1

Introduction

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1.1 Background

Domestic and international courts across the world play an important role in giving effect to international human rights law. What sort of judicial dialogue do they engage in when protecting human rights? That is the topic of this volume. Such dialogues are particularly important for securing human rights in a world affected by rapid changes. Human rights provisions are often open-ended and require an 'evolutive' interpretation.[1] Hence, judges applying human rights instruments or parallel domestic provisions are given the challenging task of ensuring 'practical and effective' protection in the light of 'present-day conditions'.[2] 'Present-day conditions' can often be characterised by new or newly recognised threats to people's ability to enjoy their human rights. A prominent example is the so-called war on terror. In the aftermath of 9/11, many countries rushed to adopt comparable counterterrorism measures, some of which have been found to violate international human rights law and/or domestic constitutional law.[3] Other current human rights issues affecting numerous countries concern the right to privacy vis-à-vis activities of intelligence services

[1] T. Makkonen, 'Between Anti-Essentialism and Anti-Everything – Is There Anything?', J. Petman and J. Klabbers (eds.), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Leiden: Brill, 2003) 251–61, at 257; D. Harris *et al.* (eds.), *Law of the European Convention on Human Rights*, 3rd ed. (Oxford University Press, 2014) at 8–10; M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerpen: Intersentia, 2003) at 81.

[2] E.g. *Tyrer v. the United Kingdom* (Appl. No. 5856/72), Judgment (Chamber), 25 April 1978, Series A, Vol. 26, para. 31, a statement that the ECtHR repeated many times in other judgments and which has become an established doctrine of the ECtHR's jurisprudence. See also Harris *et al.*, Law of the European Convention, *supra* note 1, at 8–10.

[3] E.g. D. Moeckli, *Human Rights and Non-Discrimination in the 'War on Terror'* (Oxford University Press, 2008); R.A. Wilson (ed.), *Human Rights in the War on Terror* (Cambridge University Press, 2005).

and of big internet providers and companies,[4] the protection of migrants'[5] and LGTBI people's rights,[6] as well as measures taken to address the global financial and economic crisis, some of which conflict with socio-economic rights.[7]

The interpretation and application of domestic and international human rights law concerning these and other areas often involve controversial debates, which can encompass political, historical, cultural, religious and economic interests. The controversies may involve collisions between domestic laws and international human rights law; and they can also reflect broader disagreement about the appropriate scope of protection of a particular right within a country, between states and/or within regional and international fora. When rendering judgments in human rights cases, domestic and international judges are constantly asked to find the right balance between the protection of individual rights and public interests, between the rights of different people, and between respect for international (universal) human rights law and principles on the one hand and respect for legitimate diversity in the interpretation and application of human rights on the other.

This book analyses whether, how and with what effect domestic and international courts engage in dialogue when addressing these and other challenges in securing human rights. Judicial dialogue occurs when national and international judges construing and giving effect to a particular norm look at how their colleagues in other states or international courts have construed the same or a similar norm. This practice of looking beyond 'borders' has been coined in various terms: 'transnational', 'global' or 'international' judicial dialogue,[8]

[4] E.g. L. Paquette, 'The Whistleblower as Underdog: What Protection Can Human Rights Offer in Massive Secret Surveillance?', *The Int'l J. of Human Rights* 17:7–8 (2013) 796–809; and A. Mihr, 'Public Privacy: Human Rights in Cyberspace', *SIM Working Paper, The Netherlands Institute of Human Rights*, Utrecht University (2013).

[5] R. Rubio-Marin (ed.), *Human Rights and Immigration* (Oxford University Press, 2014).

[6] E.g. M. O'Flaherty and J. Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles', *Human Rights Law Review* 8:2 (2008) 207–48; and S. Goldberg, *Sexuality and Equality Law* (Franham: Ashgate, 2013).

[7] E.g. A. Nolan (ed.), *Economic, Social and Cultural Rights after the Global Financial Crisis* (Cambridge University Press, 2014); D. Bilchitz, 'Socio-economic Rights, Economic Crisis, and Legal Doctrine', *Int'l J. of Constitutional L.* 12:3 (2014) 710–39; A. Kentikelenis *et al.*, 'Greece's Health Crisis: From Austerity to Denialism', *The Lancet* 383 (2014) 748–53.

[8] See e.g. R. Krotoszynski, '"I'd Like the World to Sing (in Perfect Harmony)": International Judicial Dialogue and the Muses – Reflections in the Perils and the Promise of International Judicial Dialogue', *Michigan L. Rev.* 104:6 (2006) 1321–59; D. Law and W.C. Chang, 'The Limits of Global Judicial Dialogue', *Washington L. Rev.* 86 (2011) 523–77; M. Waters, 'Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating

'conversation'[9] or 'engagement';[10] 'transjudicial dialogue'[11] or 'communication';[12] 'inter-judicial coordination';[13] 'transjudicialism',[14] 'judicial comparativism';[15] 'comparative international law';[16] and 'transnational interaction'[17] of courts.[18] The interaction between courts is facilitated by increased cross-border communication in most regions of the world, which has also become possible through technological advances combined with publication and reporting of (translated) court decisions.[19]

and Enforcing International Law', *Georgetown L. J.* 93 (2005) 487–574; G.S. Goodwin-Gill and H. Lambert (eds.), *The Limits of Transnational Law – Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010); M. Kirby, 'Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges', *Melbourne J. of Int'l L.* 9:1 (2008) 171–90; G. Martinico and O. Pollicino, *The Interaction between Europe's Legal Systems: Judicial Dialogue and the Creation of Supranational Laws* (Cheltenham: Edward Elgar, 2012); and A. Strauss, 'Beyond National Law: The Neglected Role of International Law of Personal Jurisdiction in Domestic Courts', *Harvard Int'l L. J.* 36:2 (1995) 373–425, introducing the phrase 'international judicial dialogue' in 1995, at 378.

[9] See e.g. C. McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', *Oxford J. of Legal Studies* 20:4 (2000) 499–532; and M. Kirby, 'Domestic Court and International Human Rights Law – The Ongoing Judicial Conversation', *Utrecht L. Rev.* 6:1 (2010) 168–81.

[10] V. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2010) at 71.

[11] M. R. Ferrarese, 'When National Actors Become Transnational: Transjudicial Dialogue between Democracy and Constitutionalism', *Global Jurist* 9:1 (2009) 1–31.

[12] A. M. Slaughter, 'A Typology of Transjudicial Communication', *University of Richmond L. Rev.* 29:1 (1994–1995) 99–139.

[13] E. Benvenisiti and G. Downs, 'Towards Global Checks and Balances', *Constitutional Political Economy* 20:3–4 (2009) 366–87, at 382.

[14] R. Bahdi, 'Globalisation of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts', *George Washington Int'l L. Rev.* 34 (2002) 555–88.

[15] E. Örücü (ed.), *Judicial Comparativism in Human Rights Cases* (London: British Institute for International and Comparative Law, 2003); M. Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press, 2013). See also G. Canivet, M. Andenæs and D. Fairgrieve (eds.), *Comparative Law Before the Courts* (London: British Institute for International and Comparative Law, 2004); and B. Markesinis and J. Fedtke, *Engaging with Foreign Law* (Oxford: Hart, 2009).

[16] A. Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law', *Int'l and Comparative L. Quarterly* 60:1 (2011) 57–93.

[17] See A. Hol, 'Highest Courts and Transnational Interaction – Introductory and Concluding Remarks', *Utrecht L. Rev.* 8:2 (2012) 1–7. This editorial relates to a number of articles discussing this phenomenon.

[18] For the terminology used in this book, see *infra* section 1.2.1.

[19] Roberts, 'Comparative International Law?', *supra* note 16, at 58; Jackson, Constitutional Engagement, *supra* note 10, at 5–6. Note in particular International Law in Domestic Courts (ILDC), published by Oxford University Press as part of the Oxford Reports on

Dialogue can help courts in the interpretation and application of domestic constitutional law and/or international human rights law, to solve a concrete dispute and to find common solutions to current human rights problems. To return to the example of counterterrorism measures, a study of how other courts have balanced the various interests involved can enhance a judge's understanding of what solution works best. In this way, international and domestic courts can arrive at shared solutions to bring these measures in line with international human rights law and/or parallel domestic norms. References to interpretations that carry transnational support can be particularly valuable as a means to strengthening judicial credibility in cases that are politically charged or otherwise controversial. From this perspective, judicial dialogue in the area of human rights can also be seen as a tool for the incremental development of *international* human rights law and principles.[20] A 'conversation' between domestic and international judges, including when it involves an acknowledgement of differentiated solutions, could help to resolve conflicting interpretations at the national, regional and international levels or promote the acceptance of legitimate national or regional differences. Yet disparities in the participation of different national and international courts in a judicial dialogue[21] may undermine the development of a *truly international* understanding of human rights law and principles.[22]

This brings us to another, larger role that national and international courts play in today's world, and that could be enhanced through dialogue through human rights:[23] ensuring the 'rule of law'.[24] While there

International Law (ORIL) and Cambridge Law Reports (CLR), published by Cambridge University Press.

[20] In this context see the observation by Esin Örücü that 'comparativism must be at the heart of human rights cases, if human rights are to be regarded as embodying principles that are "universal" rather than purely domestic or even "European"'. See E. Örücü, 'Whither Comparativism in Human Rights Cases?', E. Örücü (ed.), *supra* note 15, 229–43, at 230; see also C. Koch, 'Judicial Dialogue for Legal Multiculturalism', *Michigan J. of Int'l L.* 25:4 (2003–04) 879–903.

[21] See text accompanying *infra* notes 28–35.

[22] For example, if dialogue takes place primarily between courts of 'Western' liberal democracies, it is unlikely that socio-economic rights will gain a prominent place in this dialogue.

[23] The phrase 'judicial dialogue *through* international human rights law' is meant to take account of the fact that most of the time domestic courts do not apply international human rights law directly, but interpret domestic law in light of international human rights law. This results in a more indirect dialogue *through* international human rights law, not a direct dialogue *on* international human rights law. See also *infra* section 1.2.1 for a more detailed explanation of what we mean by 'judicial dialogue'.

[24] A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, 2011); UN GA, Declaration of the High-level Meeting of the General Assembly on

is no exact definition of this term, a common explanation contains the following three core elements: a government of laws, the supremacy of the law and equality before the law.[25] In the latter part of the twentieth century, the rule of law ceased to be an exclusively national concept, and contours of an 'international rule of law' emerged. Widely supported interpretations of the 'rule of law' that encompass both its national and international dimensions require that laws and the exercise of public power are consistent with international human rights norms.[26] It has been suggested, therefore, that when domestic judges give effect to international human rights law,[27] they guard the rule of (human rights) law both at home and globally. Contributions to this edited volume discuss how judicial dialogue can facilitate the task shared by domestic and international courts of ensuring and developing the international rule of (human rights) law.

Much research has already been conducted into various aspects of the phenomenon of judicial dialogue in the area of human rights and other fields of law. Empirical data has been collected on whether and how various domestic, regional and international courts use international and foreign legal material. Yet, concerning domestic courts, the focus has mainly been on Western European states,[28] the United States

the Rule of Law at the National and International Levels, 30 November 2012, UN Doc. A/RES/67/1, para.32.

[25] See S. Chesterman, 'Rule of Law', *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2007) accessed online (opil.ouplaw.com/home/epil).

[26] See e.g. UN Secretary-General, 'Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict States', 23 August 2004, UN Doc. S/2004/61623, para.6; The World Justice Project, 'What is the Rule of Law?', available at worldjusticeproject.org/what-rule-law; Nollkaemper, National Courts, *supra* note 24, at 4–5; B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2010) at 112; B. Zangl, 'Is there an Emerging International Rule of Law?', *European Review* 13 (2005) 73–91. Others suggest a narrower definition, see e.g. J. Waldron, 'Are Sovereigns Entitled to the Benefits of the International Rule of Law?', *European J. of Int'l L.* 22:2 (2011) 315–43.

[27] This can happen either through the direct application of international human rights treaties at the domestic level, or through the interpretation of domestic law in light of and conformity with international human rights law.

[28] See e.g. the focus of the edited volumes by Canivet, Andenæs and Fairgrieve, Comparative Law, *supra* note 15; Örücü, Judicial Comparativism, *supra* note 15; Bobek, Comparative Reasoning, *supra* note 15; and Markesinis and Fedtke, Engaging with Foreign Law, *supra* note 15; M. Gelter and M. Siems, 'Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe's Highest Courts', *Utrecht L. Rev.* 8:2 (2012) 88–99; and H. Keller and A. Stone-Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008), covering also several Central and Eastern European states.

Supreme Court,[29] as well as Commonwealth countries,[30] among them Australia,[31] Canada[32] and South Africa.[33] While there are several studies covering single countries[34] or countries from a particular region,[35] the practice of courts in many Asian, Latin American, African, Arab and

[29] G. Neuman, 'The Uses of International Law in Constitutional Interpretation', *American J. of Int'l L.* 98 (2004) 82–91; S. Calabresi and S. D. Zimdahl, 'The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision', *William and Mary L. Rev.* 47:3 (2005) 743–909; C. L'Heurreux-Dube, 'The Importance of Dialogue: Globalisation and the International Impact of the *Rehnquist* Court', *Tulsa L. J.* 34:1 (1998) 15–40; and critical: R. Brok, *Coercing Virtue: The Worldwide Rule of Judges* (Cambridge, MA: Aei Press, 2003); R. Alford, 'Misusing International Sources to Interpret the Constitution', *American J. of Int'l L.* 98 (2004) 57–69; R. Posner, 'No Thanks, We Already Have Our Own Laws', *Legal Affairs* July/August 2004, available at www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp; and M. Ramsey, 'International Materials and Domestic Rights: Reflections on Atkins and Lawrence', *American J. of Int'l L.* 98:1 (2004) 69–82; Jackson, Constitutional Engagement, *supra* note 10.

[30] B. Flanagan and S. Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges', *Int'l and Comparative L. Quarterly* 60:1 (2011) 1–28 (covering the UK House of Lords, the Caribbean Court of Justice, the High Court of Australia, the Constitutional Court of South Africa, and the Supreme Courts of Canada, India, Ireland, Israel, New Zealand and the United States).

[31] Kirby, Transnational Judicial Dialogue, *supra* note 8. M. Weisbrud, 'Using International Law to Interpret National Constitutions – Conceptual Problems: Reflections on Justice Kirby's Advocacy of International Law in Domestic Constitutional Interpretation', *American University Int'l L. Rev.* 21:3 (2006) 365–79.

[32] K. Roach, 'Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience', *Texas J. of Int'l Law* 40:3 (2004–05) 537–77; G. van Ert, *Using International Law in Canadian Courts* (Toronto: Irwin Law, 2008); and older: P. McCormick, 'The Supreme Court of Canada and American Citations 1945–1994: A Statistical Overview', *Supreme Court L. Rev.* 8 (1997) 527–33.

[33] A. Lollini, 'The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law', *Utrecht L. Rev.* 8 (2012) 55–88; D. Carey-Miller, 'The Great Trek to Human Rights: The Role of Comparative Law in the Development of Human Rights in Post-reform South Africa', E. Örücü (ed.), *supra* note 15, 201–26; and M. Martinek, 'Comparative Jurisprudence – What Good Does It Do – History, Tasks, Methods, Achievements and Perspectives of an Indispensable Discipline of Legal Research and Education', *J. of South African L.* 1 (2013) 39–57.

[34] E.g. Law and Chang, Limits of Global Judicial Dialogue, *supra* note 8, studying the practice of the Taiwanese Constitutional Court; A. Ejima, 'Enigmatic Attitude of the Supreme Court of Japan towards Foreign Precedents – Refusal at the Front Door and Admission at the Back Door', available at www.juridicas.unam.mx/wccl/ponencias/12/200.pdf; W.C. Chang, 'The Convergence of Constitutions and International Human Rights: Taiwan and South Korea Comparisons', *North Carolina J. of Int'l L. and Commercial Regulation* 36:3 (2011) 593–625; and E. Örücü, 'The Turkish Experience with Judicial Comparativism in Human Rights Cases', E. Örücü (ed.), *supra* note 15, 131–55, studying Turkish court's involvement in judicial dialogue.

[35] M. Adjami, 'African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?', *Michigan J. of Int'l L.* 24:1 (2002) 103–69;

Eastern European countries remains under-researched, or any existing research is overlooked by ('Western') scholars and judges. With respect to international courts, research on their use of 'external'[36] legal material often only covers some aspects of such dialogue[37] or focuses on a specific court like the International Court of Justice (ICJ), the Court of Justice of the European Union (CJEU) or Investment Arbitration Tribunals.[38] Thus, to fully understand the phenomenon of national and international courts' dialogue in the area of human rights, including its potential to strengthen the rule of (international human rights) law, the existing data from some courts and regions must first be complemented by empirical material from other courts and regions. Concerning national courts' engagement in dialogue, this book provides some of this material by examining Eastern Europe (with a focus on Poland), Latin America and Nigeria and Malaysia. Concerning international human rights courts, this book contributes to our understanding of one prominent court's engagement in dialogue: it sheds light on the ECtHR's dialogue with domestic courts in the Council of Europe's (CoE) member states, non-member states and international courts and quasi-judicial bodies.

The limited and uneven availability of empirical data has not prevented theoretical literature on the phenomenon of judicial dialogue in general, and in particular the area of human rights. Different positions have been taken regarding the practice and its possible purpose and effects. Anne-Marie Slaughter, for example, suggests that the dialogue unites judges

and M. Killander (ed.), *International Law and Human Rights Litigation in Africa* (Cape Town: Pretoria University Law Press, 2010), covering Benin, Botswana, Cote d'Ivoire, Ghana, Kenya, Namibia, Nigeria, Senegal, Tanzania, Uganda and Zambia.

[36] That is, domestic law and 'external' international law as well as decisions of domestic courts and decisions of other international courts.

[37] E.g. in relation to the sources of law, see A. Nollkaemper, G. Bos and W. Schabas, 'Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY', G. Boas and W. Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (Leiden: Brill, 2003) 277–96; or in relation to international law, see e.g. M. Forovicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, 2010).

[38] See respectively A. Nollkaemper, 'The Role of Domestic Courts in the Case Law of the International Court of Justice', *Chinese J. of Int'l L.* 5:2 (2006) 301–22; B. Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice', *J. of Int'l Dispute Settlement* 3:1 (2012) 7–29; F.G. Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice', *Texas Int'l L. J.* 38:3 (2003) 547–57; and V. Vadi, 'Towards Arbitral Path Coherence and Judicial Borrowing: Persuasive

around the world in a 'common global judicial enterprise'[39] or a 'global community of courts'.[40] Slaughter describes judges as 'remarkably self-consciousness about what they are doing',[41] engaging in 'open'[42] debates with courts in other countries on both procedural and substantive questions of law, most notably in the area of human rights.[43] She argues that these 'interactions both contribute to a nascent global jurisprudence' and 'improve the quality of particular national decisions'.[44] Even though she recognises that the global community of courts 'does not yet include all courts from all countries, or even all international courts and tribunals',[45] she is confident that judicial dialogue will ultimately strengthen the international rule of law, in particular the rule of international human rights law.[46]

Others are more cautious. They observe that the participation of courts in judicial dialogues is vastly inconsistent.[47] Among the reasons offered are that judges may be prevented by domestic law, procedure, established practice or ideological reasons from referring to external legal material; some judges may regard it as improper, even if they are not impeded by these factors.[48] Other courts may engage in selective dialogue, for example

Precedent in Investment Arbitration', *Transnational Dispute Management* 5:3 (2008), available at www.transnational-dispute-management.com/article.asp?key=1240.

39 A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004) at 99.

40 A.-M. Slaughter, 'A Global Community of Courts', *Harvard Int'l L. J.* 44:1 (2003) 191–221; see also L. Helfer and A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', *Yale L. J.* 107:2 (1997) 273–391, at 372–73 (referring to conferences and networks).

41 Slaughter, A Global Community, *supra* note 40, at 195.

42 *Ibid*.

43 Slaughter, A Typology, *supra* note 12, at 99–100.

44 Slaughter, A Global Community, *supra* note 40, at 195.

45 *Ibid*., at 194.

46 This view is supported by e.g. Bahdi, Globalisation of Judgment, *supra* note 14; Helfer and Slaughter, Supranational Adjudication, *supra* note 40; L'Heureux-Dube, The Importance of Dialogue, *supra* note 29, at 21; and Waters, Mediating Norms and Identity, *supra* note 8.

47 See e.g. Law and Chang, Limits of Global Judicial Dialogue, *supra* note 8, at 530–35. See also Jackson, Constitutional Engagement, *supra* note 10, at 8–9 (referring to three different postures courts can take: resistance, convergence and engagement).

48 This is the opinion of some justices of the US Supreme Court, see sources cited in *supra* note 29; and A. Harding, 'Comparative Case Law in Human Rights Cases in the Commonwealth: The Emerging Common Law of Human Rights', E. Örücü (ed.) *supra* note 15, 183–201 (discussing Malaysia); J. Tsen-Ta Lee, 'Interpreting Bills of Rights: The Value of a Comparative Approach', *Int'l J. of Constitutional L.* 5:1 (2007) 122–52, at 125–27 (on Singapore courts); Law and Chang, Limits of Global Judicial Dialogue, *supra* note 8, at 531–32; and M. Killander and H. Adjolohoun, 'International Law and Domestic Human Rights Litigation in Africa: An Introduction', M. Killander (ed.), *supra* note 15, 3–25, at 18–19.

by only referring to judgments of courts that they deem prestigious.[49] Brian Flanagan and Sinéad Ahern, for instance, observe that 'critical opportunism and the aspiration to membership of an emerging international "guild" appear to be equally important strands in judicial attitudes towards foreign law'.[50] This means that frequently the 'transnational winds blow only in one direction',[51] resulting in a skewed and uneven contribution of domestic and international courts to a 'universal' understanding of judicial practice in various areas of international law, including human rights law. The function of court-to-court dialogue in securing and developing the rule of truly *international* human rights law, to which *all* courts can contribute, can be questioned under these circumstances.[52]

Questions about the appropriateness and legitimacy of judicial dialogue are also raised. Concerning dialogue between domestic courts, Ronald Krotoszynski, for instance, asks whether a judge can reliably 'borrow' from a decision of a foreign court when he or she 'lacks even the most rudimentary understanding of the institution that issued the opinion and the legal, social and cultural constraints that provided the context for this decision'.[53] For example, domestic jurisdictions have different conceptions of 'positive' and 'negative' human rights obligations, and there are variations as to the scope and function of judicial review.[54] Misinterpretation may even occur when the external decision references international human rights provisions that are also binding on the 'receiving' court. Countries differ in the way they incorporate or transpose human rights law in their domestic legal order, and the degree of bindingness may impact on the interpretation of the relevant norm and also the outcome of the case.

Critics have also voiced concerns about the lack of clarity with respect to the legal principles in accordance with which judicial dialogue is

[49] See Alford, Misusing International Sources, *supra* note 29, at 64–69; A. Smith, 'Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case', *Berkeley J. of Int'l L.* 24:1 (2006) 218–73, at 265–66; Y. Ghai, 'Sentinels of Liberty or Sheep in Wolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights', *Modern L. Rev.* 60:4 (1997) 459–81, at 479.

[50] Flanagan and Ahern, Judicial Decision-Making, *supra* note 30.

[51] J. Hermida, 'A New Model of Application of International Law in National Courts: The Transjudicial Vision', *Waikato L. Rev.* 11 (2003) 37–58, at 54.

[52] See e.g. Law and Chang, Limits of Global Judicial Dialogue, *supra* note 8, at 527.

[53] Krotoszynski, I'd Like the World to Sing, *supra* note 8, at 1325 and 1340. This danger is also highlighted by Alford, Misusing International Sources, *supra* note 29, at 64–69; and McCrudden, A Common Law *supra* note 9, at 526.

[54] Krotoszynski, *ibid.*, at 1342. This is a common problem of comparative law; see e.g. G. Frankenberg, 'Comparing Constitutions: Ideas, Ideals and Ideology – Towards a Layered Narrative', *Int'l J. of Constitutional L.* 4:3 (2006) 439–59, at 441.

conducted. They have noted the absence of a rigorous theory, and argue that proponents of the practice have failed to ground it in any of the standard approaches to constitutional interpretation[55] or the interpretation of international law.[56] This ambiguity can give judges too much discretion[57] in deciding whether and when to follow decisions of which foreign domestic or international courts. A practice of selectiveness or 'cherry-picking' can undermine the credibility of courts as independent guardians of the rule of law. The related fear has been voiced that judicial dialogue may lead to circumvention of the checks and balances at the domestic level and ultimately of democratic accountability, in particular when courts use (certain) foreign decisions to justify their reasoning in cases that involve issues lacking consensus within their jurisdiction.[58]

This brief overview of existing research on judicial dialogue shows that questions of both a practical and theoretical nature remain on the practice, including its potential to strengthen an international rule of human rights law to which international and national courts from all regions of the world should contribute. Many of these questions formed the background for the project 'International Law through the National Prism: the

[55] See the criticism by R. Alford, 'In Search of a Theory for Constitutional Comparativism', *University of California L. Rev.* 52:3 (2005) 639–715.

[56] E.g. under article 31(3)(b) Vienna Convention on the Law of Treaties ((VCLT) (23 May 1968) 1155 UNTS 311, entered into force 27 January 1980), allowing taking account 'of any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' in the interpretation of an international treaty; or article 38(1)(d) Statute of the International Court of Justice ((ICJ Statute) (26 June 1945) 3 Bevans 1179; 59 Stat 1055, entered into force 24 October 1945), allowing to take account of relevant judicial decisions in the interpretation of international law.

[57] See e.g. J. Larson, 'Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation', *Ohio State L. J.* 65:5 (2004) 1283–1329, at 1303–26. This is also discussed by McCrudden, A Common Law *supra* note 9, at 517, who, however, suggests that there are some criteria that regulate the rules of referencing foreign legal material. Vicki Jackson also examines this challenge in regard to the use of foreign and international legal material by the US Supreme Court. She argues that the challenge can well be overcome by integrating the use of foreign and international law in the constitutional interpretation of the common law tradition that involves consideration of multiple interpretative sources; see V. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement', *Harvard L. Rev.* 119:1 (2005) 109–28, at 122–23.

[58] Krotoszynski, I'd Like the World to Sing, *supra* note 9, at 1333; the question about (democratic) legitimacy of judicial dialogue has also been asked by McCrudden, A Common Law *supra* note 9, at 530; and Jackson, Constitutional Comparisons, *supra* note 57, at 120–22, dispersing this fear for the context of the use of foreign and international law by the US Supreme Court.