21

The Role of Domestic Courts in the Interpretation of Customary International Law

How Can We Learn from Domestic Interpretive Practices?

NINA MILEVA*

1 Introduction

The role of domestic courts in the development of rules of international law is an area of research that has received increased scholarly interest in the past decade. Within the formal framework of sources, domestic courts can contribute to the development of international law in broadly three ways: as an expression of state practice or *opinio juris* for the purpose of customary international law (CIL),[1] as a contribution to general principles of law,[2] or as relevant subsequent practice for the purposes of treaty interpretation.[3] Moreover, scholars have also identified a role for domestic courts beyond the framework of sources, pointing to further contributions of domestic courts to the development of international law. For instance, using the analytical lens of 'domestic courts as agents of development of international law' a symposium hosted by the *Leiden Journal of International Law* demonstrated that while domestic courts may have a limited impact on the development of international law within the

* This contribution is based on research conducted in the context of the project 'The Rules of Interpretation of Customary International Law' ('TRICI-Law'). This project received funding from the European Research Council ('ERC') under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).

[1] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 11.

[2] As defined by Article 38(1)(c) of the Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993.

[3] As defined by Article 31(3)(b) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

regime of sources, they can still exercise an informal influence; particularly so if their pronouncements are taken up and validated or endorsed by other actors.[4] Similarly, the analytical framework of a 'cycle of contestation and deference' tells us that contestations by domestic courts in cases where they engage with international law can provoke an international reaction or adjustment of the law in response to the contestation.[5]

This chapter examines the contribution that domestic courts may have in the development of rules or guidelines for the interpretation of CIL. The examination is motivated by three considerations. Firstly, unlike in the case of treaties whose interpretation is guided by Article 31 of the Vienna Convention on the Law of Treaties (VCLT) and its customary counterparts, presently we do not have clear rules or guidelines for the interpretation of CIL. In fact, as other chapters in this volume demonstrate, legal scholarship is currently still discussing whether custom as a source of law can be subject to interpretation, and if so, what are apposite methods for its interpretation. While at present little is certain, it has been argued persuasively that custom and treaties cannot always be subject to the same methods of interpretation.[6] Thus, we cannot simply transplant the methodology of treaty interpretation onto custom wholesale, and it might even be the case that custom requires a methodology of its own. Secondly, scholarship on the role of domestic courts in the development of international law has persuasively demonstrated that domestic courts can contribute to international law both formally and informally, especially in areas where there are lacunae or the law is yet to be developed. Thus, the practice of domestic courts with respect to the interpretation of custom may prove a valuable source in our study and understanding of this developing field. Finally, by turning to domestic courts we open the door to a wealth of cases which can provide us with examples and insight into the interpretation of custom. Depending on the legal system in place, domestic courts may be faced with the task of interpreting not only CIL but also domestic custom. Thus, domestic

[4] A Tzanakopoulos & CJ Tams, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 LJIL 531, 538.

[5] M Steinbruck Platiše, 'The Development of the Immunities of International Organisations in Response to Domestic Contestations' in M Kanetake & A Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart 2016) 67.

[6] See P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015) 232–69; See Chapter 18 by Fortuna in this volume.

https://doi.org/10.1017/9781009025416.022 Published online by Cambridge University Press

courts may be uniquely positioned to provide insight into the methodology of interpreting custom as a source of law.

With these three considerations in mind, the chapter poses the question: how can interpretive methodologies employed by domestic courts inform the development of rules or guidelines for the interpretation of CIL? The chapter is organised along three substantive sections. Section 2 provides an overview of the current academic discourse with respect to CIL interpretation, and briefly introduces the interpretation of CIL as conceptualised by this chapter. Section 3 turns to the contribution of domestic courts to the development of international law, and maps the existing scholarship on the topic. Section 4 contains the operative contribution of the chapter, and begins with an overview of five domestic cases which contain examples of domestic courts interpreting customary law. It then provides some preliminary observations organised along two lines of inquiry: (i) how can we learn from domestic interpretive practices? and (ii) why should we learn from them? The observations provided in this chapter are part of the author's ongoing doctoral research focused on the interpretability of CIL and the role of domestic courts in this process. In light of this, the findings presented in it will evolve and be updated with further research.

Before continuing with the chapter, a point of terminology is in order. This chapter uses the terms 'rules' and 'guidelines' for CIL interpretation broadly and interchangeably. This is because currently there is no set terminology which denotes the parameters according to which CIL is interpreted by relevant actors. One of the main objectives of the TRICI-Law project (of which the present author is a member) is to demonstrate the interpretability of CIL and to identify the parameters which guide the process. Therefore, the chapter presently does not take a position on the nature of these parameters, and the jury is still out on the final appropriate terminology.

2 CIL Interpretation

Before delving into an analysis of the ways in which international law may learn from domestic courts' practice for the purpose of CIL interpretation, a few paragraphs must be dedicated to the interpretability of CIL and the current scholarly debates surrounding it. A detailed discussion of the interpretation of CIL is beyond the scope of this chapter and is addressed more elaborately elsewhere in this volume.[7] This section is

[7] See Chapters 16–18 in this volume.

https://doi.org/10.1017/9781009025416.022 Published online by Cambridge University Press

only intended to briefly map the current state of the scholarly discourse, and to show the reader what is the thing that we speak of when we speak of CIL interpretation throughout the chapter.

Unlike treaties, whose interpretation is guided by the VCLT and its customary counterparts, CIL's interpretation remains a mercurial process whose functioning is both questioned and unregulated. Claims against the interpretability of CIL are broadly organised along two lines: firstly, it is argued that CIL's unwritten character excludes the need for its interpretation. Here, the argument is that even though language is necessary to communicate the content of customary rules, expression through language is not an indispensable element of CIL rules. This irrelevance of linguistic expression excludes interpretation as a necessary operation in order to apply CIL rules.[8] Secondly, it is argued that CIL cannot be subject to interpretation because if an attempt is made to interpret an unwritten source such as CIL the interpretative reasoning will inevitably need to refer back to the elements of the lawmaking process and as such be circular.[9] In a similar vein, it is posited that CIL rules do not require interpretation because the mere process of their identification delineates their content as well.[10]

The argument that CIL is not subject to interpretation because it is unwritten is problematic. It is not entirely clear why the absence of a written textual manifestation in the context of CIL rules would imply that a CIL rule should not be subject to interpretation. An absence of a written manifestation merely means that a rule is not codified; it does not however deprive this rule of other forms of linguistic expression (e.g., oral expression) or of content, and subsequently of the need to clarify this content for the purpose of application in a given legal and factual context. Furthermore, in international law there is no universal approach which dictates that the unwritten character of a particular source precludes it from interpretation. For instance, as has been established by the International Law Commission (ILC) in its 'Guiding Principles Applicable to Unilateral Declarations of State',[11] unilateral declarations,

[8] T Treves, 'Customary International Law' [2006] MPEPIL 1393 [1.2].

[9] A Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2(1) JIDS 31, 56.

[10] M Bos, *A Methodology of International Law* (Elsevier 1984) 109; see also J d'Aspremont, 'The Multidimensional Process of Interpretation' in A Bianchi, D Peat & M Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) 111, 118.

[11] ILC, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto' (2006) UN Doc A/61/10, reproduced in [2006/II – Part Two] YBILC 161.

which may be formulated orally,[12] are subject to interpretation if their content is unclear.[13] Similarly, with respect to general principles of international law, which are also themselves unwritten,[14] scholars seem to acknowledge, albeit in a more limited manner, that this source of law may be subject to interpretation.[15] Therefore, it cannot be concluded that the unwritten character of CIL automatically implies that this source of law is not subject to interpretation. Moreover, it is reasonable to observe that unwritten sources, as opposed to written ones, contain a higher degree of vagueness as a result of their unwritten character. This certainly seems to be the case with CIL, where scholars often point to this source's inherent abstractness.[16] This would in turn imply that unwritten sources, rather than not being subject to interpretation, require precisely the exercise of interpretation in order to grasp their otherwise elusive content.

Turning to the second line of argument, it must be observed that this claim is negated by the practice of international courts which regularly engage in CIL interpretation as separate from its identification. For instance, in *Mondev International Ltd* v. *United States of America*, the Arbitral Tribunal observed that: 'the question is not that of a failure to show opinio juris or to amass sufficient evidence demonstrating it. The question rather is: what is the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties?'[17] The tribunal then proceeded to interpret the customary rule of fair and equitable treatment.[18] Similarly, in its judgment in the *Frontier Dispute* case which dealt with the customary principle of *uti possidetis*, the

[12] ibid 163, Guiding Principle 5.
[13] ibid 164, Guiding Principle 7.
[14] A Pellet & D Müller, 'Article 38' in A Zimmermann & CJ Tams (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2019) 924 [255].
[15] See indicatively PG Staubach, *The Rule of Unwritten International Law: Customary Law, General Principles, and World Order* (Routledge 2018) 155–99; MC Bassiouni, 'A Functional Approach to General Principles of International Law' (1990) 11 Mich J Intl L 767, 771.
[16] ILA Committee on Formation of Customary (General) International Law, 'Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law' (*ILA*, 2000) 2 <https://bit.ly/3yMGuwT> accessed 1 March 2021; F Schauer, 'Pitfalls in the Interpretation of Customary Law' in A Perreau-Saussine & JB Murphy (eds), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge University Press 2007) 13; Merkouris (n 6) 233.
[17] *Mondev International Ltd v United States of America* (Award of 11 October 2002) ICSID Case No ARB(AF)/99/2 [113].
[18] ibid [114–16].

International Court of Justice (ICJ), after briefly pointing to the 'elements of *uti possidetis*',[19] turned to an interpretation of the principle for the purposes of the case at hand.[20] In addition to these examples which illustrate a clear distinction between identification and interpretation, courts more generally and regularly engage in the interpretation of CIL. Examples are replete from the dockets of the ICJ,[21] the International Tribunal for the Former Yugoslavia (ICTY),[22] and the World Trade Organization Appellate Body (WTO AB)[23] to name a few.

Beyond the identification of examples where judges engage in the interpretation of CIL, accounting for the process of CIL interpretation bears a lot of theoretical relevance as well. In the absence of an interpretative process, there is no explanation about what happens to a CIL rule after it has been identified. Namely, once a rule of CIL is identified for the first time through an assessment of state practice and *opinio juris*, its existence is not restricted to the case where it was identified for the first time, but is rather a continuous one. When the same rule is invoked in subsequent cases before the same or a different judicial body, the judicial body does not usually go into the exercise of re-establishing that the rule in question is a customary one.[24] Instead, the rule is interpreted within the given legal and factual context of the case at hand. In this sense, interpretation accounts for the CIL rule after its identification and before its application in a subsequent case. Arguing that CIL is not subject to interpretation thus fails to account for the continued existence and operation of a CIL rule after its first identification, and rather operates from the paradoxical premise that a rule of CIL should be identified each and every time anew.

[19] *Case concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (Judgment) [1986] ICJ Rep 554 [22].

[20] ibid [23]; that this is an interpretive exercise is evident in the reference to the 'purpose' of *uti possidetis*, and the 'essence of the principle'.

[21] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14 [178]; *North Sea Continental Shelf cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) (Judgment) [1969] ICJ Rep 3, Dissenting Opinion of Judge Tanaka, 181; *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 [53–54].

[22] *Prosecutor v Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura* (Decision on Interlocutory Appeal challenging Jurisdiction in Relation to Command Responsibility) IT-01–47-AR72 (16 July 2003) Partial Dissenting Opinion of Judge Shahabuddeen [9–10].

[23] WTO, *EC – Approval and Marketing of Biotech Products – Reports of the Panel* (29 September 2006) WT/DS291/R [7.68–7.72].

[24] Merkouris (n 6) 241.

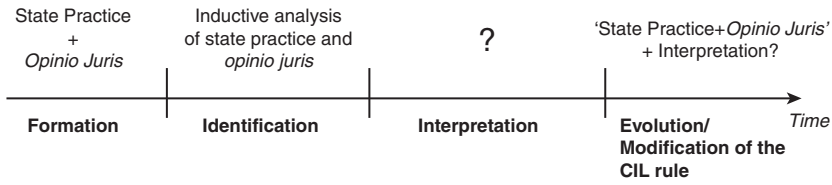

Figure 21.1 The CIL timeline

This chapter accounts for the process of CIL interpretation through the illustrative tool of a 'CIL timeline' (Figure 21.1).[25] The CIL timeline begins with the formation of a customary rule through the constitutive elements of state practice and *opinio juris*. The rule is then identified by an inductive analysis of these two elements. The reasoning in this stage includes the evaluation of evidence of practice and *opinio juris* and provides an answer to the question: does a customary rule exist? The outcome here is a binary one, in the sense that the answer will either be 'yes, a customary rule exists' or 'no, a customary rule does not exist'. This reasoning however does not provide an answer to the question 'is this customary rule applicable to the case at hand, and if yes, how is it applicable?'. This question is answered at the later stage of the CIL timeline, that is, at the stage of interpretation.

It is important to note that a form of interpretation may also be said to take place at the stage of identification. However, at this stage the relevant authority does not interpret a customary rule (as this rule has not been identified yet) but rather interprets the evidence of state practice and *opinio juris* in order to evaluate them and ascertain whether a rule has been formed. This distinction is particularly important, because although some authors have used the term 'interpretation'[26] for the reasoning that takes place at the stage of identification, this may not be considered as interpretation *stricto sensu*.[27] This is because the exercise of weighing and measuring

[25] For a discussion of CIL interpretation by reference to the 'CIL Timeline' see also N Mileva & M Fortuna, 'Emerging Voices: The Case for CIL Interpretation – An Argument from Theory and an Argument from Practice' (*Opinio Juris*, 23 August 2019) <https://bit.ly/3yGm7BD> accessed 1 March 2021.

[26] See for instance N Banteka, 'A Theory of Constructive Interpretation for Customary International Law Identification' (2018) 39(3) MichJIntlL 301, 304; DB Hollis, 'The Existential Function of Interpretation in International Law' in A Bianchi, D Peat & M Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) 78, 79; A Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757, 781.

[27] P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 ICLR 126, 138–9.

https://doi.org/10.1017/9781009025416.022 Published online by Cambridge University Press

evidence of practice and *opinio juris* in order to discover whether they can be counted for the purpose of establishing a CIL rule is not the same as applying and interpreting the CIL rule to the legal and factual context of a case. The former is an exercise of evaluating evidence; the latter is an exercise of applying a formulated legal rule to a particular context of a case. In the former we ask questions such as: 'does this piece of (state) behavior count as practice or *opinio juris*?', 'is this practice sufficiently widespread?', 'does this piece of evidence constitute a manifestation of *opinio juris*?', 'does this collection of practice and *opinio juris* point towards the existence of a rule?', etc. In the latter we ask questions such as 'is this CIL rule applicable to the factual context of the present case?', 'how does this CIL rule play out in the present context?', 'what is the specific content of this general CIL rule?', etc. Thus, while the exercise of CIL identification may in fact also contain interpretative reasoning, this is not the same type of interpretation as the one exercised over an already identified CIL rule.

Even if one would concede that in the phase of interpretation the relevant interpreter may rely on some of the evidence of state practice or *opinio juris* from the phase of identification, this would still not constitute a counterargument to the overall claim that CIL rules are in fact interpretable.[28] This is because, in this scenario, for the lack of a better analogy, this interpretative behaviour could be likened to how sometimes in the interpretation of a treaty interpreters may rely on the preparatory texts to elucidate intent, object and purpose, etc. Thus, an interpreter of a CIL rule might look back at evidence of state practice or *opinio juris* in the course of their interpretation of the rule, to answer some questions such as 'what prompted the formation of this customary rule?', 'what is the aim to be achieved with this rule?', or 'can we discern specific sub-elements of this rule if we look back to past behavior?'.

Once a rule is identified by a relevant authority, every subsequent invocation of that rule in following cases is not an exercise of re-identification but rather of application and interpretation. The reasoning employed at the stage of interpretation is concerned with the determination of the content of the CIL rule and how this rule applies to the case at hand. Unlike the binary outcome of the identification stage, this reasoning may have a variety of outcomes depending on the rule being interpreted and the legal and factual circumstances it is being interpreted in.

[28] This is also the argument forwarded by Gourgourinis (n 9) 56, according to which an attempt at interpretation of a CIL rule would be circular because it would inevitably end up back at an evaluation of the elements.

By distinguishing the two stages in this way, the CIL timeline illustrates the fact that the interpretation of a CIL rule is a process which manifests in a different and separate way from identification, a process which is subject to a separate (and perhaps unique) methodology, and a process which merits its own separate study (Figure 21.1).

In its 2016 Preliminary Report, the Study Group on Content and Evolution of the Rules of Interpretation flagged CIL interpretation as a relevant topic of exploration.[29] Building on this recommendation, and observing the existing gap posed by the lack of guidelines for CIL interpretation, this chapter now turns to its central discussion on how domestic interpretive practice may be instructive to the development of rules or guidelines for CIL interpretation in international law.

3 The Role of Domestic Courts in the Development of International Law

For the purposes of this section, the role of domestic courts in the development of international law is examined along two broad lines of inquiry: the contribution of domestic courts to international law within the framework of sources (Section 3.1), and the informal contribution of domestic courts to international law beyond or outside the framework of sources (Section 3.2). The distinction of formal versus informal contribution employed in this section is used broadly and without prejudice to the more focused discussion on formalism and the sources of international law.[30] The distinction is drawn with the aim of juxtaposing on the one hand the contribution of domestic courts to the development of international law primarily from within the framework of sources, and on the other hand the contribution of domestic courts to the development of international law beyond the framework of sources and in informal ways.

3.1 Domestic Courts within the Framework of Sources

Within the formal framework of sources, domestic courts can contribute to the development of international law in broadly three ways. Firstly, domestic judicial practice can contribute to the formation of

[29] ILA, 'Preliminary Report of the Study Group on the Content and Evolution of the Rules of Interpretation' (*ILA*, 7–11 August 2016) 9 <https://bit.ly/3q5oWbi> accessed 1 March 2021.

[30] See here notably J d'Aspremont, *Formalism and the Sources of International Law* (Oxford University Press 2011).

https://doi.org/10.1017/9781009025416.022 Published online by Cambridge University Press

a rule of CIL. Here, the decisions of a domestic court may be considered as evidence of state practice[31] or *opinio juris*[32] and thus count towards the formation of CIL. Secondly, decisions of domestic courts may be taken into account in the determination of general principles of international law as set out in Article 38(1)(c) of the ICJ Statute.[33] Finally, domestic court decisions as a form of state practice may be considered as 'subsequent practice' in the sense of Article 31(3)(b) of the VCLT and as such contribute towards the agreed interpretation of a treaty.[34] Some authors have argued that a fourth way in which domestic courts' practice can contribute to the development of international law from within the framework of sources is as subsidiary means for the determination of rules of law within the meaning of Article 38(1)(d) of the ICJ Statute.[35] This, however, greatly depends on one's reading of Article 38. The most recent commentary to the ICJ Statute for instance takes the view that, in spite of alternative readings, Article 38(1)(d) does not include the decisions of domestic courts in its reference to 'judicial decisions'.[36]

While it may seem that domestic court practice has various 'points of entry' in the formal development of international law, it must be observed that their contribution within this framework is fairly limited. Namely, although domestic court practice may feature in the formation of CIL or general principles, or the interpretation of treaties, their conduct can only meaningfully contribute to the development of international law if it is shared by other domestic courts across a multitude of states. For instance, for the purpose of CIL, the conduct of one single state is not sufficient to create a customary rule. Similarly, for the purpose of general principles, the implied threshold is that these principles are shared across most (if

[31] ILC (n 1) 133, Conclusion 6 with commentary.
[32] ibid 140, Conclusion 10 with commentary.
[33] Pellet &Müller (n 14) 925–31; Tzanakopoulos & Tams (n 4) 537.
[34] ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 11, 37, Conclusion 5 with commentary.
[35] R Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995) 208–09; A Tzanakopoulos & E Methymaki, 'Sources and the Enforcement of International Law: Domestic Courts – Another Brick in the Wall?' in S Besson & J d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 813; A Roberts & S Sivakumaran, 'The Theory and Reality of the Sources on International Law' in M Evans (ed), *International Law* (Oxford University Press 2018) 89, 99.
[36] Pellet &Müller (n 14) 954 [323].

not all) nations.[37] Thus, while domestic courts are featured in the doctrine of sources and into processes of treaty interpretation, they are formally treated just like one organ of one state and this significantly limits their formal impact on the development of international law.[38] In light of this, scholars increasingly examine the role of domestic courts in the development of international law beyond the formal framework of sources. It is to this body of scholarship that we now turn.

3.2 *Domestic Courts beyond the Framework of Sources*

In studying the contribution of domestic courts to the development of international law, scholars have pointed to the need to look beyond the traditionally formal approach of the framework of sources and widen the lens of inquiry in order to fully grasp their role.[39] What this seems to signify is that scholars retain the framework of sources as a departing point in their analysis, but identify that in practice domestic courts contribute to the development of international law much more significantly.[40] For instance, in her development of the concept of comparative international law, Anthea Roberts identifies a so-called duality of domestic courts in their interaction with international law. In this framework the role of domestic courts under international law is split between on the one hand law creation and on the other law enforcement.[41] In order to demonstrate this duality, Roberts relies on the theory of sources, but argues that domestic court decisions actually have a far greater effect on international law than what is envisaged by the sources doctrine.[42] She points to examples from the law on state immunity and human rights law where domestic judges have contributed to the progressive development of international law,[43] observing that international law does not only percolate down from the international to the domestic sphere, but also bubbles up in the opposite direction. 'In this process, national court decisions play a crucial role in developing international law, particularly in areas that tend to be tested by

[37] See for example the Trial Chamber's reasoning on this in *Prosecutor v Anto Furundzija* (Judgment) IT-95–17/1-T (10 December 1998) [178].
[38] Tzanakopoulos & Tams (n 4) 538.
[39] Roberts & Sivakumaran (n 35) 89.
[40] Tzanakopoulos & Tams (n 4) 536; Roberts & Sivakumaran (n 35) 100–15.
[41] A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 ICLQ 57, 61.
[42] ibid 63.
[43] ibid 69–70.

https://doi.org/10.1017/9781009025416.022 Published online by Cambridge University Press

domestic courts.'[44] A similar analysis can be found in the description of a so-called feedback loop between domestic courts and international law, which describes the interaction by observing that 'domestic courts are at once organs of the state, and thus potential international law-makers, and judicial institutions applying and thus enforcing the law'.[45] This indicates that domestic courts do not only passively implement international law but also, through their practice, contribute to the development of the law as well. Thus, in the case of CIL interpretation, domestic courts' interpretive practice may be instructive both in the initial phase when rules are yet to be identified or developed, and in the subsequent process where domestic courts will be one of the actors implementing the developed rules. This potential feedback loop in CIL interpretation will be further discussed in Section 4 below.

In the analytical framework of a 'cycle of contestation and deference' domestic contestations of international law may invite procedural or substantive changes, and international law may respond by paying deference to domestic systems and adjusting accordingly.[46] Within this cycle, domestic courts are one of the relevant domestic actors which have the power to invite changes on the international level through their practice of applying and interpreting international law.[47] For instance, Kanetake argues that beyond the traditional modes of interaction between domestic courts and international law provided for in the sources doctrine, domestic courts may contribute to international law through so-called normative or conceptual points of connection.[48] Normative points of connection occur in instances of inter-judicial communication across national courts of different states, when domestic courts refer to each other's decisions. In these instances, the communication 'may create norms which are yet to become part of formal international law but which affect the way international organisations and international judicial institutions render their decisions'.[49] This observation is particularly relevant for our present inquiry, because it demonstrates that the interpretive methodologies of

[44] ibid.
[45] Tzanakopoulos & Methymaki (n 35) 820.
[46] M Kanetake & A Nollkaemper, 'The International Rule of Law in the Cycle of Contestations and Deference' in M Kanetake & A Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart 2016) 445.
[47] M Kanetake, 'The Interfaces Between the National and International Rule of Law: A Framework Paper' in M Kanetake & A Nollkaemper (eds), *The Rule of Law at the National and International Levels: Contestations and Deference* (Hart 2016) 13, 24–26.
[48] ibid 28–30.
[49] ibid 28.

domestic courts, if shared or communicated across courts of various states, may contribute to the development of rules for CIL interpretation on the international level. Conceptual points of connection concern the translation of national law and domestic decisions into international law by analogy. Kanetake observes that analogical reasoning is widely used in judicial practices, and offers as an example the translation of domestic law and practices into international law by means of legal transplants.[50] The conceptual points of connection inform our inquiry by demonstrating that the interpretive practices of a domestic court may, where relevant, be transplanted to the international level for the purposes of CIL interpretation. Arguing along similar lines, Nollkaemper observes that domestic courts may contribute to the normative development of international law through their acceptance or not of pronouncements by international courts. Here, the fate of pronouncements by international courts depends on their acceptance and recognition by other actors, and domestic courts are one of the actors that play this role.[51] For the purpose of our present inquiry this points to a potential 'conversation among courts' (to use Nollkaemper's terminology) both at the stage of identification or development of rules for CIL interpretation, and at a later stage when these rules are more established. Namely, domestic courts may already be confirming existing pronouncements by international courts when it comes to the interpretation of CIL – thereby adding to a body of domestic jurisprudence from which to draw at the stage of identifying rules of interpretation; and they may continue to participate in this 'conversation' after clear rules or guidelines for CIL interpretation are identified or developed.

4 The Role of Domestic Courts in the Development of Rules for CIL Interpretation

Having examined the role of domestic courts in the development of international law both within the framework of source and beyond it, we now turn to the operative portion of this chapter. What the above examination demonstrates is that there is ample scholarship to draw

[50] ibid; see also JB Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 27 Ecology LQ 1295; A Dolidze, 'Bridging Comparative and International Law: Amicus Curiae Participation as a Vertical Legal Transplant' (2016) 26 (4) EJIL 851.

[51] A Nollkaemper, 'Conversations among Courts: Domestic and International Adjudicators' in CPR Romano, KJ Alter & Y Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 524, 539–40.

from when examining the relationship between domestic courts and international law. However, as the reader might have already noticed, the majority of scholarship focuses on the potential contribution of domestic courts in the form of substantive legal analysis and content. Conversely, what seems to be lacking is an account of the ways in which the interpretive methodologies of domestic courts may contribute to the development of interpretive methodologies in international law. In this section, we will first examine several cases where domestic courts engaged with CIL or domestic custom, with a particular focus on the methods of interpretation they employed, and, where available, the rationale behind that methodological choice (Section 4.1). Then, the section will lay out a set of preliminary observations on how these examples by domestic courts may contribute to the development of rules for CIL interpretation in international law along two lines of inquiry: how can we learn from domestic interpretive practices? (Section 4.2) and why should we learn from them? (Section 4.3).

4.1 Some Examples from Domestic Courts

This section contains examples of domestic courts interpreting CIL and domestic custom. The cases were found in cooperation with national research teams in various jurisdictions, as part of an ongoing research cooperation between these teams and the TRICI-Law project.[52]

4.1.1 Domestic Courts Interpreting CIL

We begin our analysis with the case of *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment* v. *Israel and ors*, brought before the Israel Supreme court. Of the cases examined in this section this is the only case where a domestic court engages in the interpretation of CIL, as opposed to the other cases which are all examples of domestic courts interpreting domestic custom. It is for this reason that the case is catalogued under its own sub-heading.

In this case, the core question put before the court was whether the policy of targeted killings employed by Israel against members of Palestinian 'terrorist' organisations was legal under international law. Overall, the court found that it cannot be determined in advance that every targeted killing is either permissible or prohibited according to CIL.

[52] For more information see <https://trici-law.com/research/domestic/>.

https://doi.org/10.1017/9781009025416.022 Published online by Cambridge University Press

Rather, the legality of each individual targeted killing is to be decided according to its particular circumstances.[53]

The court began its analysis by observing that the 'geometric location of our issue is in customary international law dealing with armed conflict'.[54] This is relevant because, as we will see in the subsequent analysis, the court took the text of Article 51(3) of *Protocol Additional to the Geneva Conventions of 12 August 1949* (AP I) as a verbatim statement of the relevant CIL rule, and applied it to the case not as a treaty provision but as a rule of CIL. This was done because (i) Israel is not party to AP I, and (ii) even if it was, 'the international law entrenched in international conventions which is not part of CIL is not part of the internal law of the State of Israel'.[55] Thus, although the court made constant reference to the wording of Article 51(3), when doing so it was not interpreting a treaty provision but was interpreting the customary rule reflected in that provision.

The court first went through the categories of 'combatants' and 'civilians' as defined by CIL, to conclude that members of 'terrorist' organisations do not belong to either of these categories. Instead, the court turned to the category of 'civilian taking direct part in hostilities' as the more apposite description.[56] Next, relying on 'extensive literature on the subject' the court found that presently the category of 'unlawful combatants' proposed by the Israeli state is not recognised in CIL. However, the court continued, 'new reality at times requires new interpretation. Rules developed against the background of a reality which has changed must take on dynamic interpretation which adapts them, in the framework of accepted interpretational rules, to the new reality.'[57] With this statement the court introduced in no uncertain terms the possibility, and indeed its intention, to interpret the customary rule pertaining to civilians taking direct part in hostilities evolutively.[58] The relevant customary rule was identified by reference to Article 51(3) of AP I which states that 'Civilians shall enjoy the protection afforded by this section, unless and for such time as they

[53] *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors* (13 December 2006) Supreme Court of Israel, HCJ 769/02 [60].
[54] ibid [19].
[55] ibid.
[56] ibid [24–26].
[57] ibid [28].
[58] For a discussion on evolutive interpretation see E Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014); N Mileva & M Fortuna, 'Environmental Protection as an Object of and Tool for Evolutionary Interpretation' in G Abi-Saab et al (eds), *Evolutionary Interpretation and International Law* (Hart 2020) 123.

take a direct part in hostilities.' This formulation was found by the court to express CIL in its entirety.[59] From here the court embarked on an assessment of what it observed to be the three constitutive parts of this customary rule: (i) taking part in 'hostilities', (ii) taking 'direct' part and (iii) 'for such time'.[60]

With regard to the definition of 'hostilities' the court relied on a Commentary on the Additional Protocols by the Red Cross to observe that hostilities are acts which by nature and objective are intended to cause damage to the army. Next, the court expanded this definition by stating that '[i]t seems that acts which by nature and objective are intended to cause damage to civilians should be added to that definition'.[61] Reading this passage alone, it may seem unclear how the court arrived at the finding that acts which are intended to cause damage to civilians should be added to the definition of hostilities. In the passage itself the court relied on a scholarly analysis but did not elaborate on this reference. However, reading this passage in the context of the court's earlier statement, it becomes evident that here the court is 'updating' the definition of 'hostilities' to correspond to the new factual reality of the conflict, or, in other words, is interpreting the customary concept of hostilities evolutively.

Turning next to the definition of 'direct', the court catalogued commentaries, scholarly work, and judgments of international tribunals to conclude that there is no uniform definition of direct participation in hostilities. 'In that state of affairs, and without a comprehensive and agreed upon customary standard, there is no escaping going case by case, while narrowing the area of disagreement'.[62] In order to find an appropriate definition of 'direct' for the context of justified targeted killings the court examined the objective to be achieved with the interpretive exercise:

> On the one hand, the desire to protect innocent civilians leads, in the hard cases, to a narrow interpretation of the term 'direct' part in hostilities. . . . On the other hand, it can be said that the desire to protect combatants and the desire to protect innocent civilians leads, in the hard cases, to a wide interpretation of the 'direct' character of the hostilities, as thus civilians are encouraged to stay away from the hostilities to the extent possible.[63]

[59] *Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v Israel and ors* [30].
[60] ibid [32].
[61] ibid [33].
[62] ibid [34].
[63] ibid [35].

On this reasoning, the court opted for a wider interpretation, and enumerated a wide spectrum of behavior that should be considered 'direct' participation.[64] Similarly, turning to the definition of 'for such time', the court found that there is currently no consensus on the meaning and thus it must be examined on a case-by-case basis. For the case of targeted killings, the court identified four general principles that should be borne in mind in the assessment.[65]

This case is a rich and complex example of the interpretation of CIL by a domestic court. Overall, three observations can be made. Firstly, the court took a treaty rule as the codified version of a CIL rule, and used this text for its subsequent interpretation. While this conflation of a customary rule with its codified counterpart may be considered problematic because it opens a discussion on the relationship between CIL and treaties, it may also be argued that in doing this the court engaged in systemic interpretation of CIL. Namely, when the content of a CIL rule is examined by reference to its codified counterpart, this is done because the two rules are taken as relevant to each other due to their identical content. Thus, what is in fact happening is that the CIL rule is interpreted by taking into account the treaty rule that codifies it, or in other words is interpreted according to the principle of systemic integration.[66] Secondly, it seems that two interpretative methodologies may be discerned in the court's reasoning. Overall, the court interpreted the customary rule on direct participation in hostilities evolutively, by adding new modalities of behavior which should be considered as coming under the scope of the rule in light of the new factual situation of the conflict. Moreover, the court elaborated new standards which should be considered when assessing whether a civilian is taking direct participation in hostilities for the purposes of deciding whether they can legitimately be a target of targeted killings. However, while the court interpreted the overall customary rule evolutively, in its interpretation of the individual elements of the rule it also engaged in teleological interpretation. In particular, when assessing the element of 'direct' the court inquired what objective is to be achieved with the rule, and opted for a wider interpretation in order to ensure the protection of combatants and innocent civilians and to encourage civilians to stay away from the hostilities. Finally, in the

[64] ibid [35–37].
[65] ibid [39–40].
[66] Merkouris (n 6) 264–65.

grander scheme of things, the court's reliance on evolutive interpretation might make us wonder about the role of interpretation in the life of a CIL rule. What we can see in this case is that through evolutive interpretation the court ended up 'updating' and specifying the content of the customary rule in question, thus arguably transforming it for those who may rely on it in the future. This raises the question as to what is the role of evolutive interpretation in the modification of existing CIL rules, and how does this method of interpretation play into our understanding of the genesis and continued existence of customary rules. While this discussion is presently beyond the scope of this chapter, it is certainly an interesting avenue for further research.

4.1.2 Teleological Interpretation of Domestic Custom

The next case considered in this section is *TC1.6p.7613* argued before the Veles Court of First Instance in North Macedonia. The case is an example of a domestic court interpreting a domestic customary rule. In this case, the court was asked to review a penalty stipulated in a written agreement between the plaintiff and respondent. Namely, the two had concluded an agreement regulating the payment of penalties which might arise in the case of non-compliance with two previously concluded sales contracts (agreement). The agreement was governed by the 'Law of Obligations', which is a law governing contracts and damages in the area of civil law in the Macedonian legal system. Pursuant to this law, all legal agreements between parties need to comply with the constitution, the laws and good customs.[67] Furthermore, legal agreements which do not comply with the constitution, the laws and good customs are considered null and void.[68] Thus, in this case the court had to evaluate whether the penalty for breach of contract stipulated in the agreement between the parties was in keeping with, among others, customary law.

It is important to note that in the Macedonian law of obligations custom has a secondary role behind the constitution and other written rules, and is only considered in cases where the written law is silent or

[67] Article 3 of the 'Law of Obligations' reads: 'The parties engaged in legal transactions are free to regulate their obligation relations in accordance with the Constitution, laws, and good customs and usages'; Article 15(1) of the 'Law of Obligations' reads: 'The participants of obligational relations have a duty to observe the good business customs in their legal relations' *Law of Obligations*, Official Gazette of R Macedonia No 18 of 5 March 2001 (the law has not been translated in English, and this is an unofficial translation of the relevant provision by the author) <https://bit.ly/3mOqrZU> accessed 1 March 2021.

[68] Article 95 of the 'Law of Obligations' (n 67).

there is a gap.[69] In light of this, in *TC1.6p.7613* the court considered customary law only briefly, and ultimately made its decision on a combined consideration of written law and customary rules. Nonetheless, in doing so, the court made some observations with respect to the interpretation of custom. Notably, the court observed as follows:

> In circumstances when we are dealing with a contractual penalty, that penalty needs to remain within the limits of the good business customs and serve the purpose of strengthening the discipline of the parties in their timely fulfillment of contractual obligations, and not to serve as a source of unjust enrichment contrary to the principles of conscientiousness and honesty. This is because the objective of a contractual penalty does not allow for the penalty to be excessive and disproportionate to the obligation for whose protection it is stipulated.[70]

In this case, there was no rule applicable to the situation which stipulated the specific amount that a contractual penalty can reach. Instead, the court only identified the general rule that 'a penalty should be in keeping with good business customs'. Subsequently, the court examined this general rule by reference to the objective of such rules and the purposes they are supposed to serve. In other words, it seems that here the court engaged in teleological interpretation of the customary rule. It is difficult to gauge why the court opted for teleological interpretation as the relevant method for the interpretation of custom, and more research needs to be conducted to find whether this is an isolated choice or a consistent trait of this particular legal system. Nonetheless, a few initial questions come to mind: is teleological interpretation an apposite method when it comes to customary law? How can we assess the object and purpose of a customary rule if we bear in mind that it is a rule which usually emerges gradually and in a decentralised manner?

4.1.3 Evolutive Interpretation of Domestic Custom

The final three cases examined in this section all come from the domestic courts of Kenya, and are examples of domestic courts interpreting domestic customary law. In the case of *Mary Rono* v. *Jane Rono & another* the Court of Appeal was asked to review a judgment of the High Court of Kenya related to the distribution of inheritance. In the disputed decision, the High

[69] G Galev & J Dabovikj-Anastasovska, *Obligaciono Pravo* (3rd ed, University of St. Cyril and Methodius Skopje 2012) 32–33.

[70] *TC1.6p.7613* (2013) Veles Court of First Instance, North Macedonia, 21 (unofficial translation of the original passage by the author).

Court arrived at a distribution of the inheritance based on both customary law and statutory laws on succession.[71] Namely, the High Court found that according to the relevant customary law the distribution of inheritance was by reference to the house of each wife irrespective of the number of children, and that daughters received no inheritance. On the other hand, taking statutory law and the will of the parties in consideration, the High Court found that the daughters should also be entitled to a share of the inheritance. However, because they are likely to marry, they were apportioned a lower share of the inheritance than the male children.[72]

In its review of this judgment, the Court of Appeal considered both customary law and statutory law, as well as relevant international law.[73] While the court eventually made its decision primarily on the basis of the written law, it nonetheless dedicated considerable space in the judgment on the interpretation of African customary law. 'The manner in which courts apply the law in this country is spelt out in section 3 of the Judicature Act Chapter 8, Laws of Kenya. The application of African Customary Laws takes pride of place in section 3(2) but is circumscribed thus: " . . . so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law . . . ".'[74] Having outlined this, the Court of Appeal went on to discuss whether the customary rules on distribution of inheritance could be considered 'repugnant to justice and morality'. In particular, the court considered the prohibition on discrimination contained in Kenya's constitution,[75] and the international human rights treaties and CIL applicable in Kenya,[76] as indicators of what might be considered for the purposes of the repugnancy test. Two observations can be made concerning the interpretation of the court in this case. First, when assessing whether the customary rules on distribution of inheritance might be considered discriminatory according to prevalent rules of non-discrimination from both Kenyan and international law, the court was arguably engaging in systemic interpretation of those customary rules. In this sense, the court was interpreting the customary rules in the context of the overall legal system that they are operating in and with reference to other legal rules that the customary rules coexist with. Secondly, the 'repugnant to justice and

[71] *Mary Rono v Jane Rono & Another* (29 April 2005) Kenyan Court of Appeal at Eldoret, Civil Appeal No 66 of 2002, 4.
[72] ibid.
[73] ibid 7.
[74] ibid.
[75] ibid 7–8.
[76] ibid 8.

morality' caveat to the application of African customary law is a very interesting provision of the Kenyan Judicature Act.[77] What this caveat implies is that African customary law is applicable insofar as it is not repugnant to justice and morality. Thus, by consequence, every rule of African customary law when invoked needs to be assessed against the justice and morality standards prevalent in Kenyan society. What this in essence means is that when an African customary law comes before a Kenyan court it will need to be assessed in light of the justice and morality standards prevalent in Kenyan society at that point in time. If those standards change or evolve with time, the customary rule will need to evolve with them or fall into disuse. Thus, this provision of the Kenyan constitution is in fact allowing for the evolutive interpretation of African customary law.

This conclusion is also supported by the reasoning of the High Court of Kenya in the case of *Katet Nchoe and Nalangu Sekut* v. *Republic*. In this case, the High Court of Kenya was asked to review a 10-year prison sentence handed down by a lower criminal court for the crime of manslaughter. The crime occurred during a procedure of female genital mutilation (FGM) which went wrong and resulted in the death of a 16-year-old girl. Counsel for the appellants argued that the prison sentence was harsh and excessive, and stressed that the offence for which the appellants were charged, convicted, and sentenced arose out of an old customary practice of circumcision.[78] The court accepted that this is indeed an old customary practice, and proceeded in the following manner:

> Section 3 of the Judicature Act . . . enjoins the High Court . . . to apply customary law where such custom is not repugnant to justice and morality. The repugnancy clause evokes a lot of anger and discussion among students of law, whose justice, and whose morality, I do not think it is the justice of the colonialist, or the judge or the court. It is the justice of all the surrounding circumstances of the custom in point. There is no more justice in this custom if ever there was any. . . .

[77] The full provision reads:

> The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay'.

Judicature Act, 2012 rev KLR CAP 8, 5 <https://bit.ly/2YLRay8> accessed 1 March 2021.

[78] *Katet Nchoe & Another v Republic* (11 February 2011) High Court of Kenya, Criminal Appeal No 115 of 2010, 3.

> . . . In our case, female genital mutilation is certainly harmful to the physical and no doubt the psychological and sound well-being of the victim. . . . That kind of custom could truly be well discarded and buried in the annuals of history.[79]

On this reasoning, the High Court upheld the decision to sentence the two appellants, but lowered their sentence to two years and mandated subsequent seminars on the eradication of FGM for both.[80]

Yet another case where a court relied on evolutive interpretation in their assessment of customary law is the case of *Martha Wanjiru Kimata & another* v. *Dorcas Wanjiru & another*. However, unlike in *Mary Rono* and *Katet Nchoe*, here the court did not have to evaluate the custom in question against the repugnancy clause, but resorted to evolutive interpretation in light of another line of reasoning. In this case, the High Court of Kenya was asked to consider which member(s) of family have the right to make decisions concerning a person's burial. The court found that the law applicable to a burial decision is customary law.[81] The court then went on to observe: 'Customary law like all laws is dynamic. It is especially so because it is not codified. Its application is left to the good sense of the judges who are called to apply it. It is worded the way it is to allow the consideration of individual circumstances of each case.'[82] It seems that here the High Court opted for an evolutive interpretation of custom because of the nature of custom as a source of law. Namely, in the words of the court, custom is like all laws dynamic, but especially so because it is not codified. This is an interesting observation which seems to imply that because of its unwritten character customary law is a good candidate for evolutive interpretation. In other words, the method of evolutive interpretation seems to be particularly apposite for a source like custom which is both unwritten, and, because of its unwritten character, dynamic and able to evolve together with the community it stems from.

4.2 How Can We Learn from Domestic Interpretive Practices?

We must always be careful not to draw too grand a conclusion from a small sample of cases, and it is in this spirit that these findings, however interesting, remain preliminary. Nonetheless, it emerges from a reading of the

[79] ibid 4.
[80] ibid 5.
[81] *Martha Wanjiru Kimata & another v Dorcas Wanjiru & Another* (24 February 2015) High Court of Kenya, Civil Appeal No 94 of 2014, 5.
[82] ibid.

https://doi.org/10.1017/9781009025416.022 Published online by Cambridge University Press

above cases that across varied jurisdictions judges seem to arrive at similar choices with respect to interpretive methodologies in the case of customary law. Moreover, there seems to be no prima facie difference between the methods of interpretation that domestic courts employ when interpreting domestic custom and when interpreting CIL. It transpires from the above cases that when dealing with custom judges may refer to the object and purpose of the customary rule, thus engaging in teleological interpretation. This raises the question of how might we assess the object and purpose of customary rules, and where do we turn for evidence of this? Furthermore, it seems that judges may interpret customary rules by reference to their codified counterparts, or by assessing them in the context of other rules of the legal system to which they belong, thus engaging in systemic interpretation. Finally, it emerges from the above cases that judges may resort to evolutive interpretation in their assessment of a customary rule, in order to 'update' the rule in light of new factual or legal considerations. This last observation in particular opens the questions of what the role of interpretation in the life of a CIL rule is, and how interpretation plays into our understanding of the genesis and continued existence of this source of law.

So, observing these few examples from cases and bearing in mind the role of domestic courts in the development of international law analysed in Section 3 above, we ask once again: how can the interpretive practices of domestic court contribute to the development of rules or guidelines for the interpretation of CIL? It is this author's view that the role of domestic courts envisaged by the formal framework of sources of international law does not fully grasp the contribution that domestic courts can have in the development of international law. Rather, in order to fully utilise the lessons that domestic courts have to offer, an informal line of influence must be accounted for as well. It is important to clarify that this chapter does not advocate for a complete departure from the framework of sources. Much like the scholarship discussed in Section 3, this chapter proposes that an adequate approach includes the sources framework as a point of departure and builds a broader framework of analysis from there. Thus, beginning with the framework of sources, the interpretive methodologies of domestic courts may contribute to the development of rules for the interpretation of CIL in the following ways. Firstly, the interpretive methodologies of domestic courts may contribute to customary rules of interpretation of CIL, as evidence of state practice. If an interpretive methodology can be identified across domestic courts when they interpret customary law, this may point to the existence of a customary rule(s) for the interpretation of CIL. Secondly, the interpretive methodologies of

domestic courts, if shared across the domestic courts of a majority (if not all) of states, may contribute to the identification of general principles of interpretation of customary law. However, a study of domestic court practice for the purpose of identifying general principles of interpretation raises both practical[83] and theoretical[84] problems, and this must be taken in account in future research on the subject. Finally, and depending on one's reading of Article 38(1)(d) of the ICJ Statute, the decisions of domestic courts may be considered as subsidiary means for determining the rules for CIL interpretation. However, as already mentioned in Section 3 above, scholarly views as to the inclusion of domestic court practice in the reference to 'judicial decisions' in Article 38(1)(d) are divided.

Looking beyond the framework of sources, the 'cycle of contestation and deference' framework tells us that the practice of domestic courts may also contribute to the development of international law through normative or conceptual points of connection.[85] Namely, with respect to normative points of connection which occur in instances of inter-judicial communication across national courts of different states, it is argued that they may create norms which, although not yet part of formal international law, affect the ways in which international judicial institutions render their decisions. What this means for our present inquiry is that interpretive methodologies of domestic courts, if shared or communicated across courts of various states, may informally contribute to the way CIL is interpreted by international judicial institutions by generating norms of interpretation that will be picked up by international judges. Furthermore, conceptual points of connection occur when domestic legal concepts are analogised into international law. In this context, interpretive methodologies of domestic judges may be introduced into international law or practice through means of analogy. Normative and conceptual points of connection differ from the influence of domestic courts described through the framework of sources because they account for the potential influence of domestic judicial practice on the development of international law even when this judicial practice would not otherwise qualify as evidence of CIL or general principles. What is meant here is simply that while for the purpose of a customary rule or general principle of interpretation to be extrapolated from the practice of domestic courts this practice would have

[83] Can we truly examine the practice of the domestic courts of most (or all) states in order to identify universally shared principles?

[84] Can we identify general principles of interpretation, and if so, how will this exercise differ from an identification of customary rules of interpretation?

[85] Kanetake (n 47).

to meet the standards of widespread, uniform and representative, in the context of normative or conceptual points of connection it seems that this threshold is lower. In light of this, as an analytical framework, they capture the informal ways in which domestic court practice may be taken in consideration by international judges or practitioners, and can register instances where only a handful of domestic courts or even one single domestic court has exerted a significant influence on the development of international law. In this sense, this framework allows the researcher to examine the influence of domestic courts through a wider lens.

4.3 Why Should We Learn from Domestic Interpretive Practices?

In this author's view, there are three reasons why international law should learn from domestic law for the purpose of CIL interpretation.

Firstly, because the interpretation of CIL is currently an under-examined and unregulated sphere of international law. As demonstrated by Section 2, international legal theory and practice presently offer little discussion and guidance on the issue of CIL interpretation, and there are no uniform guidelines for the process of CIL interpretation. Such an existing gap in international law may be considered to legitimately invite contributions from domestic law. For instance, scholars observe that national court decisions play a crucial role in developing international law in areas of the law that tend to come before domestic courts,[86] or in instances where there is a need to plug legal gaps in international law.[87] Similarly, domestic courts are crucial in the normative development of international law insofar as they can confirm or not pronouncements by international courts.[88] Furthermore, learning from existing legal practices and approaches in domestic law for the purpose of CIL interpretation provides the benefit of already developed knowledge and practice. Seen as we are still only at the beginning of studying and developing the rules that guide the interpretation of CIL, interpretive practices of domestic courts which have dealt with the interpretation of custom offer the opportunity to benefit from the experience of already developed practices. Moreover, existing scholarship demonstrates that international law is already in fact to a great extent relying on interpretive canons

[86] See Steinbruck Platiše (n 5); Roberts (n 26).
[87] H van der Wilt, 'National Law: A Small but Neat Utensil in the Toolbox of International Criminal Tribunals' (2010) 10 Int CLR 209, 241.
[88] See Nollkaemper (n 51).

which originate in or are derived from domestic legal systems.[89] While interpretive canons originating in domestic legal systems have so far contributed primarily to the exercise of treaty interpretation, there is no reason why domestic interpretive practices, where relevant, should not be considered instructive to the development of rules or guidelines for CIL interpretation as well.

Secondly, because domestic courts are increasingly engaging with CIL in their proceedings, and there is an ever-growing pool of relevant interpretive practice which can contribute to the development of rules or guidelines for CIL interpretation. On this point, In his contribution to a recently published casebook on international law in domestic courts, Jorian Hamster demonstrates that a variety of domestic courts across different states engage in the application and interpretation of CIL.[90] Moreover, when domestic courts are faced with the need to ascertain or interpret CIL, they often turn to international case law or international legal scholars for guidance.[91] This shows us that the interaction between the two legal orders for the purpose of CIL interpretation is already taking place, and accentuates the need to study these avenues of mutual learning further.

Finally, because by learning from domestic practices for the purpose of CIL interpretation, international law can then provide domestic judges with various familiar tools for their further engagement with CIL in the domestic context. If we consider the cyclical interaction between domestic and international law, we will recall that the two legal orders interact both in the domestic-to-international and in the international-to-domestic directions. In particular, here it would be useful to recall the feedback loop which tells us that domestic courts are both contributors to the development of international law in their various roles in (and beyond) the framework of sources, as well as judicial institutions which apply and enforce international law. What this means in our present context is that

[89] J Klingler, Y Parkhomenko & C Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2019); see in particular M Waibel, 'The Origins of Interpretive Canons in Domestic Legal Systems' in J Klingler, Y Parkhomenko & C Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2019) 25–46.

[90] J Hamster, 'Customary International Law' in A Nollkaemper & A Reinisch (eds), *International Law in Domestic Courts: A Casebook* (Oxford University Press 2018) 243; see also C Ryngaert & D Hora Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65 NILR 1, 3–4; see also Chapter 22 by Ryngaert in this volume.

[91] Hamster (n 90) 245–46.

if domestic interpretive practices feed the development of rules for CIL interpretation in international law, the developed rules for interpretation will then find their way back to domestic courts in future cases where those courts will again be faced with the task to apply and interpret CIL. The benefit of this cycle is twofold. Firstly, it is beneficial for future domestic judicial practice, because it will provide domestic judges with a familiar and coherent blueprint which they can refer to when they need to interpret CIL in future cases. Secondly, it is indirectly beneficial for the further development of international law; since domestic judicial practice can be a source of international law, by providing domestic judges with familiar and coherent guidelines for CIL interpretation we ensure that subsequent domestic case law can contribute to international law in a coherent manner. Thus, learning from domestic practices promotes the achievement of an integrated system of international law which remains closely related to and aware of domestic law.

5 Concluding Remarks

Domestic courts have the potential to contribute significantly in the development of rules or guidelines for the interpretation of CIL. Scholars have demonstrated that domestic courts are in fact often faced with the task to apply and interpret CIL, and thus yield relevant practice from which we may learn in the study of CIL interpretation. Moreover, a brief survey of some domestic practice indicates that domestic courts employ a variety of methods to interpret customary law, and there is a lot to learn from and examine in these methodological choices.

This chapter began with the question: how can interpretive methodologies employed by domestic courts inform the development of rules or guidelines for the interpretation of CIL? It examined the general scholarship on the role of domestic courts in the development of international law, and applied these findings particularly to the potential contribution of interpretive methodologies of domestic courts to the development of interpretive methodologies in international law. By examining five cases from various jurisdictions the chapter observed that in the interpretation of custom domestic courts may employ teleological, systemic or evolutive interpretation. While this is a restricted sample and no grand conclusions may be reached yet, these cases open many interesting questions about the nature of customary law interpretation and the role of interpretation in the genesis and continued existence of customary rules.

Bearing this in mind, the chapter laid out some preliminary observations along two lines of inquiry: (i) how can we learn from domestic interpretive practices? and (ii) why should we learn from them? With respect to the first question, it was observed that in order to adequately study the contribution of domestic courts' practice to the identification and development of rules for the interpretation of CIL we should depart from the role of domestic courts within the sources framework and build a broader framework of analysis from there. Thus, additional informal normative and conceptual points of interaction need to be considered in order to register and account for all the ways in which domestic interpretive practices can inform our inquiry. In answering the second question, the chapter submitted three reasons why we should look to domestic practice. Firstly, because the interpretation of CIL is currently an underexamined and unregulated sphere of international law, and this kind of 'gap' legitimately invites contributions from domestic practice. Secondly, because domestic courts are frequently engaging with customary law, and this provides a growing pool of relevant interpretive practice which can be instructive to the development of rules for CIL interpretation in international law. Finally, because by learning from domestic practices for the purpose of CIL interpretation, international law can provide domestic judges with various familiar tools for their further engagement with CIL in the domestic context. This is beneficial both for domestic judicial practice and for the further development of international law.

Overall, the chapter found that this is an area of research which raises various relevant questions, and thus invites substantive further investigation.