formal recognition and implementation of Covenant rights in domestic law as necessarily meaning that they have some impact in practice.³²

The Covenants' 'influence' on domestic law, third, is understood in many ways, even by comparative international human rights lawyers. The term is often used interchangeably with 'impact',³³ but also sometimes with 'compliance', 'reception',³⁴ or 'effectiveness'.³⁵ Some authors have even used it together with other distinct notions, such as 'authority' or 'persuasiveness'. In this study, influence is understood as any form of 'impact' (on domestic law). It is something that can be described to the extent that impact on a normative practice like law can be. The notion of influence covers positive or 'successful' impacts (what may be referred to as the 'effectiveness'

³¹ See McCrudden, 'National Judges' (n 3).

³² See Çali, 'Middle East' (n 13).

³³ See Heyns and Viljoen, 'The Impact' (n 17) 485.

³⁴ See Keller and Stone Sweet, *Europe of Rights* (n 6).

³⁵ See Krommendijk, 'Domestic Effectiveness' (n 13) 491–92.

of international human rights law, whether it is intentional and stems from 'compliance' or not) as much as negative ones.³⁶ To that extent, this study should not be confused with an assessment of domestic law's compliance with States parties' duties under the Covenants. The notion of influence captures processes as much as their outcomes (when these outcomes are positive, they are sometimes also referred to as 'reception'). Importantly, and *a fortiori*, influence should not be conflated with 'authority', even *de facto*; Covenant law influence may be explained through reasons other than coercion and even through reasons other than *de jure* authority, and this whether Covenant law's claim to bind is justified or not. As a result, the Covenants and their interpretation may exercise a legal influence without being legally binding and even without that authority being justified or legitimate.

Finally, the *method* chosen for this comparative international human rights study is legal. As a matter of fact, the proposed region-by-region comparison relies on the State-by-State legal comparison conducted within each region by the five reports discussed.

Because comparative international human rights law is a new field in comparative human rights law, a few methodological remarks are called for.³⁷ This field should be conflated neither with a comparison of *international human rights law*, which concerns competing universal and/or regional international human rights law regimes and the interactions between their monitoring bodies without reference to their reception in domestic law,³⁸ nor with a comparison of *domestic constitutional or human rights law* without reference to international (universal or regional) human rights law in domestic law.³⁹ Instead, comparative international human rights law is best approached as a combination of both fields, to the extent that domestic and international human rights law are difficult to separate from one another in practice, as the five reports demonstrate. This is also why it would be wrong to consider comparative international human rights law as yet another area of comparative international law. Unlike what applies in other areas of international law and their interpretation and enforcement under domestic law, domestic human rights law cannot be reduced to the implementation of international human rights law, but is constitutive thereof. This mutual constitution between domestic and international human rights law occurs through the transnational comparison of domestic human rights law and the identification of a transnational consensus.⁴⁰ As a result, and as the present chapter will argue, human rights comparison amounts to much more

³⁶ *Contra* Heyns and Viljoen, 'The Impact' (n 17).

³⁷ See McCrudden, 'CEDAW in National Courts' (n 12).

³⁸ See eg Burns H Weston, Robin Ann Lukes, and Kelly M Hnatt, 'Regional Human Rights Regimes: A Comparison and Appraisal' (1987) 20 *Vanderbilt J of Transnational L* 585.

³⁹ See eg Vicky C Jackson and Mark Tushnet, *Comparative Constitutional Law* (3rd edn, Foundation 2014).

⁴⁰ See Samantha Besson, 'Human Rights and Constitutional Law: Mutual Validation and Legitimation' in Rowan Cruft, S Matthew Liao, and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 279; Samantha Besson, 'Human Rights as Transnational Constitutional Law' in Anthony F Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Edward Elgar 2017) 234.

than a scholarly exercise, and is a central part of the practice of international human rights law (Section V).

Last but not least, a caveat is in order. The chapter assumes, for practical reasons, that the proposed framework of comparison is shared by the five regional reports and that, accordingly, the proposed region-by-region comparison (of State-by-State comparisons in each region) actually relies on 'comparable' reports. Of course, there are important variations between them. To start with, their aims are very different: some test hypotheses or answer questions,⁴¹ while others describe various types and degrees of influence,⁴² and yet another group makes a normative argument on that basis.⁴³ Two reports focus on the ICCPR,⁴⁴ while the other three concern the ICESCR.⁴⁵ They understand 'influence' differently: for some of them, it is a form of impact, whether negative or positive and hence whether 'successful' or not,⁴⁶ while most of them understand the concept as a form of positive compliance and in fact discuss the extent to which States conform to their duties under the Covenants.⁴⁷ Some look at all the States in their respective region,⁴⁸ while others focus only on a selection of States, although they select them on different grounds.⁴⁹ Some overlap regarding States whose regional belonging is controversial,⁵⁰ while some States, like the United States, are not addressed by any of the reports. Some of the reports focus on the Covenants' influence on domestic law only,⁵¹ while others include politics and society more broadly.⁵² One report endorses a political science and more quantitative approach,⁵³ while the others are more legal. While all this diversity may be seen as a problem, the present study tries to make a virtue of a necessity and turns some of the reports' specificities into characteristics of the influence of the Covenant in the respective regions.⁵⁴

⁴¹ See Çali, 'Middle East' (n 13).

⁴² See the African report (Manisuli Ssenyonjo, 'Influence of the ICESCR in Africa', Chapter 6 in this volume), the Latin American report (Mónica Pinto and Martín Sigal, 'Influence of the ICESCR in Latin America', Chapter 8 in this volume), and Tyagi, 'Asia' (n 24).

⁴³ See Müller, 'Europe' (n 27).

⁴⁴ See eg Çali, 'Middle East' (n 13) and Tyagi, 'Asia' (n 24).

⁴⁵ See eg Müller, 'Europe' (n 27), Ssenyonjo, 'Africa' (n 42), and Pinto and Sigal, 'Latin America' (n 42).

⁴⁶ See Müller, 'Europe' (n 27) and Tyagi, 'Asia' (n 24).

⁴⁷ See eg Çali, 'Middle East' (n 13), Ssenyonjo, 'Africa' (n 42), and Pinto and Sigal, 'Latin America' (n 42).

⁴⁸ See Pinto and Sigal, 'Latin America' (n 42).

⁴⁹ See Müller, 'Europe' (n 27), Çali, 'Middle East' (n 13), and Tyagi, 'Asia' (n 24).

⁵⁰ See the African and Middle Eastern reports (Ssenyonjo, 'Africa' (n 42) and Çali, 'Middle East' (n 13)).

⁵¹ See Ssenyonjo, 'Africa' (n 42) and Pinto and Sigal, 'Latin America' (n 42).

⁵² See Müller, 'Europe' (n 27), Çali, 'Middle East' (n 13), and Tyagi, 'Asia' (n 24).

⁵³ See Müller, 'Europe' (n 27).

⁵⁴ For instance, the fact that some reports focus more on the influence of the Covenants on the regional human rights instruments than on domestic law (eg in Africa and, although to a lesser extent, in Latin America) is an indicator of a regional specificity.

III. Comparative Analysis of the Regional Influence of the Two Covenants

This section develops a grid or pattern for comparative analysis articulating the different institutions, procedures, and mechanisms that affect how the Covenants can influence domestic law (III.A). The pattern of analysis consolidates the different dimensions identified by the five reports and adds on some more so as to constitute an instrument of use for future comparative international human rights law studies. The section concludes with an overall comparative assessment and identifies some trends (III.B).

Four caveats are in order regarding the structure of the analysis. First of all, all of these comparative dimensions should be read in combination and can either reinforce or weaken one another. For instance, the ratification of the two Covenants' Optional Protocols on their respective individual complaint mechanisms⁵⁵ affects the influence that existing domestic judicial remedies for the violation of domestic human rights law can have on Covenant rights' protection through domestic courts.⁵⁶ Another example is the overlap between the Covenants' regime and those of applicable regional human rights law instruments, and how the former may be enhanced through the latter's influence on domestic law.⁵⁷ A third type of interaction to be noted is the relationship of mutual reinforcement between the existence of domestic judicial remedies and domestic enabling legislation, on the one hand, and regional human rights monitoring, on the other; without the former, the latter may not always be able to secure a domestic influence, not to mention an impact on the Covenants' influence domestically.⁵⁸ Secondly, some of these dimensions can change over time, including under the influence of the Covenants and international human rights law in general. This may contribute to undermining the distinction between the causes and outcomes of influence. For instance, the kind of separation of powers in place domestically or the relationship between domestic and international law are two dimensions of domestic law that have evolved in certain States under the influence of the Covenants.⁵⁹

Thirdly, some of the features of the comparative analysis are actually requirements of Covenant law and international human rights law more generally. For instance, having a democratic regime, respecting the independence of the judiciary, and providing judicial remedies in case of human rights violations are all dimensions of a

⁵⁵ First Optional Protocol to the ICCPR (opened for signature 16 December 1966, entered into force 23 March 1971) 999 UNTS 171; Optional Protocol to the ICESCR (opened for signature 10 December 2008, entered into force 5 May 2016) UN Doc A/RES/63/117, 48 ILM 256 (2009) (OP-ICESCR).

⁵⁶ See eg Pinto and Sigal, 'Latin America' (n 42) and, *a contrario*, Çali, 'Middle East' (n 13) and Tyagi, 'Asia' (n 24).

⁵⁷ See eg Müller, 'Europe' (n 27) and Ssenyonjo, 'Africa' (n 42) and, *a contrario*, Çali, 'Middle East' (n 13).

⁵⁸ See Ssenyonjo, 'Africa' (n 42).

⁵⁹ See Pinto and Sigal, 'Latin America' (n 42) and Tyagi, 'Asia' (n 24).

general positive duty to set up a given institutional regime under Covenant law. It is no surprise, therefore, that the positive influence of the Covenants in domestic law is enhanced by the display of these features.⁶⁰ This may also explain why, at times, the comparative analysis comes close to an assessment of comparative compliance with Covenant duties. Finally, comparing (international) human rights law is not only a scholarly activity, but also amounts to an integral part of domestic (and international) human rights reasoning, thereby instilling a comparative regress in the analysis. For instance, domestic courts may resort to the comparison of their domestic human rights law with that of other States, including other domestic judicial decisions pertaining to the Committees' decisions and/or to other universal or regional human rights bodies' decisions, themselves potentially including comparisons amongst themselves and/or with the Committees' decisions.⁶¹

A. Comparative analysis

The present section identifies five dimensions that may affect how Covenant law influences domestic law: its international law status (Section III.A.1), its 'domestic international law' status (Section III.A.2), the domestic constitutional order (Section III.A.3), domestic institutions (Section III.A.4), and other domestic actors (Section III.A.5).

1. International law status

There are many ways in which States *qua* subjects of international law can relate to the Covenants on the international plane. The various dimensions of that relationship explain variations in the influence of the Covenants in domestic law.

First of all, States' relationships to the two *Covenants* themselves *qua* human rights treaties need to be considered. The Covenants' influence on domestic law indeed reflects the degree of States' involvement during their negotiation and drafting, if applicable. Another relevant dimension is whether the two Covenants were signed and then ratified in a short period of time, and, if not, how long it took for them to be ratified and why. If the two Covenants were not signed and/or ratified at the same time, it may be interesting to wonder why, as this may affect their influence domestically. Another important factor is whether the Covenants were signed and ratified at the same time as other international and regional human rights instruments. The national historical context of signature and ratification matters as well. It is important to know especially whether ratification was motivated by internal (eg decolonization, democratization) or external (eg human rights conditionality, occupation) factors, and of what kind.⁶² Another relevant question is how many States in the region have ratified one or both Covenants, and on what grounds.⁶³

⁶⁰ See Çali, 'Middle East' (n 13) *a contrario*.

⁶¹ See Ssenyonjo, 'Africa' (n 42) and Pinto and Sigal, 'Latin America' (n 42).

⁶² See Çali, 'Middle East' (n 13).

⁶³ There is an important difference in this respect between Europe, Latin America, and Africa on the one hand, and the Middle East and Asia on the other.

Once the Covenants have been ratified, the next question is whether and which of the (material and/or procedural) Optional Protocols⁶⁴ have been ratified, whether this occurred at the same time or later on, and why. Reservations and interpretative declarations matter too. Besides their content (eg restrictions to the personal, material, or territorial scope of some rights; religious exceptions; federal clauses), it is important to know whether they have been controversial, domestically and on the international plane. They may have been invalidated by the Committees because they objected to them, could have been withdrawn, or may have grown obsolete in the meantime through contrary domestic practice. Finally, the level of implication of States in the UN General Assembly or the Human Rights Council, and, more specifically, in the Office of the UN High Commissioner for Human Rights (OHCHR) context (eg reform,⁶⁵ finances, etc) also matters.

Secondly, States' relationships to the two *Committees* need to be considered. A first factor of variation pertains to the procedures ratified by States, and in particular whether the Committees may hear inter-State and/or individual complaints against them in addition to reacting to their submissions in the periodic reporting procedure. When one or both of these complaint mechanisms applies to given States, it matters how they relate to other international and regional individual human rights complaint mechanisms that these States may have ratified, whether they are used regularly, and whether States comply with the resulting Views or provisional measures. Regarding periodic reports, it is important to establish how regularly States' reports have been submitted, what kind of information States have provided (eg merely formal or substantial), whether they have adopted the simplified reporting procedure (based on the List of Issues), and how they have behaved in the follow-up procedures and in the dialogue with the Committees following concluding observations, but also, if applicable, in the various default procedures.⁶⁶ More generally, it is interesting to know how many members of the Committees there have been for each State since it ratified the Covenants, how these individuals were selected, and how involved they have been in the Committees' daily work (and, accordingly, in their reform process) and especially their interpretations of the Covenants.⁶⁷ Other issues in States' relations with the Committees also need to be considered, in particular potential notices of derogation in case of national emergency⁶⁸ or retrogressive measures and their follow-up by the Committee.

A third relevant feature is the interaction with *other international (universal or regional) human rights instruments* applicable to the States concerned and the

⁶⁴ On the ratification of the OP-ICESCR, contrast Çali, 'Middle East' (n 13) and Tyagi, 'Asia' (n 24) with Pinto and Sigal, 'Latin America' (n 42).

⁶⁵ See the discussion of the adoption of UNGA Res 68/268 (21 April 2014) UN Doc A/RES/68/268 in Tyagi, 'Asia' (n 24).

⁶⁶ See the Asian and Middle Eastern reports (Tyagi, 'Asia' (n 24) and Çali, 'Middle East' (n 13)) for the consequences of the non-submission or of irregularities in the submission of reports for the lack of integration of regional specificities into the Committees' interpretations.

⁶⁷ See Tyagi, 'Asia' (n 24), for the consequences of the lack of representation in the Committees for the integration of regional specificities into the Committees' interpretations.

⁶⁸ See Çali, 'Middle East' (n 13).

procedures open before their *corresponding bodies or courts*. To assess how the influence of the Covenants may be tied to that of other international human rights instruments, first of all, issues of timing (ratification and entry into force) and the scope of the respective rights (material, personal, or territorial) need to be explored. Starting with the other universal human rights instruments, first, many of them have fewer States parties than the Covenants, but their procedures are often more advanced and may be used to promote the Covenants domestically. The potential overlaps between their respective rights and complementarity between their interpretations by their respective general and specific treaty bodies are worth considering too. With respect to regional human rights instruments, second, some of them refer expressly to the Covenants.⁶⁹ As a matter of fact, some regional human rights bodies have made it a practice to include interpretations by the Committees in their own interpretations of their respective instruments.⁷⁰ Still other regional human rights instruments were actually drafted on the model of one of the two Covenants. This steers their interpretation by the corresponding regional human rights bodies even more towards a parallel with that of the relevant Covenant.⁷¹ All of this affects the overall influence of the Covenants in domestic law, especially when one of these international human rights bodies issues binding judicial decisions.⁷² Other benefits to the Covenants' influence stemming from their coexistence with regional human rights instruments may be the individuation of remedies or the application of indicators in the context of economic and social rights.⁷³ Of course, the coexistence of the Covenants and other international (universal or regional) human rights instruments may not only give rise to mutual reinforcements, but also to jurisprudential contradictions and even conflicts and, accordingly, to the limitation of the influence of Covenant law in domestic law.⁷⁴ Various principles and methods apply to the resolution of these conflicts under general international law (eg systemic interpretation), as we will see (Section V). Moreover, it may be the case that regional human rights instruments have worked or still work as quasi-constitutions in certain States, thereby benefitting from a privileged position in the domestic legal order.⁷⁵ This may either favour the influence of other international human rights treaties domestically or, on the contrary, signal their difference to domestic authorities.

Finally, another interesting international law feature is the *relationship to other international bodies and courts* whose practice includes or emulates the Covenants. One may think of the Human Rights Council, whose special procedures, individual complaint mechanism, or universal periodic review (UPR) may include the monitoring of Covenant rights for their States parties. Another relevant body may be the

⁶⁹ See Ssenyonjo, 'Africa' (n 42) on art 60 of the African Charter on Human and Peoples' Rights (African Charter or ACHPR) (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58).

⁷⁰ See Pinto and Sigal, 'Latin America' (n 42) on art 29(b) of the American Convention of Human Rights (ACHR) (opened for signature 22 November 1969, entered into force 18 July 1978) 36 OAS Treaty Series, 1144 UNTS 123.

⁷¹ See Ssenyonjo, 'Africa' (n 42), on the African Charter.

⁷² See *a contrario* Çali, 'Middle East' (n 13) and Tyagi, 'Asia' (n 24).

⁷³ See Pinto and Sigal, 'Latin America' (n 42).

⁷⁴ See Müller, 'Europe' (n 27).

⁷⁵ See Pinto and Sigal, 'Latin America' (n 42).

International Court of Justice (ICJ), whose case law has contributed to reinforcing the authority of the Committees' interpretations of the Covenants.⁷⁶

2. 'Domestic international law' status

Domestic law entails rules pertaining to the relationship between domestic and international law, ie domestic foreign relations law or 'domestic international law'. These rules affect the influence of the Covenants on domestic law.

First of all, it is interesting to start by looking at the *domestic procedures of approval* that precede the Covenants' ratification. The existence of a procedure of parliamentary approval, or even of a popular referendum on the Covenants, matters for their democratic legitimacy domestically and hence for their influence. Generally, the issue of the domestic law 'pedigree' (eg constitutional or legislative) of the Covenants, where they are enacted as a piece of domestic legislation, is relevant as it may, later on, condition the rank of the Covenants in the domestic legal order. The same may be said about the existence of a procedure of pre-approval abstract judicial review of international human rights treaties, including of the Covenants. Such a procedure may indeed lead to the amendment of domestic legislation and/or constitutional law prior to ratification.

A second dimension pertains to potential *domestic reforms* occurring prior to or at the time of the entry into force of the Covenants. Some States wait until the entry into force to proceed with reforms, or do not plan any systematic reforms at all, while others organize them and postpone international treaties' entry into force until the completion of the required domestic reforms. It is in this context, too, that the question of the integration of Covenant rights into the domestic bill of rights (whether it is constitutional or not) or into another form of domestic legislation is to be considered. In dualist countries, this takes the shape of incorporation legislation, but some monist countries are also known to integrate (some) Covenant rights into their bill of rights or legislation. Independently from general reforms or from the actual integration of Covenant rights into domestic law, or in addition to them, some States, although this is rare in practice, have adopted enabling legislation to help enforce the Covenants alone, and sometimes also the Committees' concluding observations, Views, or General Comments, in domestic law. Enabling laws vary greatly in content: some only pertain to domestic adjudication, while others even foresee special domestic remedies and reparations for violations of the Covenants established by the Committees in their Views.

Once the Covenants are in force, a third relevant issue is the *relationship between domestic and international law*. This relationship is organized around questions of validity, rank, and effects, and the same applies to international human rights law and the Covenants—although one may interestingly observe a certain level of uncertainty or even overlaps between these categories in regions other than Europe.

⁷⁶ See eg *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639, 664.

In certain States, international human rights law behaves like international law in general, but, in others, it has a special status, both in terms of validity (usually immediate) and rank (usually supra-legislative). Some constitutions even entail a clause establishing what rank international human rights law, including the Covenants, should have in domestic law.⁷⁷ With respect to validity, some States are monist and recognize the immediate validity of the Covenants, while others are dualist and have to incorporate them, either into their domestic bill of rights or in a separate piece of legislation, for them to have any form of validity and effect in domestic law. Regarding the rank granted to the Covenants in domestic law, States vary significantly: some grant them legislative rank, while others give them supra-legislative, constitutional, or even supra-constitutional value. With respect to the Covenants' effects, States usually give individual rights under the Covenants direct effect (whether it is through their justiciability or not, depending on how judicialized domestic human rights protection is in general). The rights under the ICESCR are often treated differently in this respect, depending in particular on the extent to which the direct effect of economic and social rights is recognized under domestic law in general. Note that dualist legal orders usually address issues of the rank and effects of the Covenants in their incorporating legislation. Finally, some States distinguish between Covenant rights and their interpretations by the Committees' decisions, and do not grant the latter the same validity, rank, and effects. Some regard the latter as binding, while others do not (see Section IV).

Fourthly, another ground of variation pertains to the *relationship between domestic and Covenant rights*. The first question to ask is whether the State has a domestic bill of rights (constitutional or not) and whether that bill includes all rights protected under the two Covenants (maybe with differences between economic and social rights and civil and political rights), as this may affect the significance of the Covenants domestically.⁷⁸ What matters in the latter case is whether the inclusion or 'internalization'⁷⁹ of Covenant rights pre-existed the ratification of the Covenants or is a consequence thereof. The domestic bill of rights' degree of constitutional entrenchment and its relationship to domestic legislation matter also by comparison to the entrenchment of the Covenants in domestic law. The relationship between the domestic bill of rights and the Covenants in case of conflict between their respective interpretations, and especially their ranking, also needs to be explored. In some States, domestic and international human rights are subsumed in the context of special judicial human rights remedies or, at least, in regular domestic courts' human rights reasoning. This may, in the long run, lead to the levelling-up or the levelling-down of the protection of Covenant rights domestically, through mutual influence between domestic human rights law and the Covenants with respect to various features of human rights reasoning (eg jurisdiction and applicability; personal, material, and territorial scope, such as horizontal effect; positive and/or negative duties;

procedural obligations; restriction justifications, such as proportionality; rights' inner core; and constitutionality/conventionality review).

Finally, the *relationship between the Covenants and other international (universal or regional) human rights instruments* (and, more accurately, their interpretations by their respective bodies/courts) can affect the influence of the former in domestic law. This relationship can be approached from an international law perspective (eg conflict rules, systemic interpretation), as in the previous section, but it may also be affected by domestic law's approaches to these instruments. Domestic law may expressly or tacitly rank certain instruments (usually regional ones, with a regional court monitoring them) higher than others.⁸⁰ It may also provide some instruments with more effective judicial remedies domestically after an adverse decision by these other international human rights bodies. Depending on whether other international human rights instruments, and their monitoring bodies' interpretations, refer to the Covenants and their interpretations, therefore, the former's privileged position in domestic law may enhance the influence of the Covenants.

3. *Domestic constitutional order*

Various other background or constitutional factors in domestic law affect the influence of the Covenants domestically.

This is the case, first of all, of the *constitutional order* itself. The influence of the Covenants can vary considerably depending on whether there is a formal constitution domestically, whether it is entrenched, whether it includes a bill of rights, and whether it is monitored by a constitutional court and through constitutional review of legislation.

Secondly, other more general features of the domestic *legal order* may also affect the influence of the Covenants domestically. One should mention in particular the recognition of legal pluralism (religious or not) or of other forms of legal devolution and special legal regimes within the domestic legal order. Despite the State's international responsibility under the Covenants, the latter may not be applied in the same way in all parts of the domestic legal order. Issues of rank and effect, in particular, may be addressed differently in each of them. One should also enquire about the role of the predominant legal theories or cultures in the legal order, and in particular legal realism, legal formalism, or jusnaturalism.⁸¹

A third influential feature is the *political organization* of the State. This includes primarily the question of its federal organization, with the implications this may have on the ranking and effects of the Covenants in domestic law. The issue of (allocation of and potential centralization of) competences in federal States often interferes with the implementation of international human rights law in practice and can have a chilling effect on compliance.⁸² Other related questions, such as

⁷⁷ See especially Pinto and Sigal, 'Latin America' (n 42).

⁷⁸ See Pinto and Sigal, 'Latin America' (n 42).

⁷⁹ See Versteeg, 'Law versus Norms' (n 19). See also Çali, 'Middle East' (n 13).

⁸⁰ Contrast Ssenyonjo, 'Africa' (n 42) with Pinto and Sigal, 'Latin America' (n 42).

⁸¹ See Çali, 'Middle East' (n 13) on the former and Pinto and Sigal, 'Latin America' (n 42) on the latter.

⁸² See eg Krommendijk, 'Domestic Effectiveness' (n 13).

political inequalities among citizens (eg under a caste system or a personal status system under Sharia⁸³) can affect the Covenants' influence by discriminating between groups of right-holders.

A fourth and related feature pertains to the *political regime* applicable domestically. When it is democratic,⁸⁴ as it should be according to the political requirements imposed by the Covenants, it is important to know whether it is parliamentary or not, whether it grants direct democratic rights, and whether it adheres to a majoritarian or consociational system, for all these features may modulate the Covenants' influence in practice. Other features of the political regime can also affect the Covenants' interpretation domestically, in particular predominant political ideologies like liberalism, communism,⁸⁵ or socialism.⁸⁶ One should also consider cultural characteristics of domestic politics, such as their relationship to religion or other forms of social morality. Thus, the existence of collective moralities tends to affect the influence of individual rights, and hence of the Covenants, in practice.⁸⁷

A fifth background or constitutional dimension that may affect the Covenants' influence is the *supranational or international integration* of States. One may think of various forms of integration of States, be they economic or political (eg the European Union, the African Union, the Economic Community of West African States, the Arab League, or the Organization of American States). Some have a human rights dimension, as discussed before, that may also affect the influence of the Covenants, usually with a positive effect. When these integrated communities of States do not have their own human rights regimes and do not refer to one, their secondary law (eg on trade-related matters) may affect the international legal duties of States, including those arising under the Covenants, thereby raising issues of the fragmentation of international law.

Finally, one should mention the role played by *structural difficulties*. One may think of migration, poverty,⁸⁸ literacy,⁸⁹ corruption, climatic hardship, armed conflict (international or not),⁹⁰ epidemics, or financial and economic crisis.⁹¹ These difficulties all hamper, in one way or another, the capacity of States to comply with their international human rights duties, and hence with the Covenants.

4. Domestic institutions

Domestic institutions and their respective organization also affect the influence of the Covenants domestically.

This is the case, first of all, of the *separation of powers*. The first thing to ask is whether the domestic institutional order employs that principle and how it

understands it. It is important to know, in particular, whether the legislative, executive, and judicial powers exercise mutual checks on one another or whether some have supremacy (eg due to parliamentary sovereignty) over others, and how. Given the close relationship between international human rights law and the Covenants, on the one hand, and domestic courts and judicial remedies, on the other, situating judicial power in relationship to the other two domestic powers, and in particular the parliament and the administration, is key.⁹² The situation of judicial power may affect other fundamental considerations, such as the existence of constitutional and/or, at least, 'conventional' review (based on international human rights treaties like the Covenants) and the scope of the judicial remedies that can be ordered. It is also important to know whether that constitutional review can be abstract and thus pertain to legislation or even constitutional changes.

Secondly, the existence and scope of *pre-legislative human rights scrutiny* can also affect the influence of the Covenants domestically. Its role is to scrutinize any proposed legislation for its compatibility with human rights law. It is important to ascertain whether its scope is restricted to domestic human rights law or whether it extends to international human rights law and the Covenants, and to which extent it encompasses the latter's interpretations by the Committees' concluding observations, Views, or General Comments.⁹³

Thirdly, the existence and scope of *executive human rights monitoring* is another factor affecting the influence of the Covenants in domestic law. More and more States have established an ombudsman or a national human rights commission of some kind. Some of these have as their mandate to monitor domestic human rights protection, but most expand it to include international human rights law and the Covenants.⁹⁴ Establishing a national human rights institution (NHRI) has become a requirement for governments and administrations under international human rights law and the Paris Principles, and this duty has been monitored through the Human Rights Council's UPR in particular.

Finally, the scope and organization of *domestic human rights adjudication* can affect how the Covenants influence domestic law. The first variation factor is whether domestic courts can review legislation on human rights grounds, adjudicate individual cases of human rights violations, and/or even interpret domestic legislation in the light of the Covenants (eg in order to fill gaps). It is also important to know which courts can do so (only federal ones, or local ones too; only constitutional or highest courts, or all of them). Regarding individual human rights complaints, it is important to identify whether there are specific judicial remedies for human rights violations. Another relevant feature is whether these remedies are open to violations of domestic and international human rights law (including the Covenants) alike.⁹⁵ Another question is whether Covenant rights are applied as such or in light of their interpretation in the Committees' concluding observations, Views, or General Comments and, in the latter case, whether these interpretations are only referred to

⁸³ See Çali, 'Middle East' (n 13).

⁸⁴ On authoritarian regimes, compare Müller, 'Europe' (n 27), Tyagi, 'Asia' (n 24), and Çali, 'Middle East' (n 13).

⁸⁵ See Müller, 'Europe' (n 27), on the Russian and Eastern European exception.

⁸⁶ See Pinto and Sigal, 'Latin America' (n 42).

⁸⁷ See Tyagi, 'Asia' (n 24) and Çali, 'Middle East' (n 13).

⁸⁸ See Ssenyonjo, 'Africa' (n 42).

⁸⁹ See Tyagi, 'Asia' (n 24).

⁹⁰ See Çali, 'Middle East' (n 13).

⁹¹ See Müller, 'Europe' (n 27).

⁹² See Pinto and Sigal, 'Latin America' (n 42).

⁹³ See Müller, 'Europe' (n 27).

⁹⁴ *ibid.*

⁹⁵ Contrast Ssenyonjo, 'Africa' (n 42) and Pinto and Sigal, 'Latin America' (n 42) in this respect.

when they pertain to the State in question or to any State (so-called *erga omnes* effect). The question of 'judicial' or 'quasi-judicial' dialogue between domestic courts and the Committees may be raised in this context. Regarding domestic courts' reasoning, it may be interesting to assess how comparative it is, whether across domestic human rights law or between international (universal and/or regional) human rights law and domestic human rights law. As explained previously, it is relevant to identify whether domestic courts merge domestic and Covenant rights in their reasoning, and what this leads to with respect to various issues such as jurisdiction, scope, restrictions, or remedies. More generally, it is interesting to ascertain what areas of domestic human rights adjudication are most influenced by Covenant rights and their interpretations.

Interestingly, some States have introduced special remedies that apply following a violation of Covenant rights (usually as established in adverse Views by the Committees), often in their domestic legislation incorporating the Covenants or facilitating their enforcement in domestic law. These remedies may be prescribed specifically, such as, for instance, to order the reopening of the domestic judicial procedure that led to the violation or to fast-track remedial orders when the violation stems from domestic legislation. In most cases, however, it is up to domestic judges to remedy the situation within the constraints of the separation of powers and the domestic constitutional order. Pre-existing domestic judicial remedies of this kind help compensate for the lack of binding nature of the Committees' Views. The absence of such remedies in domestic law explains, for instance, why the most that victims can expect from governments after adverse Views of the Committees are often *ex gratia* payments.

5. Other domestic actors

The role of other domestic actors also affects the influence of the Covenants domestically.

A first set of such actors are *political parties* and *lobbies*. Some have placed international human rights law, and the Covenants, at the core of their political mandate and project. This is often the case of opposition parties,⁹⁶ but not only.

A second group of relevant domestic actors are *non-governmental organizations* (NGOs). Some are national, while others are regional or even universal in scope. NGOs may contribute to the influence of international human rights law and the Covenants, both in domestic and international institutions and procedures, but also through sensibilization work with civil society.⁹⁷ Their contribution may be felt in the legislature, but also in the judicial process through representation, fact-finding, or third-party interventions. The Committees have long associated NGOs with the follow-up process and the reporting procedure in general, and this has

contributed, when these NGOs also have a strong foothold domestically, to enhancing the Covenants' influence in domestic law.

A third relevant domestic actor for the influence of the Covenants in domestic law is *academia or scholarship*. Its influence can occur through research and publications, but also through teaching, professional training, and academic conferences. All of these avenues can potentially include Covenant law and contribute to its dissemination in the domestic legal order.⁹⁸ Other important factors are the translation of the Committees' decisions into local languages or the development of databases pertaining to Covenant law, as these are often academic projects. One may also mention other kinds of advanced training in Covenant law, be they organized together with the bar or other professional associations.

Finally, the role of the *media* on the influence of the Covenants in domestic law needs to be assessed in each State. Regular coverage of Views or General Comments can help remind domestic lawyers and human rights-holders about the Covenants.⁹⁹

B. An overall assessment: Four trends and five needs

There are four trends that emerge clearly from the comparative analysis of the influence of the Covenants in domestic law across the five regions examined.

First of all, the existence of preventive *domestic legislation* and/or remedial *judicial remedies* enforcing Covenant rights enhances their domestic influence. In that context, what matters especially is the relationship between the legislature (and/or administration) and the judiciary, and especially the existence of a separation of powers and mutual checks between them. This is confirmed by all reports, either positively in Europe and Latin America¹⁰⁰ or negatively in Africa.¹⁰¹ Importantly, ratification of the two Optional Protocols on the individual complaint mechanism enhances the influence that existing judicial remedies for the violation of domestic human rights law can have on Covenant rights protection through domestic courts. This is echoed in the reports' findings on Latin America¹⁰² and, *a contrario*, on the Middle East and Asia.¹⁰³

Secondly, the overlap between the Covenants and *regional human rights law instruments*, and their monitoring bodies, enhances the former's influence in domestic law. The reports confirm this in Europe and Latin America,¹⁰⁴ but also, *a contrario*, in Asia and the Middle East.¹⁰⁵ Interestingly, however, in the absence of domestic enabling legislation and judicial remedies specifically dedicated to the Covenants, the existence of a regional human rights monitoring system, including a system that includes the Committees' interpretations into its regional body's own

⁹⁶ See Müller, 'Europe' (n 27).

⁹⁷ See Tyagi, 'Asia' (n 24); Patrick Mutzenberg, 'NGOs: Essential Actors for Embedding the Covenants in the National Context', Chapter 5 in this volume.

⁹⁸ Tyagi, 'Asia' (n 24).

⁹⁹ See Müller, 'Europe' (n 27).

¹⁰⁰ See Müller, 'Europe' (n 27) and Pinto and Sigal, 'Latin America' (n 42).

¹⁰¹ See Ssenyonjo, 'Africa' (n 42).

¹⁰² See Pinto and Sigal, 'Latin America' (n 42).

¹⁰³ See Çali, 'Middle East' (n 13) and Tyagi, 'Asia' (n 24).

¹⁰⁴ See Müller, 'Europe' (n 27) and Pinto and Sigal, 'Latin America' (n 42).

¹⁰⁵ See Tyagi, 'Asia' (n 24) and Çali, 'Middle East' (n 13).

interpretations, does not necessarily suffice to secure domestic influence, as confirmed in the African report.¹⁰⁶

Thirdly, the Covenant's influence in domestic law depends to a great extent on *political (and judicial) culture*. It requires more than *pro forma* legal protection of Covenant rights, in other words.¹⁰⁷ All of the reports confirm this, but especially the Asian and Middle Eastern ones,¹⁰⁸ which emphasize the lack of political will in some of the States in these regions and hence also the lack of constructive interaction with the Committees.

Finally, the Covenants' influence in domestic law is enhanced when the *political and institutional requirements* that stem from general positive duties arising under Covenant rights are fulfilled. All reports confirm the importance of democracy, constitutionalism, and judicial review for the Covenants' influence. This is especially true in Latin America,¹⁰⁹ but the same conclusion may also be drawn from the Middle Eastern report *a contrario*.¹¹⁰

Generally, among the main directions for future reform that one may identify from the reports, one should mention the following five.

A first set of needs includes human rights *education and information* and, more specifically, the development of *databases* pertaining to Covenant law domestically and regionally.¹¹¹ A second common concern is the need for heightened sensitivity to *moral (and religious) pluralism*, and the legal diversity that stems from it across regions, at the risk of otherwise alienating some States from the Covenants and the Committees.¹¹² Thirdly, there is a need for more (demographic or cultural) *proportionate representation* in the Committees.¹¹³ A fourth concern pertains to the need for new *means of constructive dialogue and/or pressure* by the Committees on States that do not provide information or only do so *pro forma*.¹¹⁴ Finally, and more generally, there is a call for more *resources* as the price of better human rights protection.¹¹⁵

IV. A Comparative Law Argument for the Authority of the Committees' Interpretations

The (legal) authority or binding nature of the Committees' interpretations of the two Covenants (concluding observations, Views, and General Comments) has long been controversial. Instead of approaching the issue in the traditional way and top-down as a compliance problem, that is, from the perspective of the Committees, whose authority to settle the question is as controversial as their authority to interpret the Covenants in the first place, comparative international human rights law

provides an opportunity to look at it differently, that is, bottom-up and from the perspective of States.

As a matter of fact, most of the decisive arguments advanced in the discussions to date stem from general international law, and in particular from the international law on sources and on responsibility. Interestingly, these customary rules and general principles arise from State practice. It is the very kind of topic in international law, therefore, regarding which comparative international law can amount to an essential resource: it enables us to map State practice and identify a transnational consensus on the matter.

This comparative approach fits the issue of authority very well. It is a question whose treatment, as legal philosophers have long realized, should bridge the sociological and normative realms.¹¹⁶ It suffices to stress how difficult it is to distinguish the duty to obey from the practice of obeying, or the claim to authority from the exercise of authority, and, more generally, to decide what comes first: the claim or the practice.¹¹⁷ Given that the kind of sociological data required to settle this question cannot but be domestic, since international human rights law binds States to individuals under their jurisdiction, the comparison of domestic human rights law and practice has to be central to the elucidation of the authority of the Committees' interpretations of the Covenants.

Scope precludes rehearsing the debate pertaining to the authority of the Committees' interpretations of the Covenants.¹¹⁸ In short, like any other international treaty, the two Covenants are binding international law. The problem is that the interpretations of the treaties given by the two Committees were expressly considered as non-binding by the two treaties. This is evidenced by the terms used, such as 'views', 'observations', 'comments', or 'recommendations'.

Unsurprisingly, the Committees have distanced themselves from this starting point by referring to the good faith obligations of States parties and, more generally, to their interpretations' 'authority'.¹¹⁹ As a result, they have relied on their past interpretations of the Covenants as if they were binding. The ICJ itself considered that the Committees' interpretations should be ascribed 'great weight' in the *Diallo* case. The reasons it gave were that the States parties have established independent bodies to interpret the Covenants on the one hand, and that granting their interpretations special weight would serve the goals of 'clarity', 'consistency', and 'legal security' on the other.¹²⁰ It is difficult, however, to see how the latter could amount to an argument in the absence of the former: it is the interpretative authority of the Committees that seems to be key. Curiously, however, no argument to that effect is to be found in the ICJ's decision.

¹⁰⁶ See Ssenyonjo, 'Africa' (n 42).

¹⁰⁷ *ibid.*

¹⁰⁸ See Tyagi, 'Asia' (n 24) and Çali, 'Middle East' (n 13).

¹⁰⁹ See Pinto and Sigal, 'Latin America' (n 42).

¹¹⁰ See Çali, 'Middle East' (n 13).

¹¹¹ See Ssenyonjo, 'Africa' (n 42), Tyagi, 'Asia' (n 24), and Çali, 'Middle East' (n 13).

¹¹² See Tyagi, 'Asia' (n 24).

¹¹³ *ibid.*

¹¹⁴ See Tyagi, 'Asia' (n 24) and Çali, 'Middle East' (n 13).

¹¹⁵ See Ssenyonjo, 'Africa' (n 42), Pinto and Sigal, 'Latin America' (n 42), and Müller, 'Europe' (n 27).

¹¹⁶ See eg Nicole Roughan, 'From Authority to Authorities: Bridging the Normative/Sociological Divide', in Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory: Theorising across Disciplines* (Edward Elgar 2016) 280.

¹¹⁷ See Joseph Raz, *The Morality of Freedom* (OUP 1986) 65.

¹¹⁸ See eg Gerald L Neuman, 'Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members', Chapter 3 in this volume.

¹¹⁹ See HRC, 'General Comment 33' (2009) UN Doc CCPR/C/GC/33, para 13–14.

¹²⁰ See ICJ, *Diallo* (n 76) 664.

Among the international law arguments brought so far in favour of the binding nature of the Committees' interpretations, one could mention the responsibility argument (under ICCPR article 2(2) and (3)) and the 'quasi-judiciality' argument. The former begs the question of why the Committees' interpretation of the secondary duties of responsibility, which arise for States anyway, actually binds, and the latter begs the question of what makes a finding a 'judgment', and thus binding, in the first place. A third argument put forward is that of States' 'subsequent practice', whether it is validated *qua* interpretation of the Covenants under the conditions of article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT)¹²¹ or arises *qua* customary international law norm. This is not an argument for the binding nature of the Committees' interpretations, however; it merely grounds the separate authority of the latter's content in another source of law: States' consensual practice or custom.¹²² The question of the authority of the Committees and their interpretations remains open as a result.

It is here that comparative international human rights law can help us map State practice and identify the existence of a potential transnational consensus in that practice that is sufficiently common to become either a ground for an evolutive interpretation of the treaty or a new custom pertaining to the binding nature of the Committees' interpretations. What the five reports show is that the Committees' interpretations are increasingly treated as part of Covenant law (and not only when these interpretations are grounded in States' subsequent practice or custom, as explained above), and that this applies particularly to concluding observations and Views. This is especially the case in States that have ratified regional human rights instruments and acceded to the jurisdiction of their respective courts, since the latter systematically include the Committees' interpretations in their interpretations of their own respective instruments.

V. Three Proposals for Enhancing the Legitimacy of the Committees' Interpretations

If the argument proposed in the previous section is correct, and the Committees' interpretations can bind, their practice needs to change also with respect to legitimacy. Indeed, establishing the authority of the Committees' interpretations and their binding nature under international law does not yet imply that their authority is justified and hence legitimate. Of course, because the Committees lacked authority for a long time, their concern for legitimacy was limited. This has even arguably led to the converse paradox: it is because the Committees did not care enough about

¹²¹ Vienna Convention on the Law of Treaties (VCLT) (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

¹²² This may explain the confusion of the Committee on Economic, Social and Cultural Rights (CESCR) pertaining to *whose* subsequent practice should matter under VCLT art 31(3)(b): its own or States'. See eg CESCR, 'General Comment 19' (2008) UN Doc E/C.12/GC/19, para 53a; Daniel Moeckli, 'Interpretation of the ICESCR: Between Morality and State Consent', Chapter 4 in this volume.

justifying (the authority of) their interpretations that these were not considered as binding by States until recently. As a result, the time has come to think about justifying the Committees' interpretations, and the present comparative study of the influence of the Covenants, with its transregional focus, is a good opportunity to do so.

This section makes three interrelated proposals regarding the Committees' future practice in this respect: it should take subsidiarity more seriously (V.A); in order to do so, it should resort to comparison to identify a transnational human rights consensus on Covenant law (V.B); and, finally, it should make the most of regional mechanisms for the identification of that consensus (V.C).

A. The role of subsidiarity in Covenant law

A way to justify the authority of the Committees' interpretations of the Covenants could be to respect a core principle of international human rights law: human rights subsidiarity.

A descriptive survey of international human rights law shows that subsidiarity is usually approached as a two-sided principle: States have the primary responsibility to secure human rights protection, including through judicial review, and international human rights bodies or courts have a complementary review power in cases where international minimal standards are not effectively protected domestically.¹²³ More specifically, the survey reveals three types of human rights subsidiarity: 'procedural', when it pertains to the actual power of the international human rights court or body to review (eg exhaustion of domestic remedies); 'substantive', when it qualifies the intensity of that review (eg the fourth instance doctrine, the margin of appreciation, or the principle of favour); and 'remedial', when it pertains to the scope of review (eg the *restitutio in integrum* principle).¹²⁴

If the principle of subsidiarity so described is very much at the core of regional international human rights regimes, the same cannot yet be said about the Covenants and the Committees' practice. Interestingly, it is within judicialized international human rights law regimes, and hence the regional ones, like the 1950 European Convention on Human Rights (ECHR), with its Court, the European Court of Human Rights (ECtHR), or the 1969 American Convention on Human Rights, with its Court, the Inter-American Court of Human Rights (IACtHR), that one encounters all three types of human rights subsidiarity. In the universal international human rights regimes, by contrast, the rule seems to be, first of all, that the less institutionalized they are, the less frequently subsidiarity is invoked and respected. Thus, while some forms of subsidiarity may be identified in the practice of UN human rights treaty bodies, very few subsidiarity requirements subsist in the individual

¹²³ See eg the prevailing approach under the law of the European Convention on Human Rights law (ECtHR, 'Subsidiarity: A Two-Sided Coin?' (2015) ECtHR Background paper <www.echr.coe.int/Documents/Seminar_background_paper_2015_ENG.pdf> accessed 1 April 2017, 1).

¹²⁴ For a full argument, see Samantha Besson, 'Subsidiarity in International Human Rights Law: What is Subsidiary about Human Rights?' (2016) 61 American J of Jurisprudence 69.

procedures before the Human Rights Council. A second observation is that, even before human rights treaty bodies like the two Committees, if procedural subsidiarity is usually respected, this is not the case for substantive subsidiarity, or then only in a very limited fashion to the extent that there is no clear reference to the notion of 'margin of appreciation';¹²⁵ this is also not the case for remedial subsidiarity given the frequent prescription of individual or general measures as remedies.

Claiming authority for the Committees' interpretations comes at a price, however: they should endeavour to respect the principle of human rights subsidiarity in order to justify the authority of their interpretations and secure their legitimacy. In international human rights law, subsidiarity amounts to the justification for the complementary review and interpretation power of international human rights bodies or courts.¹²⁶

Justifications of human rights subsidiarity itself are two-fold: epistemic and democratic. This has been confirmed by the ECtHR, which refers to domestic authorities' being 'better placed than an international court to evaluate local needs and conditions', on the one hand, and to reasonable disagreement and the special weight that should be given to the democratically-elected domestic policy-maker, on the other.¹²⁷ The epistemic justification of subsidiarity is to be found in the concrete nature of human rights duties, whose content can only be specified by reference to threats existing in domestic circumstances. The democratic justification of human rights subsidiarity is egalitarian and pertains to the protection of the political equality of individuals in the specification of their respective human rights and duties through domestic democracy.¹²⁸

If the Committees are to develop a more rigorous practice of substantive subsidiarity, they will need a test to apply in this regard. In regional human rights law, the test used for human rights subsidiarity is the effectiveness of domestic protection of the minimal international standard of human rights. The ECtHR and the IACtHR have developed the criteria of transnational consensus, 'common ground', or 'converging approach' to identify what constitutes that minimal standard of human rights protection across the States parties and to determine the corresponding degree of scrutiny applicable to a given domestic measure. Regrettably, this is not the sole test at play in these courts' reasoning when setting the margin of appreciation, however, and its application remains largely unpredictable as a result. Nevertheless, there are ways for the transnational consensus test to be streamlined and generalized as a test for substantive subsidiarity in international human rights law.

Referring to democratic consensus as constitutive of a minimal standard of human rights protection ties into the democratic justification of human rights subsidiarity. Importantly, however, the existence or absence of democratic consensus should only

¹²⁵ See eg HRC, 'General Comment 34' (2011) UN Doc CCPR/C/GC/34, para 36.

¹²⁶ See eg David Szymczak, 'Rapport introductif: Le principe de subsidiarité dans tous ses états' in Frédéric Sudre (ed), *Le principe de subsidiarité au sens du droit de la Convention européenne des droits de l'homme* (Anthémis 2014) 15, 27.

¹²⁷ See ECtHR, *SAS v France*, App no 43835/11, 1 July 2014, para 129.

¹²⁸ See Samantha Besson, 'The Egalitarian Dimension of Human Rights' (2012) 136 *Archiv für Sozial- und Rechtsphilosophie Beiheft* 19.

work as a test for the margin of appreciation within the limits of the democratic justification of subsidiarity itself, that is, provided non-discrimination rights and the fundamental core of human rights are not infringed.

Of course, some may object that not all States parties to the Covenants are democratic, and that this jeopardizes the democratic argument for applying human rights subsidiarity to the Committees' power of review and to the latter's intensity and scope. This democratic objection applies from the perspective of both non-democratic States and democratic States.

With respect to the former, this is a false problem given that, under international human rights law, all States have to be democratic as much as they have to respect human rights. It is unclear, therefore, why the lack of democratic legitimacy of minimal international democratic and human rights standards should worry the people of a non-democratic State that is not yet abiding by either of these standards. Secondly, regarding the impact on democratic States and their populations, the concern may also be put aside. When a State has not ensured sufficient democratic deliberation in a given human rights case, its margin of appreciation should be limited and subsidiarity sidestepped because the conditions for the latter, that is, domestic deliberation and reason-giving, are not fulfilled.¹²⁹ Non-democratic States should not be allowed to contribute further, for instance through the consolidation of their respective human rights practice into the transnational human rights consensus, to the development of the minimal international human rights standard that also amounts to a minimal democratic standard constraining democratic States parties in return.¹³⁰

B. The role of comparison and transnational consensus in Covenant law

If transnational human rights consensus is to become the test for substantive subsidiarity, and for States' margin of appreciation under Covenant law, the Committees should generalize their recourse to comparative international human rights law. Comparison is the main method available to international human rights bodies and courts in order to identify a common ground or consensus in States' human rights practice.

The importance of comparison in international human rights law becomes clear once the duality of the domestic-international regime of human rights law is fully understood.¹³¹ One of human rights law's features, indeed, is the transnational

¹²⁹ See also Andreas Føllesdal, 'Appreciating the Margin of Appreciation' in Adam Etinson (ed), *Human Rights: Moral or Political?* (OUP 2018).

¹³⁰ For a full argument, see Besson, 'Transnational Constitutional Law' (n 40). It would be paradoxical indeed to insist, on the one hand, on participatory grounds, that all non-democratic States should be included in the determination of international human rights law and hence in the transnational human rights consensus, while, on the other, refusing at a later stage to take that consensus seriously because it is dominated or tainted by so-called 'pretenders' and could impose parochial conceptions of human rights. See also Heyns and Killander, 'Universality' (n 22) 673–74.

¹³¹ See also Gerald L. Neuman 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55 *Stanford L Rev* 1863.

nature of its sources, be they international or domestic.¹³² Domestic and international legal norms protecting human rights relate in a way that is uncommon in international law: they are not only situated in a relationship of top-down enforcement of an international standard in domestic law, but also in a relationship of bottom-up international recognition of the common law stemming from different domestic legal orders and of its progressive consolidation into a minimal international human rights standard. Because this transnational minimal standard, once it has been entrenched, requires the same level of transnational commonality to evolve one way or the other, levelling-down is rare in practice. Moreover, as explained before, only the domestic human rights practices regarded as minimally democratic according to the common standards entrenched in international human rights law may and should be considered in the further transnational development of this minimal international human rights standard.

Again, justifications for this transnational process of human rights law-making are both democratic and epistemic. The moral epistemology of human rights is social and reflexive,¹³³ and this requires that human rights first be identified in the socio-political context in which they are already protected in substance, that is, domestically and democratically, followed by international recognition to protect and entrench these epistemic egalitarian constraints.

Of course, some may object to this justification of transnational human rights law-making on grounds of the universality of (minimal) international human rights law. The problem is that international human rights law itself may be criticized for its lack of universality. The parochialism objection is indeed usually raised in opposition to the claimed universality of international human rights law and based on what it regards as the largely parochial conceptions of these rights stemming from one dominant culture and imposed on others in the name of universality.¹³⁴ In reply to this objection, one may therefore argue that the transnational making of human rights law actually amounts to a way of preventing parochial conceptions from being too quickly entrenched into international human rights law. Starting from many distinct domestic human rights interpretations and comparing them on a transnational scale in order to identify common ground can contribute to questioning the future international human rights standard and hence to making it less parochial. This is not to say that there are no epistemic qualities in existing international human rights institutions, such as for example their inclusiveness, representativeness, or deliberativeness,¹³⁵ but only that the latter are actually best understood as complementary and transnational in their functioning rather than unilateral and top-down.

¹³² For a full argument, see Besson, 'Transnational Constitutional Law' (n 40).

¹³³ See Allen Buchanan, 'The Reflexive Social Moral Epistemology of Human Rights' in Miranda Fricker (ed), *Social Epistemology* (2018) forthcoming.

¹³⁴ See Samantha Besson, 'Justifications' in Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (eds), *International Human Rights Law* (3rd edn, OUP 2017) 22.

¹³⁵ See Allen Buchanan, 'Human Rights and the Legitimacy of the International Order' (2008) 14 *Legal Theory* 39.

The transnationality of human rights law, thus understood and justified, explains the specific function comparative law plays or should play in domestic¹³⁶ and international human rights reasoning, a role very different from that of scholarly comparisons or one-to-one judicial references.¹³⁷ If there is comparison in the contemporary dual human rights regime, it is because human rights law claims to be transnational and hence universal and shares a common ground. It is not merely because it is interesting, or even strategic, to compare domestic practices, for instance to clarify certain constitutional concepts.

What this means for the Committees is that they should resort more systematically to comparative international human rights reasoning by comparing the various domestic practices pertaining to Covenant rights and try, more regularly, to identify a transnational consensus.¹³⁸ Arguably, this is already the way in which State practice becomes consolidated into Covenant law as subsequent State practice in the Committees' concluding observations¹³⁹ and then reimposed as such onto States thanks to the perpetuation of this transnational human rights law-making cycle over time.¹⁴⁰ To that extent, the way in which the Covenants' interpretation is developed is already truly transnational. It is important, however, to make this process even more comparative, and in particular to extend that human rights comparison into the other procedures whereby Covenant law is interpreted, such as General Comments and individual Views.

Resorting to human rights comparison would enable the Committees to comply more strictly with the conditions of VCLT article 31(3)(b) when they interpret the Covenants by reference to subsequent State practice; this method implies substantiating State practice and assessing whether it reveals a new agreement. The fact that domestic institutions, and especially domestic courts, increasingly resort to comparative human rights law (across domestic human rights law rules, but also between the various universal and regional regimes of human rights law) could, of course, be of great help to the Committees in this comparative endeavour and should be encouraged on the same grounds.

C. The role of regions and regional human rights regimes under Covenant law

Pursuing human rights comparison, and especially identifying a transnational consensus on that basis, may be more difficult on the Covenants' universal scale than on the regional level. This may explain why the minimal human rights standard under Covenant law has overall been thinner in scope than under regional human rights

¹³⁶ See Jeremy Waldron, 'Rights and the Citation of Foreign Law' in Tom Campbell, KD Ewing, and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 410, 423.

¹³⁷ See eg Christopher McCrudden, 'Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20 *OJLS* 499.

¹³⁸ See Pinto and Sigal, 'Latin America' (n 42), on the use of the term 'consensus'.

¹³⁹ See eg CESCR 'Report on the Seventh Session' (23 November–11 December 1992) UN Doc E/1993/22, para 32 and 49.

¹⁴⁰ See also Moeckli, 'Interpretation' (n 122).

regimes. Clearly, however, identifying such a universal transnational human rights consensus is not impossible. As a matter of fact, comparing human rights practice across regions rather than States may ease the process. Looking for regional human rights consensuses may be a good way to promote, at an intermediary level, the consolidation of a universal consensus around interpretations of Covenant rights.

Various *general* arguments for the beneficial role of regional human rights law regarding the influence of the Covenants in domestic law have been mentioned in this study, including the supranational judicial remedies available under these regimes and their integration rules (Section III). These benefits were confirmed by the regional reports corresponding to the four regions, out of the five studied, that have regional human rights instruments in place. From a broader perspective, and to quote Gerald L Neuman, one may make three arguments for the adoption of regional human rights regimes: trust, effectiveness, and expertise.¹⁴¹ Regional human rights bodies staffed by neighbour States' nationals are more likely to be trusted in adjudicating and interpreting human rights than universal ones like the Committees, more likely to be effective in the authority they claim and in enforcing human rights, and likely to know better how to interpret human rights in domestic circumstances. The Asian report actually emphasizes Asian States' distrust of the distant universal human rights machinery in charge of monitoring conformity with the ICCPR.¹⁴² As a matter of fact, some developments towards the establishment of a new regional human rights regime are now observed in that region too.¹⁴³

Importantly, nothing in these arguments for the development of regional human rights instruments should be interpreted to mean that universal human rights instruments like the Covenants and their monitoring by the Committees would be dispensable, provided regional instruments were in place universally and inclusive of all States in every region.

Of course, for the reasons mentioned above, regional human rights instruments and especially regional human rights bodies have been easier to set up and sustain. History confirms that regional regimes were put in place first or, at least, to a greater institutional depth, and especially that they were the first ones to be judicialized. This affects the comparative advantages of both systems today and how they have grown to coexist through that differentiation. One may mention, for instance, the differences between the kinds of human rights they protect, between the thickness of the minimal consensus they reveal on these rights, and, finally, between the kinds of international remedies they provide, and especially whether these remedies are general and political (eg State reporting) and/or individual and judicial (eg individual applications).

All the same, contemporary fears that regional human rights systems could displace the universal human rights system, or at least undermine it, are wrong.¹⁴⁴

¹⁴¹ See Neuman, 'Import, Export, and Regional Consent' (n 7) 106; Heyns and Killander, 'Universality' (n 22) 673.

¹⁴² See Tyagi, 'Asia' (n 24).

¹⁴³ *ibid.* See Heyns and Killander, 'Universality' (n 22) 691ff.

¹⁴⁴ See, however, Heyns and Killander, 'Universality' (n 22) 674, 695.

With respect to the former concern, one should stress that (domestic and regional) human rights law's claim to universality implies the coexistence of a (minimal) universal international human rights standard, at least *qua* general principles or customary law. As a result, there could be no regional human rights law without a universal human rights regime. A confirmation of this form of epistemic discipline generated by the universality of international human rights law may be found in regional human rights courts' interpretations. The second concern may also be set aside to the extent that, based on the arguments put forward earlier in this chapter, it is unclear why regional human rights law and institutions should necessarily be less democratic and more epistemically parochial than universal ones. Even if they were, the inherent democratic and egalitarian limitations placed on States' margin of appreciation, the international entrenchment of the minimal transnational human rights standard that requires an equivalent universal transnational human rights consensus to be amended, and, finally, the reflexive benefits of transnational human rights comparison within a region would all prevent a regional human rights system whose guarantees allegedly fall below the threshold of the minimal international human rights standard from being invoked to derogate from the latter and to level it down.

Among the *specific* arguments one may give for the contribution of regional human rights regimes to the identification of a regional human rights consensus and, accordingly, to the consolidation of a universal consensus on Covenant rights, one should, of course, mention the evidence that stems from the existing regimes.¹⁴⁵ What the four regional reports show is that regional human rights regimes have led to the development, over time, of common political or constitutional traits¹⁴⁶ in domestic human rights practice. As a matter of fact, the Asian report confirms that commonalities can also be identified in Asia despite the absence of a regional human rights instrument.¹⁴⁷

Accordingly, the Committees should encourage regional human rights protection and interpretations, and, in regions where these are not present, require States to resort more regularly to regional comparisons and to the identification of a regional consensus. This could, in turn, enable the Committees, in their own reasoning, to distinguish the claims before them from those addressed by regional courts and, when available, to rely on one or more regional consensuses. This could then facilitate the identification of a transnational consensus on Covenant rights based on commonalities between regional human rights consensuses. This comparison and search for consensus should, of course, be done in an inclusive and universal way to avoid privileging some States or some regions over others and developing a parochial interpretation of the Covenants.¹⁴⁸ From an institutional perspective, this may imply restructuring the Committees to create regional rapporteurs, to devolve some

¹⁴⁵ See Neuman, 'Import, Export, and Regional Consent' (n 7).

¹⁴⁶ See Pinto and Sigal, 'Latin America' (n 42).

¹⁴⁷ See Tyagi, 'Asia' (n 24).

¹⁴⁸ See eg Gerald L Neuman, 'Standing Alone or Together: The Human Rights Committee's Decision in *AP v Russian Federation*' in Eva Brems and Ellen Desmet (eds), *Integrated Human Rights in Practice: Rewriting Human Rights Decisions* (Edward Elgar 2017).

of their work to regional sub-committees, or, at least, to hold regional meetings.¹⁴⁹ In this respect, an important contribution of better consideration of regional human rights law in the Committees' deliberations could be to compensate for the lack of proportionate representation of the regions in the Committees' membership.

Provided they can identify a transregional consensus on a given Covenant right through comparison, the Committees should demonstrate some deference to that consensus and enforce it through their interpretations of States' duties. In other cases, they should grant States parties a broad margin of appreciation. Importantly, within these boundaries, the existence of a transnational human rights consensus would not pre-empt the Committees' power to review and interpret Covenant rights.¹⁵⁰

A separate and difficult question pertains to the relationship, in case of contradiction, between distinct regional human rights 'consensuses', on the one hand, and between (some of) them and the universal human rights consensus, on the other. In circumstances of reasonable disagreement, one should expect that the respective consensuses could diverge.

Regarding the former kind of conflict, first of all, the democratic and epistemic justifications of transnational human rights law point to the priority of the common ground identified in the relevant region. The existence of these contradictions should, however, remind regional human rights courts of the importance of subjecting their interpretations to comparative revision and of their necessary corrigibility. Such conflicts should not be all too common, however.¹⁵¹ Indeed, existing regional human rights regimes have adopted a universalizing approach to the identification of their respective regional human rights consensuses.¹⁵² From the perspective of the Committees, the identification of such conflicts between regional human rights consensuses should be taken as a signal in the identification of a potential universal and transnational human rights consensus.

With respect to the conflict between regional and universal human rights consensuses, second, priorities are more difficult to draw. Of course, much of the time, regional consensuses are thicker than the universal one and, if conflicts arise, they fall within the thinner scope of the latter only. However, even in that context, such conflicts should not be all too common. Indeed, as explained, existing regional human rights regimes have adopted a universalizing discipline in the identification of their regional human rights consensuses, and have integrated the Committees' interpretations of the Covenants into the interpretation of the American, African, and

¹⁴⁹ See Heyns and Viljoen, 'The Impact' (n 17) 513.

¹⁵⁰ Comparing human rights and identifying a transnational human rights consensus should not, therefore, be equated with requiring the Committees to adopt the lowest minimal common standard shared by States across regions. For a full argument for the authority of comparative human rights law and especially of the transnational and transregional human rights consensus, see Samantha Besson, 'Comparative Law and Human Rights' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook on Comparative Law* (2nd edn, OUP 2018) forthcoming.

¹⁵¹ See Heyns and Killander, 'Universality' (n 22) 688ff.

¹⁵² See eg *Demir and Baykara v Turkey* App no 34503/97 (ECtHR, 12 November 2008) para 85.

even European instruments.¹⁵³ The Committees have also shown a lot of deference to regional human rights consensus, especially when it is transregional¹⁵⁴—albeit not always by referring expressly to its comparative sources or distinguishing between them.¹⁵⁵ Of course, there are many other reasons for convergence between the Committees and regional human rights courts.¹⁵⁶

In the rare cases in which conflicts between regional and universal consensuses arise, however, the relationship between the respective consensuses cannot be one of subsidiarity; subsidiarity is justified on democratic grounds and only applies between domestic democratic and international human rights law. This is why the favour clause cannot apply either.¹⁵⁷ Some human rights scholars have criticized this lack of coherence in international human rights law.¹⁵⁸ This risk of fragmentation is usually addressed by reference to international law's rules on conflicts, and in particular to the idea of systemic interpretation (VCLT article 31(3)(c)).¹⁵⁹ In the case of conflicts between regional and universal human rights interpretations, one should add that they share a common universality in the human rights duties they impose; this is what should guide their respective interpretations.

VI. Conclusions

The transregional scope of this study has provided a unique opportunity to confirm the role of regional human rights instruments and bodies in international human rights law descriptively, but also to argue normatively for their justification from the perspective of the universality of human rights. It has also shown why comparative international human rights law amounts to much more than a scholarly project and should become a more integral part of the practice of international human rights law, including in the Committees' reasoning.

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¹⁵³ See Pinto and Sigal, 'Latin America' (n 42), Ssenyonjo, 'Africa' (n 42), and Müller, 'Europe' (n 27).

¹⁵⁴ See Heyns and Killander, 'Universality' (n 22) 688ff, 695.

¹⁵⁵ See Neuman, 'Standing Alone or Together' (n 148).

¹⁵⁶ See Shany, 'Fragmentation' (n 22).

¹⁵⁷ *Contra* Adamantia Rachovitsa, 'Treaty Clauses and Fragmentation of International Law: Applying the More Favourable Protection Clause in Human Rights Treaties' (2016) 16 *Human Rights L Rev* 77.

¹⁵⁸ See eg Brems, 'Integration' (n 22); Payandeh, 'Fragmentation' (n 22).

¹⁵⁹ See Neuman, 'Meaning and Effect' (n 118).

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