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# A Case for the Recognition of a Concept of Judge-made International Law

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## A Case for the Recognition of a Concept of Judge-made International Law

### Introduction

Judge-made international law (JMIL) is not a term of art of international law, much less generally recognised as forming a part thereof. It exists however in some courts' judicial practice on international law. Introducing the category of JMIL is therefore a positivist effort to conceptualise a phenomenon which exists in real life. It is not a normative claim.

To capture and then to conceptualise that judicial practice, this article will proceed in several steps. In a first section, it will tackle three preliminary points. It will first (re)define customary international law (CIL) so as to facilitate the enquiry. It will then discuss whether court pronouncements can be equated to utterances of other State organs under the aspect of the *opinio juris* component of CIL. It will come to the conclusion that insofar as independent courts are concerned they can not. There is therefore space for a JMIL distinct from CIL proper. That there is such space however does not yet show that courts do in fact make law. So the question whether they do will be discussed in the third preliminary step. It will receive an affirmative answer not only for common and civil law jurisdictions, but also for international law. It will be argued that JMIL, which may be based on first principles, has different aspects, one coming close to the common law concept of mandatory precedent while the other provides persuasive authority for mostly foreign court decisions.

It is the second aspect this article is most interested in, and the case for its recognition will be made in the second section. This section will discuss judgments positivising first principles by setting a precedent or, consecutively, by building on such a judgment. It will discuss these first principles, or laws of reason, as well as different constructions of the observed phenomena. It will further discuss the persuasive authority of judgments for foreign courts which is the mortar holding together the building blocks of the JMIL discussed, with special attention being given to the idiosyncrasies of the Germanic practice. It

will go on to discuss the legitimacy and the requiredness of cross-border reliance on foreign decisions in international law cases, referring in passing to the extensive relevant case law of the German Federal Constitutional Court (FCC), and will further discuss some exemplary decisions.

Under this second aspect JMIL will be seen as a set of non-binding but persuasive norms distinct from those of CIL. Thus, the third section will discuss the relationship between those two sets of norms, which will be seen to be based on two different secondary rules. It will further discuss the divergence between JMIL and CIL as well as the influence the former may have on the latter, and their coexistence. This coexistence means that a court has a choice, not governed by any international legal norm, whether to apply a norm of JMIL or a norm of CIL.

## I. Preliminary Questions

### 1. The concept of CIL

There is vast agreement among international lawyers that modern CIL is very different from the traditional variety<sup>1</sup>. More specifically, what I want to consider in this article as JMIL is considered by many as part of modern CIL. Thus to make the case this article is attempting to make it is first necessary to (re)define CIL in a more traditional way. The ICJ's standard definition of CIL is convenient for my purposes. As the ICJ has repeatedly stated, "[i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States ..."<sup>2</sup>. For CIL to

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<sup>1</sup>Cf eg Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95 AJIL 757 (2001).

<sup>2</sup>ICJ, *Continental Shelf (Libyan Arab Jarnahiriyu/ Malta)*, I. C.J. Reports 1985, pp. 29-30, para. 27, quoted in ICJ, *Jurisdictional Immunities of The State (Germany v. Italy : Greece intervening)*, Judgment of 3 February 2012, I.C.J. Reports 2012, 96, para 55. - Robert Uerpmann-Witzack, Serious Human Rights Violations as Potential Exceptions to Immunity: Conceptual Challenges, in: Immunities in the Age of Global Constitutionalism (Anne Peters, Evelyne Lagrange and Stefan Oeter, eds., Leiden: Brill, 2013/2014), [5], has called the ICJ's

be found it is therefore necessary to determine, *inter alia*, the *opinio juris* of States. Insofar as, on a given subject of international law, only State practice, especially in the form of municipal court decisions, but no corresponding State *opinio juris* can be determined there may therefore be room for JMIL.

In accordance with a view sometimes expressed in academic writings<sup>3</sup>, there is a reason to distinguish between CIL and JMIL which will become more apparent in the course of the present enquiry. To put it succinctly, JMIL and CIL proper regularly diverge. It is thus conducive to conceptual clarity not to see resulting conflicts as intra-CIL conflicts but rather as conflicts between norms of two different sets.

The confusion between customary law and judge-made law has a long municipal, especially common law, tradition. As has been noted, from early on much so-called customary law was judge-made law<sup>4</sup> or “the custom among the judges”<sup>5</sup>. Courts used to look at the custom on the ground ie a “utilitarian local

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approach “State-centred“ and has contrasted it with a “civilist approach: construing legal rules“ (ibid, [2]) and a “constitutional approach: sovereignty vs. human rights“ (ibid, [3]).

<sup>3</sup>Karol Wolfke, Custom in Present International Law (1993), at 74, sees that it may “be advisable to discern judge-made law in international law“. The full quotation is: “There may, of course, be doubts as to whether the rules created to some extent by judicial organs, should not be reckoned rather as a separate category of rules (judge-made law, or case-law). In our opinion, even if it be advisable to discern judge-made law in international law, there is no obstacle to ranking it within customary international law as well.“ Cf. also Noora Arajärvi, The Lines Begin to Blur? Opinio Juris and the Moralisation of Customary International Law (March 2011). Available at SSRN: <http://ssrn.com/abstract=1823288> or <http://dx.doi.org/10.2139/ssrn.1823288>: “As a result, when this ‘natural process’ [of formation of CIL] is disturbed or interfered by judges, practitioners or scholars, we are not necessarily anymore within the realm of customary international law, but veiling a novel source of international law under the old name“.

<sup>4</sup>Cf. eg. David Ibbetson, Custom in medieval law, in: The Nature of Customary Law (A. Perreau-Saussine and J.B. Murphy, eds.) Cambridge 2007, 151 et seq.

<sup>5</sup>Benedict Kingsbury & Benjamin Straumann, State of Nature versus Commercial Sociability as the Basis of International Law: Reflections on the Roman Foundations and Current Interpretations of the International Political and Legal Thought of Grotius, Hobbes, and Pufendorf, in: The Philosophy of International Law (S. Besson & J. Tasioulas, eds.), OUP 2010, 33, 50. Cf. also Friedrich Carl von Savigny, quoted by Jeremy Waldron, “Partly Laws Common to All Mankind“. Foreign Law in American Courts, Yale UP 2012, 217 (n. 98); Adolf Julius

practice<sup>6</sup> only at the time of the very foundation of the common law<sup>7</sup>, if ever<sup>8</sup>. This confusion however did not prevent legal historians and philosophers to draw a distinction between judge-made law and customary law proper. The dichotomy between the two laws plays out differently in different circumstances. In modern international law, in contrast to the historical example referenced, there are still rather few cases to reach the courts. Thus, while there is always the possibility of customary law being “denatured“ as soon as it falls into the hands of judges<sup>9</sup>, the likelihood of this to happen is not that great in many areas of international law<sup>10</sup>. There is also greater deference by international judges to the State custom on the ground than there used to be in the referenced historical example<sup>11</sup>. Therefore, JMIL does not supplant CIL to anything like the same degree as was the case in the historical analogy. What does happen,

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Merkel, *Gesetzesrecht und Richterrecht*, in idem, *Gesammelte Schriften* vol. 1 fasc. 1 (Dorothea Mayer-Maly et al., eds.) (1993), 317 at 323: “Abstraktion des Richterrechts, als welche sich das Gewohnheitsrecht der Hauptsache nach darstellt ...“ (abstraction of judge-made law which customary law essentially is ...[my translation]).

<sup>6</sup>Kingsbury/Straumann (n. 5), 50.

<sup>7</sup>Cf. Michal Lobban, Custom, common law reasoning and the law of nations in the nineteenth century, in *The Nature of Customary Law* (n. 4), 256, 257: “In [common lawyers’] view, while community custom provided the historical foundation of the common law, its development was the preserve of judges.“

<sup>8</sup>Cf. Alan Cromartie, The Idea of Common Law as Custom, in: *The Nature of Customary Law* (n. 4), 203, 204-6.

<sup>9</sup>Cf. Arajärvi, quoted in n. 3.

<sup>10</sup>Historically, customary law proper continued to exist in fields of law, especially sectors of international law, in which courts were not involved and interactions between States were frequent and their actions clearly in view, especially in the law of war and more specifically the law of sieges on which cf. Randall Lesaffer, *Siege warfare in the Early Modern Age: a study on the customary laws of war*, in: *The Nature of Customary Law* (n. 4), 176 et seq. It should be noted that there is here an important difference to the modern law of war: relevant State practice tends to be no longer clearly, or even at all, in view. Cf. eg John B. Bellinger and William J. Haynes, A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*, *International Review of the Red Cross* 89 (2007), 443, esp. 464-5. Cf. also Waldron (n. 5), 189.

<sup>11</sup>Contrast the ICJ’s statement, quoted in the text at n. 2, with the quotation from Lobban reported in n. 7.

however, as will be demonstrated below<sup>12</sup>, is that JMIL grows at the side of enduring CIL.

## 2. The independence of courts

It is virtually undisputed in modern international law, and will not be disputed in this article, that judgments of municipal courts on international law questions may count as State practice ie as one of the components of determining CIL within the meaning of Article 38 (1) (b) of the ICJ Statute<sup>13</sup>. This applies irrespective of the respective court's measure of independence from the

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<sup>12</sup>Cf text at n. 81 et seq.

<sup>13</sup>Eg Maurice Mendelson, *The Formation of Customary International Law*, *Recueil des Cours* 272 (1998), 155, 200. - *The Case of the S.S. "Lotus"* (1927) PICJ, Ser. A No. 10, 28, did not "paus[e] to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law" but, in the words of Hersch Lauterpacht, *Decisions of municipal courts as a source of international law*, *BYIL* 10 (1929), 65 at 80, "proceeded to examine at great length the relevant judicial decisions in various countries". - Alfred Verdross & Bruno Simma, *Universelles Völkerrecht*, 3rd ed. Duncker & Humblot Berlin 1984, para 584, claim that "the emergence of the rules of customary international law on the immunity of States makes it definitely clear that customary international law ... can come into being by the practice of all State organs ... eg the judiciary" (my translation; footnote omitted). *Ibid*, para 622 n. 14 they add: "the customary international law rules on the position of foreign States before domestic courts could ... not develop otherwise than by the practice of those courts" (my translation). Similarly, André Nollkaemper, *The Role of Domestic Courts in the Case Law of the International Court of Justice*, *Chinese Journal of International Law* (2006), 301, 304, with reference to ICJ, *Lotus*, and ICJ, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3. Cf also ICJ, *Jurisdictional Immunities* (n. 2), para 55, and eg German Federal Constitutional Court (*Bundesverfassungsgericht* [FCC]), judgment of 30 April 1963, BVerfGE 16, 27, 34; *Claim against the Empire of Iran case*, 45 ILR 54: "The custom of States is - because it is a question of the exercise of judicial jurisdiction - primarily to be identified by looking at the practice of courts" (my translation). - This was not always the position of publicists. Rather, authors "writing in the earlier part of th[e 20th] century" (Mendelson, *ibid*, 198, referring, among others, to K. Strupp, *Les règles générales du droit de la paix*, *Recueil des Cours* 47 (1934), 257, 313-5) and beyond (cf. eg Otto Kimminich, *Einführung in das Völkerrecht*, 5th ed. Francke Tübingen and Basel 1990, 242. In the same sense Friedrich Berber, *Lehrbuch des Völkerrechts*, vol. I, 2nd ed. C.H.Beck'sche Verlagsbuchhandlung Munich 1975, 44-48) flatly denied specifically that municipal courts could so count. Doubts are also expressed by USSC, *Banco Nacional de Cuba v. Sabbatino*, 84 S.Ct. 923 at 943-944; 376 U.S. 398, speaking of "the sanguine presupposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies." A discussion is in Michael Zander, *Act of State Doctrine*<sup>7</sup>, *The Modern Law Review* Vol. 27 588, 590 (1964).

executive. “Judgment“ seen as State practice is the result at which a judgment arrives, or its conclusion. The question here relevant is whether the *reasoning* of courts, especially municipal courts, can also contribute to the determination of international law and if so, how.

It has been claimed by Hersch Lauterpacht that because of their independence, “the pronouncements of courts are more important for the function of international custom than those of other state organs“<sup>14</sup>. Lauterpacht does not say which role those pronouncements play for international custom<sup>15</sup>. Independent municipal courts certainly ought to speak the law of their country including, as the case may be, international law<sup>16</sup>, but they do not speak for their or indeed any other country. Their decisions give only the court’s opinion of what the law is, or even, in some cases<sup>17</sup>, of what it should be. It is therefore submitted that the reasoning of courts as expressed in their decisions is categorically different from utterances of other State organs<sup>18</sup>, especially the executive’s<sup>19</sup>, insofar

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<sup>14</sup>Lauterpacht (n. 13), 82-84.

<sup>15</sup>Whether court decisions count as State practice, as *opinio juris* - this appears to be the understanding of eg Berber (n. 13), 46-7, who claims that a decision of a superior municipal court may be important evidence for the existence of a rule of international law, especially for the subjective element necessary for the formation of customary law (my translation) - or as both is very much in dispute.

<sup>16</sup>On constitutional limits for the respect of international law by municipal courts cf eg Riccardo Pavoni, The Law of International Immunities after *Germany v. Italy, Mothers of Srebrenica* and *Jones: The Best is Yet to Come*, ESIL Newsletter vol. 13, March 2014, who however considers them as “part and parcel of the dynamic process governing the evolution of international law“.

<sup>17</sup>Cf eg *Corte di Cassazione*, orders of 29 May 2008, as quoted in International Court of Justice, Case Concerning Jurisdictional Immunities of the State (Germany v. Italy), Memorial of the Federal Republic of Germany 12 June 2009, available at <http://www.icj-cij.org/docket/files/143/16644.pdf>, para 27 p. 19.

<sup>18</sup>This fact is obfuscated by the abstraction that “courts are organs of the state“, as Lauterpacht (n. 13), 80-1, puts it.

<sup>19</sup>It is “the Government, which is ... the organ with primary responsibility for the conduct of international relations“: Mendelson (n. 13), 200.

as those courts enjoy independence from the former<sup>20</sup>, which is the case in many countries. The more independent a municipal court is, the less its decisions can be seen as reflecting the *opinio juris* of its proper, or indeed another, State<sup>21</sup>. *Jurisdictional Immunities* significantly does not mention municipal court decisions among the State utterances reflecting *opinio juris*<sup>22</sup>. That the decisions of independent courts cannot count as *opinio juris* does not diminish their importance as State practice as the former and the latter need not emanate from the same State organ or indeed the same State<sup>23</sup>. After all, Article 38 (1)(b) of the ICJ Statute does not specify who has to accept the general practice as law.

In contrast, a court decision dictated for all practical purposes by the executive of the court's State may count as reflecting that State's *opinio juris*. In many

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<sup>20</sup>On the importance of court independence cf. eg Court of Final Appeal of The Hong Kong Special Administrative Region - Final Appeal Nos 5, 6 & 7 of 2010 (Civil), *Democratic Republic of the Congo, China Railway Group (Hong Kong) Limited, China Railway Resources Development Limited, China Railway Sino-congo Mining Limited, China Railway Group Limited and Secretary For Justice v. FG Hemisphere Associates Llc*, Judgment of 8 June 2011, available at [http://arbitrationlaw.com/files/free\\_pdfs/congo\\_et\\_al\\_v\\_fg\\_hemisphere\\_associates\\_llc\\_facv\\_no\\_5-7\\_of\\_2010.pdf](http://arbitrationlaw.com/files/free_pdfs/congo_et_al_v_fg_hemisphere_associates_llc_facv_no_5-7_of_2010.pdf), paras. 78-129, per Bokhary PJ.

<sup>21</sup>Similarly, Michael Wood, First report on formation and evidence of customary international law, U.N. Doc. A/CN.4/663, 17 May 2013, available at [http://legal.un.org/ilc/guide/1\\_13.htm](http://legal.un.org/ilc/guide/1_13.htm), para 50, treats with caution utterances of States made in pleadings before international courts and tribunals because "here they are in advocacy mood".

<sup>22</sup>ICJ, *Jurisdictional Immunities* (n. 2), para 55. But cf. Nollkaemper (n. 13), 303, who, referring to *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, (*Merits*) (1926) PCIJ, ser. A No. 7, 19, sees "national judicial acts as 'facts which express the will ... of States'". - The ICJ thereby ruptures a connection routinely made by Anglo-American authors between the development of common law and that of customary international law. The development of common law from precedent relies on their respective *ratio decidendi* (cf. eg Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, *American University International Law Review* 14, no. 4 (1999): 845, 849 n. 6 and 850-1 n. 10) and thus on law whereas court decisions as State practice are seen only as facts; cf Nollkaemper, *ibid*, 311.

<sup>23</sup>In this sense eg ICJ, *Jurisdictional Immunities* (n. 2), para 56. Cf also ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*. I.C.J. Reports 1986, p. 14, 109, para 207: "Either the States taking such action or other States in a position to react to it".

jurisdictions, certain questions are not for the courts. Examples are the practice of courts to defer to the executive on some questions of politics or international law<sup>24</sup>. One could mention here also the English common law doctrine according to which the question of who is sovereign in a foreign country is a matter of political determination<sup>25</sup>. There can be no serious doubt that judgments deferring in this way to the executive reflect the State's *opinio juris*. Even more telling is a recent and explicit example of a court openly acknowledging its lack of independence concerning an international law question. The Court of Final Appeal of The Hong Kong Special Administrative Region had to decide whether the Democratic Republic of the Congo enjoyed immunity from its jurisdiction for *acta juris gestionis*<sup>26</sup>. It declined to decide that question independently<sup>27</sup> but rather felt bound by Hong Kong's Basic Law to defer to the decision of the Standing Committee of the National People's Congress<sup>28</sup>. That decision was duly given<sup>29</sup>, and the court followed it in a unanimous final decision<sup>30</sup>. The latter is best seen as reflecting the *opinio juris*

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<sup>24</sup>Cf eg Winston P. Nagan and Joshua L. Root, The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory, 38 N.C. J. Int'l L. & Com. Reg. 375, 415-6 (2013): "Following the Tate Letter, the decision of whether to grant a foreign state immunity was largely an executive decision. The State Department advised the courts on a case-by-case basis whether immunity should be granted.... As McDougal noted, this 'culminated in an almost complete subservience by the courts to the executive, permitting a high degree of politicization of particular decisions.'" (note omitted).

<sup>25</sup>Cf. Lobban (n. 7), 269-70.

<sup>26</sup>Hong Kong Court of Final Appeal (n. 20).

<sup>27</sup>Cf *ibid.*, para. 183, per Chan PJ, Ribeiro PJ and Sir Anthony Mason NPJ: "we have arrived at the following conclusions which ... are necessarily tentative and provisional".

<sup>28</sup>*Ibid.*, para. 407.

<sup>29</sup>Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress, available at [http://www.legislation.gov.hk/blis\\_ind.nsf/CurAllEngDoc/F67C2B1F73E094AC482579110015D2D8?OpenDocument](http://www.legislation.gov.hk/blis_ind.nsf/CurAllEngDoc/F67C2B1F73E094AC482579110015D2D8?OpenDocument).

<sup>30</sup>Final judgment of September 8, 2011, available at [http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_frame.jsp?DIS=78113](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=78113).

expressed in the Standing Committee's decision. It therefore clearly represents the State's *opinio*. But it is also clear that it does so only, or at least only demonstrably, because of the court's foregoing decision to defer to a political body.

To sum up, independent courts are different from other State organs in that their decisions, while constituting State practice, do not necessarily reflect *opinio juris*. They therefore cannot on their own make CIL which requires both components. This leaves the reasoning of municipal court decisions on questions of international law, beyond their possible probatory value<sup>31</sup>, irrelevant for the determination of CIL. Still, it may be relevant for the formation of JMIL.

### 3. The making of international law by courts

While JMIL is not even a term of art in international law<sup>32</sup>, it is widely accepted that the influence of court decisions on international law goes far beyond anything contemplated by the framers of Article 38 (1)(d) of the ICJ

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<sup>31</sup>Many authors who deny that municipal decisions can contribute to the formation of international law take the view that decisions of domestic courts on international law questions may be valuable subsidiary means to prove CIL; cf eg Kimminich (n. 13), 242. And cf. Ian Brownlie, *Principles of Public International Law*, 5th ed. OUP Oxford 1998, 23, who, discussing Article 38 (1)(d) of the ICJ Statute, remarks that “[s]ome decisions [of national courts] ... involve a free investigation of the point of law and consideration of available sources, and may result in a careful exposition of the law“. An example is ICTY, Trial Chamber judgement in *Furundzija*, paras 191-249, in particular paras 234-5, 249, as referred to by ICTY, Case No. IT-05-87-A, *Prosecutor v. Nikola Sainovic, Nebojsa Pavkovic, Vladimir Lazarevic, Sreten Lukic*, Appeals Chamber Judgement of 23 January 2014, para. 1626. Municipal examples can be found especially in the case-law of the FCC; cf. the citations in n. 13 and 98.

<sup>32</sup>There is no corresponding entry in the Max Planck Encyclopedia of International Law, and a search for “judge-made law“ within the encyclopedia renders just two results. There is an entry *Richterrecht* in the index of Knut Ipsen, *Völkerrecht*, 6th ed C.H. Beck, Munich 2014, but the referenced passage (p. 504, para 16) just denies international courts such a power, referring to ICJ, *South-West Africa cases (Ethiopia/Liberia v. South Africa)*, ICJ Rep. 1966, 6, 48-9. - According to Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 German Law Journal 979 (2011) 988, “[j]udicial lawmaking is not a concept of positive law, but a scholarly concept“. It is more than that: it is a fact of life.

Statute<sup>33</sup>. I want to consider two aspects of JMIL. One comes close to the common law concept of binding precedent. The other one provides persuasive authority for mostly foreign court decisions.

a) The law-making of municipal courts

A positivist concept of judge-made law requires that judges do make general law. While this is accepted<sup>34</sup> in common law jurisdictions as a question of municipal law<sup>35</sup>, it is traditionally denied in civil law jurisdictions<sup>36</sup>. International law, in this respect, appears to follow the civil law approach<sup>37</sup>. Thus the concept to be discussed appears to fail *ab initio*. But a look at any

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<sup>33</sup>But according to Mohamed Shahabuddeen, *Precedent in the World Court* (1996), 76, there are two possible interpretations of Article 38 (1)(d). First, decisions of the ICJ "may serve as material for the determination of a rule of law by a later decision". Second, "judicial opinions may effect the determination of rules of law on the basis of earlier judicial decisions. The new decision by which a rule of law has been determined on the basis of earlier decisions is not a subsidiary means; it is the source of a new rule of international law, it is made by the Court alone." Cf also *v. Bogdandy & Venzke* (n. 32), 992-3.

<sup>34</sup>Although sometimes criticised; cf. eg Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 7 (1997): "playing common-law judge . . . consists of playing king—devising, out of the brilliance of one's own mind, those laws that ought to govern mankind. How exciting!"

<sup>35</sup>Cf eg Martin Shapiro, *Courts: A Comparative and Political Analysis*, University of Chicago Press 1981, 28 et seq.

<sup>36</sup>Cf eg Karl August Bettermann, § 73: *Die rechtsprechende Gewalt*, in *Handbuch des Staatsrechts* (Isensee and Kirchhof, eds.), vol. 3, 2nd ed. 1996, para. 27-8; M. Robespierre, speech of 18 November 1790 in the National Assembly, *Archives Parlementaires de 1787 à 1860. Première Série (1787-1799)*, Vol. XX (23 Octobre 1790 - 26 November 1790), 1885, 516: "Ce mot de jurisprudence des tribunaux, dans l'acception qu'il avait dans notre ancien régime, ne signifie plus rien dans le nouveau; il doit être effacé de notre langue. Dans un État qui a une Constitution, une législation, la jurisprudence des tribunaux n'est autre chose que la loi: alors il y a toujours identité de jurisprudence." According to Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 *Journal of International Dispute Settlement* 5 (2001), Article 5 of the French *Code civil*: "forbids judges ... to establish a general rule in a specific proceeding".

<sup>37</sup>Cf. Art. 38 (1) (d) and 59 of the ICJ Statute; Lauterpacht (n. 13), 86: ... the ICJ, "for which it was intended to secure all the persuasive influence of judicial precedent without adhering to the doctrine *stare decisis*"; Wolff Heintschel von Heinegg, in Ipsen (n. 32), 504 para 16. International law insofar resembles classical common law up to the eighteenth century; cf eg Frederick Schauer, *Thinking Like A Lawyer* 42 n.9 (2009) ("[T]he constraints of *stare decisis* did not become accepted until the nineteenth century" (citations omitted)).

judgment of a superior court at least in a jurisdiction belonging to the Germanic family of laws<sup>38</sup> shows that the court cites its own former decisions extensively<sup>39</sup>. It will not consider them as binding law, and will sometimes deviate from some of them, even expressly<sup>40</sup>. In general, however, it will follow them<sup>41</sup>, in a way reminiscent of the common law doctrine of *stare decisis*<sup>42</sup>, not least for reasons of equal treatment and legal certainty both of which require that like cases be treated alike<sup>43</sup>. Both are basic tenets of a

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<sup>38</sup>As has been repeatedly reported in English language literature, the situation in France is different. The *Cour de cassation* does not cite its own decisions and whether there is a “*jurisprudence constante*” must be determined by “*la doctrine*”. Cf eg Philippe Jestaz, *La jurisprudence constante de la Cour de cassation*, in: *L’image doctrinale de la Cour de cassation, La documentation française, Actes du colloque des 10 et 11 décembre 1993*, 216: “la Cour de cassation dit le droit, mais elle le dit en peu de mots, voire en termes sybillins ... Pour le reste, c’est l’oracle doctrinal qui parle à sa place en lui prêtant, à tort ou à raison, des intentions de constance ou de non constance”. But France appears to be the outlier within the civil law tradition. Certainly, the Italian *Corte Suprema di Cassazione* and the Spanish *Tribunal Supremo* do cite their own decisions (and other decisions as well). Cf eg *Corte di Cassazione [Sezioni Unite civili]*, 11 March 2004, No. 5055, *Ferrini v. Repubblica Federale di Germania*, *Rivista di diritto internazionale* 2004, 539, available also, in the Italian original and in English translation, at [http://www.geneva-academy.ch/RULAC/pdf\\_state/Ferrini.pdf](http://www.geneva-academy.ch/RULAC/pdf_state/Ferrini.pdf), and, selected at random, *Tribunal Supremo, Sala de lo Civil, judgment of 17 March 2014*, *Roj: STS 852/2014*.

<sup>39</sup>Indeed there is “the hypothesis that precedent plays a role in every legal system, albeit perhaps of varying significance”: Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, 12 *German Law Journal* 1005-1032 (2011) 1007, available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1351>, referring to Neil MacCormick & Robert Summers, *Further General Reflections and Conclusions*, in: *Interpreting Precedents*, 531-532 (Neil MacCormick & Robert Summers eds, 1997).

<sup>40</sup>Cf. also J.L. Brierly, *Règles Générales du Droit de la Paix*, HAG R, 58 (1936-IV) at 64, quoted by Shahabuddeen (n. 33), 42: “Precedents are not therefore binding authorities in international law, but the English theory of their binding force merely elevates into a dogma a natural tendency of all judicial procedure. When any system of law has reached a stage at which it is thought worth while to report the decisions and the reasoning of judges, other judges inevitably give weight, though not necessarily decisive weight, to the work of their predecessors.”

<sup>41</sup>Guillaume (n. 36), 5-6, speaks of “*jurisprudence constante*” or “*ständige Rechtsprechung*”.

<sup>42</sup>On which cf Waldron (n. 5), 112. The details of the doctrine are often disputed; cf. eg US Supreme Court, *Alleyne v. United States*, June 17, 2013, 570 U. S. \_\_\_\_ (2013), 133 S.Ct. 2151 (2013), Opinion of the Court, n. 5: “The force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.”, Sotomayor, J., with whom Ginsburg, J., and Kagan, J., join, concurring, and Alito, J., dissenting, esp. n. \*.

<sup>43</sup>Cf also Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press 1977, 1978, 113.

*Rechtsstaat*, and as such guaranteed by many constitutions<sup>44</sup>. Similarly, while the case-law of a superior court does not become law binding upon an inferior court in its own right, there being, in the civil law tradition, no doctrine of mandatory precedent<sup>45</sup> which is specific to common law systems<sup>46</sup>, there is a very strong “gravitational force”<sup>47</sup> or “pull”<sup>48</sup> to follow decisions of a superior court<sup>49</sup>. Thus, court decisions also in the civil law tradition, at least

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<sup>44</sup>For Germany, cf. Articles 3 and 28 of the Basic Law for the Federal Republic of Germany (*Grundgesetz*) in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 21 July 2010 (Federal Law Gazette I p. 944)); English translation by Christian Tomuschat and David P. Currie, revised by Christian Tomuschat and Donald P. Kommers in cooperation with the Language Service of the German Bundestag, available at [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html).

<sup>45</sup>A telling example is *Amtsgericht* (local court) Nürtingen, judgment of 5 July 2013, Az. 46 C 520/13, available at [openjur.de/u/641151.html](http://openjur.de/u/641151.html), where the *Amtsgericht* refuses to follow not only an earlier judgment of the ECJ (paras. 49-67 of the judgment) but also a judgment which the *Landgericht* (regional court) Stuttgart had handed down on appeal against a former, essentially identical judgment of the *Amtsgericht* (paras. 77-80). The *Amtsgericht* reasons that the *Landgericht* did not discuss, and therefore could not refute, the *ratio decidendi* of the *Amtsgericht*'s earlier judgment. Contrast this with eg United States District Court, Southern District of New York, *New York Progress and Protection PAC v. James A. Walsh, et al.*, 13 C i v . 6 7 6 9 ( P A C ) , 2 4 A p r i l 2 0 1 4 , a v a i l a b l e a t <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=397>: “The Court has noted its concern ... The Court is bound, however, to follow the Supreme Court and Second Circuit’s clear guidance.”

<sup>46</sup>But some international courts instituted by treaty have claimed the authority to give interpretations of those treaties and possible secondary law which are binding upon the courts of the respective treaty States beyond the case in which the interpretation was given (cf. ECJ, Case 283/81, Judgment of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, [1982] ECR 3415, paras 13-4; ECtHR, *von Hannover v. Germany (no. 2)*, no. 40660/08 and 60641/08, Grand Chamber Judgment of 7 February 2012, para. 125: “The Court .. observes that the national courts explicitly took account of the Court’s relevant case-law.”), and some constitutional court decisions in civil law jurisdictions have been given, by an act of parliament, the force of law (cf eg Sec. 31 of the law on the FCC [*§ 31 Bundesverfassungsgesetz*]).

<sup>47</sup>Dworkin (n. 43), 111.

<sup>48</sup>Chad Flanders, *Toward a Theory of Persuasive Authority*, *Oklahoma Law Review* 62 (2009) 55, 58.

<sup>49</sup>Cf. also Lauterpacht (n. 13), 92; Bhala (n. 22), 919: “all precedent is binding. It is just a question of whether a precedent is binding in a de facto or a de jure sense.” And cf. Jan Komárek, *Reasoning with previous decisions*, in *Practice and Theory in Comparative Law* (Maurice Adams and Jacco Bomhoff, eds.), Cambridge 2012, 49, 58: “Of course that reasoning with previous decisions is very different in French law, reflecting the difference of its legal process from the one in the common law tradition. But it does not mean that it does not exist”

in those jurisdictions belonging to the Germanic family of laws, are building upon one another virtually in the same way in which Dworkin has described, with the image of the chain novel<sup>50</sup>, the courts' interpretative work in a common law system<sup>51</sup>. In this sense of a body of norms that will, in all likelihood, for legal reasons, be applied by the courts to like cases, it is permitted to speak of judge-made law also in civil law jurisdictions<sup>52</sup>. There is therefore every reason to find an expression to describe this phenomenon which is not adequately captured by speaking of "persuasive authority"<sup>53</sup> or "non-binding precedent"<sup>54</sup>. Bhala convincingly proposes the term "*de facto* precedent"<sup>55</sup> and offers this definition of the difference: "The effect of a 'nonbinding' precedent ... is limited to guidance or persuasion. It has no obligatory force as a matter of law or as a matter of the observed behavior of the adjudicator. ... My definition of *de facto stare decisis* ... says the adjudicator has an institutional memory and puts it to work at every, or almost every,

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(footnote omitted).

<sup>50</sup>Ronald Dworkin, *Law's Empire*, The Belknap Press 1986, 228 et seq.; Waldron (n. 5), 140.

<sup>51</sup>Indeed, modern authors generally accept, at least in Germany, that courts can and do make law; cf eg Christoph Schönberger, *Höchstrichterliche Rechtsfindung und Auslegung gerichtlicher Entscheidungen*, *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer* 71 (2012), 296, 306; Marion Albers, *Höchstrichterliche Rechtsfindung und Auslegung gerichtlicher Entscheidungen*, *ibid.*, 257, 262. The picture painted by Jacob (n. 39), 1009-10, is thus rather dated.

<sup>52</sup>If this argument resembles that which Waldron (n. 5), 72, has made for considering foreign decisions not as law but as sources of law this is because the underlying idea in both cases is that of persuasive authority. Cf. also Shapiro (n. 35), 126 et seq. For Guillaume (n. 36), 6, "in all national laws, precedent is the starting point of judges' reflections".

<sup>53</sup>On this concept, cf text at n. 150.

<sup>54</sup>"Precedent" is mostly understood, in the common law tradition, as mandatory precedent. Understood in this way, a "non-binding precedent" is a *contradictio in se* as Bhala (n. 22), 919-21, notes. The contradiction however vanishes if precedent is defined, following Komárek (n. 49), 67, as "a previous judicial decision that has normative implications beyond the context of a particular case in which it has been delivered".

<sup>55</sup>According to Stefan Vogenauer, *Sources of Law and Legal Method in Comparative Law*, in *The Oxford Handbook of Comparative Law* (Mathias Reimann and Reinhard Zimmermann, eds.), Oxford 2006, 895, "even a *de facto* source which is habitually followed ... is applied and interpreted according to certain methodological standards".

opportunity.<sup>56</sup>

b) The law-making of international courts

The pattern of courts relying on their own case-law is repeated in the case of international courts<sup>57</sup>. This applies as well to the ICJ<sup>58</sup> and the ECJ<sup>59</sup> as to the WTO's Appellate Body<sup>60</sup>, the ICTY<sup>61</sup> and the ICTR but also to human

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<sup>56</sup>Bhala (n. 22), 940-1.

<sup>57</sup>A historical overview is given by Guillaume (n. 36), 7-8.

<sup>58</sup>Presciently Alf Ross, *A Textbook of International Law* 86-87 (1947): "There is reason to believe that gradually, as the number of precedents of the Permanent Court increases, an international judge-made law will be established by practice, a law which will be of the greatest importance by giving to International Law that stability in which it is now so wanting. Whether or not the court formally believes in the binding force of precedents is actually of no great consequence." Wood (n. 21), para 62, n. 117, refers to *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, at p. 245, para. 41; *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 38, para. 46, and raises the question "how far the fact that a rule of customary international law has been ascertained by one tribunal at a certain point in time (sometimes decades ago) means that such tribunal or other tribunals may simply rely on such finding in the future". For the opinion that "[i]ndirect violation of custom occurs when an international tribunal invokes and applies customary international law, as previously declared by another tribunal, without scrutinizing the basis for such a declaration" he quotes B. Chigara, *Tribunal for the Law of the Sea and Customary International Law*, *Loyola of Los Angeles International and Comparative Law Review*, 22 (2000), 433, 450. Cf. also Guillaume (n. 36), 9-12; Shahabuddeen (n. 33), 26: "It is scarcely necessary to state that the Court also follows its own case." and the quotations *ibid.* For a discussion of Article 59 of the ICJ Statute in this context cf Jacob (n. 39), 1118-20.

<sup>59</sup>Cf eg Advocate General Trstenjak, Case C-331/05 P, *Internationaler Hilfsfonds v. Commission*, 28 March 2007, ECR I-5477, para 85-7.

<sup>60</sup>Appellate Body Report, US - Final Anti-Dumping Measures on Stainless Steel from Mexico, para 162, WT/DS344/AB/R (Apr. 30, 2008) on which cf eg v. Bogdandy & Venzke (n. 32), 991-2; Ingo Venzke, *Understanding the Authority of International Courts and Tribunals: On Delegation and Discursive Construction*, ACIL Research Paper 2013-07, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2269648](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269648), 18-9. The recent jurisprudence signals a departure from the Appellate Body's previous jurisprudence. See e.g., Appellate Body Report, Japan - Taxes on Alcoholic Beverages, 14, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R.

<sup>61</sup>Cf. Case No IT-95-14/1-A, *The Prosecutor v Zlatko Aleksovski*, Judgement of the Appeals Chamber of 24 March 2000, para 114: "The Appeals Chamber considers that decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive."

rights courts like the ECtHR<sup>62</sup>. The same applies, in the case of international and hybrid criminal tribunals, for the persuasive or, in the case of the ICTY and the ICTR, even mandatory<sup>63</sup> authority of Appeal(s) Chamber judg(e)ments for the respective Trial Chambers<sup>64</sup>. All those courts rely in their judgments quite often on their proper case-law<sup>65</sup>, rather than looking at “raw“ international custom as conceived of by Article 38 (1)(b) ICJ statute<sup>66</sup>. Because of the highly persuasive authority of a court’s own precedents which amount to *de facto* precedents<sup>67</sup> going beyond the mere result of the decision and covering also its *ratio decidendi*<sup>68</sup> it must be permitted to speak also, in the sense

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<sup>62</sup>Cf. eg ECtHR, case no. 28957/95, *Christine Goodwin v United Kingdom*, Judgment (GC) of 11 July 2002, para. 74.

<sup>63</sup>ICTY (n. 61), para 113. The ICTR Appeals Chamber adopted the same position shortly thereafter in *Prosecutor v Semanza*.

<sup>64</sup>Cf also William Schabas, Customary Law or ‘Judge-Made’ Law: Judicial Creativity at the UN Criminal Tribunals, in José Doria, Hans-Peter Gasser & M. Cherif Bassiouni, eds., *The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blishchenko*, Leiden/Boston: Martinus Nijhoff, 2009, pp. 77-101.

<sup>65</sup>For ICJ judgments Shahabuddeen (n. 33), 95, claims that “even though it may be open to a State to take the position that a new holding by the Court is not part of international law, the practical enjoyment of that right is not likely to mean much before the Court.“ Beyond that, governments have a “widespread practice of measuring the legality of state conduct with reference to ICJ jurisprudence” as Joan Donoghue, *The Role of the World Court Today*, 47 Ga. L. Rev. (2012-2013) 181, 198, notes.

<sup>66</sup>T. Meron, *The Making of International Criminal Justice: A View from the Bench: Selected Speeches* (Oxford University Press, 2011), 31: “the ICJ and other international courts are increasingly relying on precedent rather than repeatedly engaging in detailed analysis of the customary status of the same principles in every case”.

<sup>67</sup>Cf also the Declaration of Judge Mohamed Shahabuddeen, *Prosecutor v Oric* (Judgment) ICTY-03-68-A (Appeals Chamber), 3 July 2008, para 14: “[a] decision to reverse turns upon more than theoretical correctness; it turns upon larger principles concerning the maintenance of jurisprudence, judicial security and predictability. Included in those principles is, I believe, a practice for a judge to observe restraint in upholding his own dissent. [...] I do not assert that a dissenting judge can never form part of a subsequent majority upholding his earlier dissent, but I think that the preferred lesson of the cases is that he is expected to do so with economy.”

<sup>68</sup>Cf Bhala (n. 22), 942-3. Whether the distinction of *ratio decidendi* and *obiter dicta* is really convincing in the context of *de facto* precedents is however questionable. Both are *dicta propria* of the court and can as such give indications of how the court will decide, in an appropriate case, and will raise corresponding expectations. Cf also Shahabuddeen (n. 33), chapter 11.

discussed, of JMIL<sup>69</sup>. Insofar as a court has compulsory jurisdiction, there is an additional reason for doing so. The persons under such a jurisdiction have to reckon with the court's following its own case-law and, inversely, may rely on it<sup>70</sup>. It is submitted that this is enough to make such a court's judge-made law the law of the land<sup>71</sup>.

### c) Looking at foreign jurisdictions

Things change when we are no longer looking at the use of precedent by a court in whose jurisdiction it has been set - the setting just discussed -, but rather at its use by a court from a different jurisdiction<sup>72</sup>. Here, the possibility of mandatory precedent - *de jure* or *de facto* - can generally be ruled out<sup>73</sup>.

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<sup>69</sup>Cf. Ross (n. 58).

<sup>70</sup>According to v. Bogdandy & Venzke (n. 32), 980, “[a]lthough the phenomenon of international judicial lawmaking is omnipresent, it is most visible in legal regimes in which courts have compulsory jurisdiction and decide with sufficient frequency to allow for a *jurisprudence constante* to develop”; *ibid*, 987.

<sup>71</sup>This is the case of the *ad hoc* international criminal tribunals but also of municipal courts at least in well-ordered States for those persons under their respective jurisdiction. Concerning States, it is the case eg of the Appellate Body for the members of the WTO and of the ECtHR for the Member States of the Council of Europe. Cf also ECtHR, *Opuz v. Turkey*, 33401/02, 9 June 2009, para 163: “bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States.”

<sup>72</sup>Guillaume (n. 36), 7.

<sup>73</sup>But there is the possibility that a municipal court, for municipal, especially constitutional, reasons, considers earlier decisions of an international court not so much as a *de jure* or *de facto* precedent but as a binding decision on a preliminary question. In this way, the FCC, in its decision on the question of the effects of a violation of the Vienna Convention on Consular Relations (FCC, decision of 19 September 2006, 2 BvR 2115/01, available at [http://www.bverfg.de/entscheidungen/rk20060919\\_2bvr211501.html](http://www.bverfg.de/entscheidungen/rk20060919_2bvr211501.html)), relies heavily on the ICJ case-law (ICJ, *LaGrand Case (Germany v. United States of America)*, Request for the Indication of Provisional Measures, Order of 3 March 1999, ICJ-Reports 1999, 9; ICJ, *LaGrand Case (Germany v. United States of America)*, Judgment of 27 June 2001, ICJ-Reports 2001, 464; ICJ, *Case concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, ILM 43 [2004], 581) granting it, for constitutional reasons, quasi-mandatory authority (para 57 et seq). The decision is commented by Jana Gogolin, *Avena and Sanchez-Llamas Come to Germany. The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations*, 8 German LJ 262 (2007).

Courts from different jurisdictions can regard decisions handed down by courts from another jurisdiction as having persuasive authority at best<sup>74</sup>. More will have to be said below<sup>75</sup> on this type of use made of a precedent. Here, it must suffice to note that it is widely accepted, at least as a *desideratum*, that international courts should avoid a fragmentation of international law and therefore normally should follow decisions of other international courts<sup>76</sup>. In spite of that, absent mandatory precedents it is quite normal that there are contradictory decisions. Examples abound<sup>77</sup>. To mention just two from international law: in the jurisprudence of human rights treaty bodies, the IACtHR and the Human Rights Committee deny the treaty States of the ACHR and the ICCPR, respectively, a margin of appreciation<sup>78</sup> whereas that margin plays an important role in the jurisprudence of the ECtHR<sup>79</sup>. In the jurisprudence of international criminal tribunals there is a much discussed controversy over a specific element of the *actus reus*<sup>80</sup>. This clearly shows, if need be, that court decisions are not

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<sup>74</sup>But for the subject matter of his report, Wood (n. 21), para 66 says: “One thing stands out. Notwithstanding the specific contexts in which these other courts and tribunals work, overall there is substantial reliance on the approach and case law of the International Court of Justice, including the constitutive role attributed to the two elements of State practice and *opinio juris*.”

<sup>75</sup>Cf text at n. 148 et seq.

<sup>76</sup>Cf Guillaume (n. 36), 15 and 20-1.

<sup>77</sup>Cf the examples quoted by Guillaume (n. 36), 18. Cf also Antonio Cassese, Paola Gaeta et al., Cassese’s International Criminal Law (OUP 2013), 29. It is also normal that precedents of one court are used by another court, especially a court from a different jurisdiction, to justify a result which otherwise would be difficult to justify. Cf the examples quoted by Guillaume, *ibid*, 21-3, who appears to disapprove of that practice: “The recourse to precedent does not hide well the desire to ignore positive law and to promote natural law created by the conscience of judges.”

<sup>78</sup>IACtHR, *Almonacid-Arellano v. Chile*, Judgment of September 26, 2006, para 124 (the “control of conventionality” doctrine; HRC, *Ilmari Lämsman et al. v. Finland*, 511/1992, views of 8 November 1994, para 9.4.

<sup>79</sup>Cf eg ECtHR, *S. and Marper v. United Kingdom*, 30561/04 et al., 4 December 2008, para 102-3.

<sup>80</sup>Cf Special Court for Sierra Leone, Appeals Chamber, judgment of 26 September 2013, case no. SCSL-03-01-A, *Prosecutor v Charles Ghankay Taylor*, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=t14fjFP4jJ8=&tabid=191>, paras. 474-80, and ICTY, Case No. IT-05-87-A, *Sainovic* (n. 31), paras. 1617-51, *contra* ICTY, Case No. IT-04-81-A, *Prosecutor v. Momcilo Perisic*, Appeals Chamber Judgement of 28 February 2013, paras. 25 et seq.

binding on courts from foreign jurisdictions.

## II. The case for the recognition of JMIL based on a law of reason

### 1. Judgments positivising laws of reason

#### a) Setting a precedent

Following precedents, mandatory or persuasive, is not the only way which can be observed in practice for courts to make international law. Setting a precedent is another. In this context, a question arises which did not come up earlier: the question of the substantive law according to which a court decides. There are judgments, mostly by superior municipal courts, purportedly on international law but which do not refer to, or the *ratio decidendi* of which is not founded on, CIL according to the ICJ's standard definition. Rather they are based on first principles or, to put it more provocatively, on a law of reason<sup>81</sup>. Such laws are pre-legal. For becoming legal norms, they need to be positivised. While this is normally done by an acknowledged legislator practice shows that courts occasionally apply laws of reasons directly<sup>82</sup>. It is true that “[j]udicial decisions must not only be creative but also constrained and constraining in order to increase [their] authority<sup>83</sup>. But whether they are will be decided by other courts engaging with their reasoning<sup>84</sup>.

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<sup>81</sup>In the taxonomy of Uerpman-Wittzack (n. 2) such decisions may follow either the “civilist” or the “constitutional” approach.

<sup>82</sup>Cf. also USSC, *State of New Jersey v. State of Delaware*, 291 U.S. 361, 54 S.Ct. 407, per Justice Cardozo, para 31: “International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality.” W. Michael Reisman, *International Law-making: A Process of Communication*, 75 *Am. Soc’y Int’l L. Proc.* 101 (1981) 103. This appears today to be a bit dated at least for some areas of international law.

<sup>83</sup>Venzke (n. 60), 21.

<sup>84</sup>Venzke (n. 60), *ibid*, quotes Robert Brandom, *Some Pragmatist Themes in Hegel’s Idealism: Negotiation and Administration in Hegel’s Account of the Structure and Content of Conceptual Norms*, 7 *EUR. J. PHIL.* 164, 181 (1999): “The current judge is held accountable to the tradition she inherits by the judges yet to come.”

A municipal court decision positivising a law of reason in the field of international law is an instance of State practice<sup>85</sup> and may, in that function, contribute to the determination of CIL. Also, if it is the decision of a superior court, especially one against whose decision no judicial remedy is available within its proper jurisdiction, it will likely become a *de facto* precedent, bestowing “jural quality“ on the law of reason and transforming it into judge-made law for that jurisdiction<sup>86</sup>. Law so generated is international law under at least three aspects: it is implicating a foreign State, generally the defendant before the deciding court<sup>87</sup>, it deals, by definition, with a subject matter generally regarded as regulated by international law, and it could be, and by some writers is, treated as emerging CIL<sup>88</sup>. As noted in the introduction, JMIL is an effort to conceptualise a phenomenon occurring in the practice of courts. As a different conceptualisation, that as emerging CIL, unequivocally is seen as international law there cannot be a valid reason to deny that classification to JMIL. However, it is, at least initially, not general but only particular international law<sup>89</sup> restricted to one jurisdiction<sup>90</sup> which leads, for the time being, necessarily to a fragmentation of international law. But it may be taken

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<sup>85</sup>Cf. ICJ, *Jurisdictional Immunities* (n. 2), para 55.

<sup>86</sup>Cf. text at n. 33 et seq. And cf eg the situation following *Ferrini* as described in the German Memorial (n. 17), 1-2: “After this judgment had been rendered, numerous other proceedings were instituted against Germany before Italian courts by individuals who had also suffered injury as a consequence of the armed conflict. ... the Corte di Cassazione has recently confirmed its earlier findings in a series of decisions delivered on 29 May 2008 and in a further judgment of 21 October 2008. Germany is concerned that hundreds of additional cases may be brought against it.“

<sup>87</sup>Cf. Samantha Besson, *Theorizing the Sources of International Law*, in: *The Philosophy of International Law* (n. 5), 163, 167: “What is strictly speaking international as opposed to *national* about international law no longer lies in its subjects nor in its objects ... The difference must ... lie ... in the sources of international law: international law-making processes take place ... sometimes inside [the national State], but by implicating other subjects than the national law-makers only“ (author’s italics).

<sup>88</sup>On which cf text at n. 118.

<sup>89</sup>According to Lauterpacht (n. 13), 89 et seq., municipal court decisions can be a source of particular international law.

<sup>90</sup>Indeed, Cardozo’s (n. 82) examples are all taken from intra-US disputes.

up by foreign courts engaging with its reasoning and persuaded by it.

Indeed, beyond deciding the case at hand in a way that conforms to the court's sense of justice<sup>91</sup>, such a judgment which is by definition incompatible with extant general CIL is typically aimed at developing international law by influencing other actors, especially other courts, municipal or international<sup>92</sup>. Depending on whether it succeeds in persuading courts from other jurisdictions it may be described, with hindsight, alternatively as “one swallow [that] does not make a rule of international law”<sup>93</sup> or as a “first move ... Others follow”<sup>94</sup>. This, for the time being, is the difference between the recent *Ferrini* judgment of the Italian *Corte di Cassazione*<sup>95</sup>, the object of the former quotation, and the early Italian and Belgian decisions initiating the development of restrictive State immunity<sup>96</sup>, the object of the latter, which were taken up by the Swiss Federal Court (*Bundesgericht*, BG)<sup>97</sup> and a host of later

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<sup>91</sup>German Memorial (n. 17), para 27: “Apparently, however, ... [the *Corte di Cassazione*] felt entitled to develop the law since the positive law in force did not correspond to requirements of justice as perceived by it.”

<sup>92</sup>Cf. *v. Bogdandy & Venzke* (n. 32), 988; *Jacob* (n. 39), 1022. Cf. also Maria Gavouneli and Ilias Bantekas, *Prefecture of Voiotia v. Federal Republic of Germany*. Case No. 11/2000. *Areios Pagos* (Hellenic Supreme Court), May 4, 2000, *AJIL* 95 (2001), 198: “... *Areios Pagos* ... may have followed a well-established tradition of innovation, perhaps actively contributing to the consolidation of an emergent rule of customary international law.” But cf. also Christian Tomuschat, *The International Law of State Immunity and Its Development by National Institutions*, 44 *Vanderbilt Journal of Transnational Law* 1105, 1133, 1137 (2011), “Judges are not called upon to act with the explicit intention to create new law. If they do so, they fail in their professional duties.”

<sup>93</sup>So Lord Bingham in *Jones v. Ministry of Interior Al-Mamlaka Al-Araibya AS Sandiya* [2006] UKHL 26, [2006] I.L.R. 713 (U.K.), para. 22.

<sup>94</sup>So Lord Denning in *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] 1 Q.B. 529, 556.

<sup>95</sup>n. 38.

<sup>96</sup>Cf. Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, *BYIL* 1951, 220, 251 et seq.

<sup>97</sup>BG, 13 March 1918, *K.k. Österreich. Finanzministerium v. Dreyfus*, BGE 44 I 49, 54-5, referred in general to German, Austrian, French, English and North American court practice but opposed to it the Italian (“since 1886”) and Belgian (“since 1903”) practice as well as the opinions of German and French authors and a 1891 draft adopted by the *Institut du droit international* of an international regulation concerning the jurisdiction of courts over foreign States

decisions<sup>98</sup> which were obviously convinced by their reasoning.

b) *Grenzorgane*

Arguably, setting a precedent by positivising a law of reason is different in kind from other cases of judicial law-making. At least in some instances, it will not be a question of adding an additional chapter to the Dworkinian chain-novel but rather of writing the first chapter, at least if one excludes from that novel the pre-legal chapters. It means also for a court to refuse to follow extant CIL which would be normally binding on it. Thus arguably a special explanation and justification for that kind of judicial law-making is required. Such an explanation is offered by the doctrine of borderline institutions (*Grenzorgane*).

Courts are generally organised in hierarchies. At the top of the hierarchy stands a court against whose decisions there is no judicial remedy under its proper law. Such a court is, of course, still bound by substantive law but there is no sanction provided for in the case it deviates from that law. It can therefore be said that such a court is bound only in its conscience, i.e., that its obligation to respect the law is not a legal but a moral obligation<sup>99</sup>. As such, it can be balanced against, or outweighed by, other moral obligations eg an obligation to

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and Heads of State, and followed the latter view, giving apparently the greatest weight to that (private) draft.

<sup>98</sup>Cf the decisions listed in FCC, *Claim against the Empire of Iran case* (n. 13), 33-51 (the citations are too numerous to be reproduced here); FCC, decision of 13 December 1977, BVerfGE 46, 342, 364-65, returning to the above question, cites, in addition, US Supreme Court, *Dunhill v. Republic of Cuba*, 96 S. Ct. 1854, 1861 ff. [1976]; Privy Council, *Philippine Admiral v. Wallem Shipping [Hong Kong] Ltd.* [1976] 1 All E. R. 78, International Legal Materials [ILM] XV [1976] 133; Court of Appeal for England and Wales, *Trendtex Trading Corp. Ltd. v. Central Bank of Nigeria* [1977] 2 W.L.R. 356, ILM XVI [1977] 471 ff. [13 January 1977].

<sup>99</sup>See Alfred Verdross, *Völkerrecht* 24 (2d ed. 1950). Another interpretation is that while following the law leads to an ideal decision, to deviate from the law leads to a still possible decision. See Hans Kelsen, *Reine Rechtslehre*, 2nd ed. 1960, 274. But see James W. Harris, *Kelsen's Concept of Authority*, 36 Cambridge L.J. 353, 358 (1977). Yet another is that while a court may only decide according to the law, it can also decide differently. Theodor Schilling, *Artikel 24 Absatz 1 des Grundgesetzes, Artikel 177 des EWG-Vertrags und die Einheit der Rechtsordnung*, 29 *Der Staat* 161, 169-70 (1990).

remedy narrow and unjust decisions<sup>100</sup>. Institutions which are bound by law but not subject to legal control (a subset of which are courts against whose decisions there is no remedy) have been dubbed *Grenzorgane* (borderline institutions) mostly in Austrian academic discourse<sup>101</sup>. A decision of a *Grenzorgan* is legally valid irrespective of whether it has decided the case in conformity with substantive law or not<sup>102</sup>. To put it differently, there is simply no way to know the substantive law but by looking at the decisions of such a court<sup>103</sup>. For all practical purposes that means that the decision of such a court<sup>104</sup> determines the law<sup>105</sup>. One justification of that quite extraordinary power is that it was granted to the municipal court in question by whoever has set it up, often in the State's constitution. Another one is that there simply is no other way<sup>106</sup>. Of course, the situation becomes confusing if there are, as in international law, many *Grenzorgane*. Here, if those *Grenzorgane* disagree, there is simply no way to know the substantive law. In international law parlance, this means that the law is fragmented.

### c) The laws of reason

#### aa) Substantive and adjective indications

It is in the nature of laws of reason as pre-legal laws that substantive indications of what laws there might be cannot be given. Examples in the field of State

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<sup>100</sup>Cf text at n. 278.

<sup>101</sup>The notion was coined by Verdross, *ibid.*, at 25.

<sup>102</sup>A.J. Merkl, *Justizirrtum und Rechtswahrheit*, in *idem* (n. 5), 369, 377 et seq.; Kelsen (n. 99), 272.

<sup>103</sup>Cf. Theodor Schilling, *Justizrevolutionen*, 51 *Der Staat* 525 (2012) 538-9.

<sup>104</sup>Which can also be a decision confirming the decision of an inferior court.

<sup>105</sup>Cf. also ECtHR, *Opuz*, quoted in n. 71.

<sup>106</sup>Peter Wysk, *Das Gesetz und seine Richter: Mund des Gesetzes? Rechtsbeistand des Gesetzgebers? Oder ...?*, in: M. Kloepfer (ed), *Gesetzgebung als wissenschaftliche Herausforderung. Gedächtnisschrift für Thilo Brandner* (Nomos Baden-Baden 2011), 137-154 at 141.

immunity are cited below<sup>107</sup>. But adjective indications appear to be possible. It is rare for a court to identify on its own a law of reason on which to base its judgment. Regularly, a law of reason, before being applied by a court, will have been discussed and developed by authors, agents of the civil society, dissenting opinions and so on<sup>108</sup>. Such a process that may be described as a process of communication<sup>109</sup> was certainly at the origin of the law of reason applied by *Ferrini*.

#### bb) Different constructions

This indicates that different constructions of the phenomenon understood here as pre-legal laws of reason are possible. Citing “modern communications theory“, and referring to the New Haven School, it has been claimed that norms emanating from a process of communication, far from being mere laws of reason, are, if they create corresponding expectations<sup>110</sup>, without more norms of international law whether or not that process includes a court decision<sup>111</sup>. Expectations however is an equivocal term. It may designate alternatively what you hope for or what you realistically expect<sup>112</sup>. When it is noted that *Jurisdictional Immunities* “was in keeping with the conservative view the court

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<sup>107</sup>Cf text at n. 122.

<sup>108</sup>A good example of such a development is ICJ, *Jurisdictional Immunities* (n. 2), diss. op. Yusuf, para 28-33.

<sup>109</sup>Cf eg Reisman (n. 82), *passim*.

<sup>110</sup>According to Nagan and Root (n. 24), 383, communications are “collective understandings of what the expectations of international law are“.

<sup>111</sup>Nagan and Root (n. 24), 459 et seq. This may be a distortion of what the New Haven School had in mind which more narrowly defined that process as combining the requisite “coordinate communication streams - policy content, authority signal and control intention -“ (Reisman [n. 82], 113), and more generally appears to consider its approach to narrow rather than widen the enumeration of sources in Article 38 of the ICJ Statute. Cf. Reisman, *ibid*, 119: “Something may fall within one of the formal sources, but simply not be, or have ceased to be, law.“

<sup>112</sup>The Macmillan Dictionary - <http://www.macmillandictionary.com/dictionary/british/expectation> - distinguishes between “the belief that something will happen“ and “a belief that something should happen in a particular way“.

has previously articulated<sup>113</sup> and that the “decision was not surprising<sup>114</sup> then its outcome must have been expected (in the second sense). This appears also to be what the New Haven School means by “expectations ... that certain policies are authoritative and controlling<sup>115</sup>. Indeed, “norms are prescribed because they are policies which parts of the community do not voluntarily or spontaneously support<sup>116</sup>. In contrast, the term is used in the first sense when it is claimed that “the international community is communicating a clear expectation that jurisdictional immunity should not be granted when states abuse *jus cogens* norms<sup>117</sup>. I cannot see that a case for the concept of international law emanating directly from this type of wishful thinking, disguised as a process of communication, without any “authority signal“, has been accepted anywhere, perhaps with the exception of a narrow circle of human rights activists.

Another approach would treat some pre-legal laws of reason as emerging international law. There is a close affinity between laws of reason, and indeed JMIL based on them, and the concept of emerging international law<sup>118</sup>. The main difference is that whereas a law of reason is conceived of as needing a specific positivisation ie a law-making act which may be the act of a court to become positive law there is assumed to be a seamless transition from emerging law to CIL. The problem with that approach is that the widespread reliance on *emerging* international law for providing solutions to *present* legal problems is inherently contradictory. Claiming that a rule is (only) emerging is admitting

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<sup>113</sup>Nagan and Root (n. 24), 451-2.

<sup>114</sup>Ibid, 457.

<sup>115</sup>Reisman (n. 82), 108.

<sup>116</sup>Reisman (n. 82), 111.

<sup>117</sup>Nagan and Root (n. 24), 468.

<sup>118</sup>Indeed, the *Ferrini* law of reason has been repeatedly characterised as emerging international law. Cf eg Nagan and Root (n. 24), 468: “The ICJ has postponed the emergence of a *jus cogens* exception to immunity, but the customary international law on point will, like the common law, creep along regardless.“

that it has not (yet) emerged so to rely on it is to rely on a non-rule and to admit it at the same time. In addition, the “yet“ is no evidence that the law will emerge at any time soon or indeed at all. It just indicates that it may emerge or, of course, may not emerge. Thus, the doctrine of an anticipatory effect of a norm ie of an effect a norm has before coming into force<sup>119</sup> cannot apply. A judgment that would further reduce State immunity following a corresponding trend that has been claimed to exist<sup>120</sup> ie based on a supposedly emerging law therefore would be at odds not only with extant CIL but also with logic. Convincingly, the ICJ has held that “[i]n the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.”<sup>121</sup> Treating a supposedly emerging norm as a pre-legal law of reason or, once positivised, as JMIL avoids that contradiction by relying on the law-making authority of courts for their respective jurisdictions. Such a treatment recognises that the “emerging law“ becomes positivised only by being applied by a court.

#### d) Examples

aa) The early Italian and Belgian decisions and *Ferrini* are obvious examples of superior courts deciding on the basis of a law of reason. The early courts could not decide in favour of restrictive State immunity by relying on extant CIL because no such State practice or *opinio juris* existed at the time<sup>122</sup>. Even

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<sup>119</sup>On which cf. especially Michael Kloepfer, *Vorwirkung von Gesetzen* (1974).

<sup>120</sup>Cf eg ECtHR, *McElhinney v. Ireland*, 31253/96, 21 November 2001 (GC), diss. op. Loucaides, para 2. The judgment itself, para 38, observed such a trend, “by no means universal“, only for the so-called tort exception.

<sup>121</sup>ICJ, *Fisheries Jurisdiction (United Kingdom v. Zeeland)*, Merits, Judgment, I.C.J. Reports 1974, p. 3, para 53. Further examples from the ICJ’s case-law are mentioned by Guillaume (n. 36), 9.

<sup>122</sup>The first decision in case was the Naples *Corte di Cassazione*’s of 27 March 1886, Giur.it. 1886, I, 1, 228. There simply was no prior practice of restrictive immunity, at least none the court knew of (cf n. 127). The *Cour de Cassation de Bruxelles*, 11 June 1903, Pasirisie belge 03 I 294 = Dalloz 03 I 401 = Niemeyers Zeitschrift für internationales Privat- und öffentliches Recht XVI (1906), 243-5, did not cite the Italian decision (or any other source). Cf. also Lord

more than 30 years later, when the *Bundesgericht*<sup>123</sup> was apparently the first court to decide on restrictive immunity while referring to foreign decisions, there still was a large majority of jurisdictions opposed to restrictive immunity (a fact that the *Bundesgericht* openly acknowledged) so that the “nose-counting”<sup>124</sup> involved in the determination of CIL<sup>125</sup> would need to have led to a different result. Rather, those courts had to rely on laws of reason and to use deductive reasoning<sup>126</sup>. One of those laws was that “the State assumes as soon as it enters the domain of private law, the position to which a private-law subject is entitled ... with respect to judicial proceedings serving the protection of such rights“, which may have been derived from Roman law<sup>127</sup>. Another one was that the purpose of State immunity was the protection of State sovereignty which the courts said was not involved in commercial transactions<sup>128</sup>. Those laws of reason led the courts to deny foreign States immunity for *acta jure gestionis*<sup>129</sup>. In other words, they used those principles

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Denning (n. 94): “Whenever a change is made, someone some time has to make the first move.“

<sup>123</sup>*Bundesgericht* (n. 97).

<sup>124</sup>The expression is from Waldron (n. 5), 85.

<sup>125</sup>For an empirical research into how today’s courts find international custom, cf. Mitu Gulati, *How do Courts Find International Custom?*, available at [http://law.duke.edu/cicl/pdf/opiniojuris/panel\\_6-gulati-how\\_do\\_courts\\_find\\_international\\_custom.pdf](http://law.duke.edu/cicl/pdf/opiniojuris/panel_6-gulati-how_do_courts_find_international_custom.pdf), who found, according to Figure 5, that “determinations where [CIL] was found“ cited treaties (70 %), international tribunals (46 %), academic treatises and UN/League resolutions 23 % each, domestic tribunals (21 %) and so on.

<sup>126</sup>Cf especially *Cour de Cassation de Bruxelles* (n. 122).

<sup>127</sup>Bavarian Court of Conflicts of Jurisdiction (*K. B. Gerichtshof für Kompetenzkonflikte*), *Heizer v. Kaiser-Franz-Joseph-Bahn A.-G.*, 4 March 1885, quoted from Lauterpacht (n. 96), 267. This decision matches well with that of the *Cour de Lucques [Corte di Lucca]*, 22 March 1887, 16 *Journal du droit international privé* (Clunet) 335 (1889), which has treated a foreign State expressly on a par with its proper State.

<sup>128</sup>Cf. eg the reasoning of the Naples *Corte di Cassazione* (n. 122), quoted by Lauterpacht (n. 96), 251-2.

<sup>129</sup>That reasoning is apparently still convincing. Cf House of Lords, *I Congreso del Partido* [1981] 2 All ER 1064, [1983] 1 AC 244 where Lord Wilberforce’s speech provided an authoritative statement of the principles underlying the distinction. He said ([1981] 2 All ER 1064 at 1070, [1983] 1 AC 244 at 262): “The relevant exception, or limitation, which has been engrafted upon the principle of immunity of states, under the so-called restrictive theory, arises

to operate a teleological reduction of the law of extant absolute State immunity.

While the early Italian and Belgian decisions must have been considered wrong under CIL as there simply was at the time no State practice and/or *opinio juris* on which they could have relied, far from being irrelevant, they have been, with hindsight, the basis of an important development of international law. This is clearly shown by their progeny, especially the Tate letter<sup>130</sup>, the *Claim against the Empire of Iran* judgment<sup>131</sup>, the opinion of Lord Denning<sup>132</sup> and the speech of Lord Wilberforce<sup>133</sup>. For a positivist jurisprudence there can be no doubt that those courts have made international law. More generally, this means that judgments such as the early Italian and Belgian decisions are law, rather than simply wrongly decided. As that way of law-making is not covered by the terms of Article 38 (1) of the ICJ Statute, the positivist case for the recognition of a distinct concept of JMIL, it is submitted, is made.

bb) *Ferrini* stands squarely in the tradition of those early decisions. In a case concerning a claim for reparations for an international crime committed by a foreign State, the *Corte* restricted jurisdictional State immunity beyond what by then had been widely accepted and thereby fell foul of CIL<sup>134</sup>. Insofar as here relevant, the *Corte* claims that “[i]nternational crimes ... consist of the particularly intense or systematic violation of basic human rights ... which are protected by non-derogable norms that stand at the apex of the international

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from the willingness of states to enter into commercial, or other private law, transactions with individuals. It appears to have two main foundations. (a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. (b) To require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state.“

<sup>130</sup>n. 24.

<sup>131</sup>n. 13.

<sup>132</sup>n. 94.

<sup>133</sup>n. 129.

<sup>134</sup>Cf ICJ, *Jurisdictional Immunities* (n. 2), para 76-7.

legal system, taking precedence ... also over those norms governing immunity.”<sup>135</sup> It further claims that “[t]he recognition of immunity from jurisdiction for States that are responsible for such offences is in blatant contrast with the normative framework outlined above”, and “that this antinomy must be resolved by giving precedence to the higher-ranking norms”. The premiss of the former claim, but not its relevance to immunity, it buttresses, perhaps with a nod to CIL, with the citation of national and international court decisions<sup>136</sup>. It refers however to their reasoning, not to their respective conclusion. The latter claim it buttresses mainly with a reference to the dissenting opinion of the (very big) minority in the ECtHR’s *Al-Adsani* judgment<sup>137</sup>, without engaging with the decision itself<sup>138</sup>. In sum, the *Corte* treats earlier municipal and international court decisions not as facts but as efforts to expound the law with which it might agree or disagree ie as persuasive, or dissuasive, authority. Particularly telling in this respect is its treatment of the *Areios Pagos’ Distomo* decision: while the *Corte* agrees with the conclusion of the Greek decision, it does not accept its reasoning and therefore disregards it when searching for its own result<sup>139</sup>.

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<sup>135</sup>*Corte di Cassazione, Ferrini* (n. 38), para 9.

<sup>136</sup>*Ibid.*

<sup>137</sup>*Ibid.*, para 9.1, referring to ECtHR, 35763/97, *Al-Adsani v. United Kingdom*, 21 November 2001 (GC), Rep. 2001-XI. Cf eg Flanders (n. 48), 69: “And indeed, there is no general reason ... why a dissent in a court opinion from another jurisdiction might not have greater persuasive authority than a majority or concurring opinion.” But cf. Anthony D’Amato, *The Concept of Special Custom in International Law*, 63 *American Journal of International Law*, 211-223 (1969) 215: “The citation of long passages from dissenting opinions is a dangerous and misleading practice for any scholar in any legal system, for the court obviously was aware of these dissents when it reached its decision and usually deals with them in the way the majority opinion is organized and written.”

<sup>138</sup>Of course, depending on circumstances, this may be a perfectly adequate approach in a domestic context. Cf. *Jones* as quoted in the text at n. 93.

<sup>139</sup>Cf. especially *Ferrini* (n. 38) on *Distomo*, paras. 8.1-8.2. Contrast ICJ, *Jurisdictional Immunities* (n. 2), para 83, where *Distomo* (ie its result) is cited as the rare piece of State practice supporting the Italian defence of *Ferrini*.

It thus appears that the *Corte*, while ostensibly applying CIL<sup>140</sup>, does not rely on State practice and *opinio juris* but treats international law as it presumably would treat municipal law<sup>141</sup>. Indeed, it notes that “customary norms ... are part of a system and therefore may only be correctly understood in relation to other norms that form an integral part of the same legal system”<sup>142</sup>. It appears to try to reconcile different aspects of the law according to a logical process based on a conflict of norms and on hierarchy<sup>143</sup>. However, the *Corte* makes it abundantly clear that it are the values behind the non-derogable norms which give them their high ranking<sup>144</sup>. Indeed, the *Corte* avoids the term “*jus cogens*”<sup>145</sup>. Its decision is JMIL, based on the law of reason that the prohibition of international crimes must sweep away all obstacles preventing victims of such crimes from obtaining damages. It positivises that law of reason and gives it, to borrow language from Cardozo<sup>146</sup>, the “imprimatur of a court” which attests, or, in the present context, rather creates, the law of reason’s “jural quality”.

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<sup>140</sup>*Corte di Cassazione, Ferrini* (n. 38), para. 5.

<sup>141</sup>*Corte di Cassazione, Ferrini* (n. 38), especially paras. 9.1-9.2; Pasquale De Sena and Francesca De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, EJIL 16 (2005), 89, 102, 110-1; cf. *Jones* (n. 93), para 63, per Lord Hoffman: “if the case had been concerned with domestic law, [this] might have been regarded by some as ‘activist’ but would have been well within the judicial function ... But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to ‘develop’ international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.”

<sup>142</sup>*Ibid*, para 9.2.

<sup>143</sup>According to Uerpman-Witzack (n. 2), [3], this would be a “civilist approach” which he claims “seems to be value-free” (*ibid*, [6]). And cf *ibid*, [8]: “The civilist approach is equally recognized in international law.”

<sup>144</sup>Cf quotation in the text at n. 135. And cf Lord Hoffmann in *Jones* (n. 93), para 63: “the Ferrini case should be seen rather as giving priority to the values embodied in the prohibition of torture over the values and policies of the rules of state immunity. I think that this is a fair interpretation of what the court was doing”.

<sup>145</sup>As has been noted by Tomuschat (n. 92), 1127.

<sup>146</sup>n. 82.

## 2. Judgments building upon judgments positivising a law of reason

### a) The relevance of a municipal judgment positivising a law of reason for international law

The reasoning underlying a municipal court decision positivising a law of reason offers courts from other jurisdictions the possibility to take notice of the positivised law of reason and to engage with the positivising decision. Among the instances of such an engagement are the many foreign courts which in the long run have followed the early Italian and Belgian decisions<sup>147</sup> but also *Jones*<sup>148</sup>, refusing to follow *Ferrini*. Such an engagement demonstrates that foreign courts ascribe persuasive or, as the case may be, dissuasive authority to the decisions they engage with. This shows that persuasive authority goes beyond the proper municipal legal system of the latter, in accord with a common practice of cross-border references by one court to the decisions of another. Put differently, municipal court decisions positivising a law of reason in the field of international law play a role in the development of the latter not only, restricted to their result, as State practice but also, including their reasoning, because of the persuasive authority those decisions may have for other municipal and for international courts<sup>149</sup>.

### b) Persuasive authority

#### aa) Definition

Persuasive authority has been defined as “authority which attracts adherence as opposed to obliging it”<sup>150</sup>. It is “material ... regarded as relevant to the

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<sup>147</sup>Cf n. 98.

<sup>148</sup>n. 93.

<sup>149</sup>According to Alec Stone Sweet, *The Judicial Construction of Europe* 10 (2004), “precedent camouflages lawmaking, while enabling it”.

<sup>150</sup>H. Patrick Glenn, *Persuasive Authority*, 32 McGill L.J. 261, 263 (1987).

decision which has to be made by the judge, but ... not binding on the judge under the hierarchical rules of the national system determining authoritative sources”<sup>151</sup>. In the field of international law, CIL is, in principle<sup>152</sup>, binding upon the judge but JMIL has only persuasive authority. Insofar as a court relies on an earlier judgment from another jurisdiction, it is an indication that it applies JMIL if it relies on the reasoning of the earlier decision; should it rather rely on CIL it would typically simply register the result of that decision and look for *opinio juris* elsewhere<sup>153</sup>.

The term “persuasive authority“ is generally used in the sense of the persuasive authority of court decisions for other courts<sup>154</sup>. In this context, it has been said that persuasive authority is an ambiguous term. “Sometimes it means treating a precedent as having force only by virtue of the persuasiveness of the reasoning it embodies; other times it means treating a precedent as having less than binding force, but still some force independent of its persuasiveness“<sup>155</sup>. This is a useful distinction between what I shall call pure persuasive authority and authoritative persuasive authority, respectively. The persuasiveness of an argument may depend, for any number of reasons, on the position of the person or body making the argument. Those reasons may include the experience of the arguer or the way the argument has been devised, especially whether this was done in a formalised eg court procedure. Thus a weak argument made by a

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<sup>151</sup>Christopher McCrudden, *Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 *Oxford J. Legal Stud.* 499, 502-03 (2000). Cf. also Timothy Schwartz, *Comment, Cases Time Forgot: Why Judges Can Sometimes Ignore Controlling Precedent*, 56 *Emory L.J.* 1475, 1479 (2007): “The touchstone of persuasive authority is that the deciding court is not required to follow [the] result or reasoning of the referenced authority.”

<sup>152</sup>Cf text at n. 99 et seq.

<sup>153</sup>Cf ICJ, *Jurisdictional Immunities* (n. 2), para 55.

<sup>154</sup>Cf eg Frederick Schauer, *Authority and Authorities*, 94 *Va. L. Rev.* 1931 (2008) at 1940: “[H]ere a court is conventionally understood to be following only those decisions or conclusions whose reasoning the court finds persuasive.”

<sup>155</sup>Waldron (n. 5), 21.

well-respected court may be as persuasive as a strong argument made by, say, a doctoral student.

Especially, persuasive authority quite often relies also on the fact that what is attracting adherence is the reasoning of a *court*. Here, we are in, or close to<sup>156</sup>, authoritative persuasive authority. Courts may try “to make their decisions consistent with the decisions of ... other courts”<sup>157</sup>. Judges may feel a “sense of obligation” to judges in other foreign courts as “an obligation to the law”<sup>158</sup>. “References to transnational sources may relate not only to the place of the court’s nation in the community of nations, but also to the status and relationship of courts to each other in the development of the law”<sup>159</sup>. In this sense a “joint venturing” is implicit in the citation of courts from other jurisdictions as persuasive authority<sup>160</sup>. With regard to the ICJ it has been said that “[w]hen it renders a judgment deciding a question of international law that is well-reasoned and strongly supported by judges on the ICJ, the legal rule it declares will be powerfully influential for other tribunals deciding questions of

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<sup>156</sup>On a kind of intermediate authority cf Venzke (n. 60), 2, who “submits that the authority of [international courts and tribunals] is best understood as their ability to establish content-laden reference points that participants in legal discourse can hardly escape and that redistribute argumentative burdens.” The argument does not apply only to international courts and tribunals. Indeed, Venzke, *ibid*, 22, adds “that, with lesser density and force, the reception of international decisions at the domestic level may in a similar way contribute to the construction of their authority”.

<sup>157</sup> Flanders (n. 48), 75.

<sup>158</sup>Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 *Loy.L.A. L. Rev.* 271, 305 n. 119 (2003).

<sup>159</sup>Jackson (n. 158), 283. Similarly Waldron (n. 5), 61: persuasiveness is “in part a function of the respect due to the tribunal from which [the precedent] emerges”. But the German Federal Court had no qualms to cite, among others, a US District Court; cf BGH, judgment of 17 December 1998, BGHSt 44, 308, 312. Cf. also Jeremy Waldron, “Partly Laws Common To All Mankind”: *Foreign Law In American Courts*, available at <http://iilj.org/courses/documents/2008Colloquium.Session1.Waldron.pdf>, 36, n. 67, discussing the respective persuasiveness of foreign common law precedents in New Zealand courts: “And although the distinction is artificial, all of this can be understood as a matter of greater or lesser weight being accorded to English decisions on grounds other than the correctness of the reasons provided by the court for its holding.”

<sup>160</sup>Jackson (n. 158), 280.

international law, even though there is no formal *stare decisis* effect<sup>161</sup>.

Of the possible reasons for such an effort, one is of particular relevance in our context: that “not to reach the same result as another court would be to fail to treat ‘like cases alike’ on some relevantly similar factual situation, thus violating the legal principle of fairness<sup>162</sup> as well as the principles of equality<sup>163</sup> and, often, legal certainty<sup>164</sup>. In the international context, following a precedent having persuasive authority also helps avoid or mend the fragmentation of international law. At a minimum, it is in the interest of justice that international courts acknowledge decisions of other such courts dealing with the same or a similar law or even the same question<sup>165</sup>, and many of them do<sup>166</sup>. The same must apply to municipal court decisions on international law.

#### bb) Idiosyncrasies of the Germanic practice

It is particularly in common law jurisdictions that court decisions play an outstanding role as persuasive authority. In some other jurisdictions, especially those belonging to the Germanic family of laws, courts cite routinely not only such decisions but also treatises and academic articles. Here, we are most likely in the area of pure persuasive authority where the level of persuasiveness of an authority depends to a large extent directly on the quality of its reasoning. This

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<sup>161</sup>Jonathan I. Charney, The “Horizontal” Growth of International Courts and Tribunals, 96 Am. Soc’y Int’l L. Proc. 369, 370 (2002). In contrast, persuasive authority cannot only mean (although this plays a role) that “[t]he higher the level of uniformity in past precedents, the greater their persuasive force of case-law“, as has been claimed for precedents within civil law systems by Vincy Fon and Francesco Parisi, Judicial precedents in civil law systems: A dynamic analysis, International Review of Law and Economics 26 (2006) 519, 522. It is doubtful whether this claim can be made beyond the specificities of the French system on which cf n. 38.

<sup>162</sup>Flanders (n. 48), 75.

<sup>163</sup>An extended argument in favour of “treating like cases alike (in the world)“ is made by Waldron (n. 5), 109-41, and considered in the text at n. 226.

<sup>164</sup>Flanders (n. 48), 75: “there is some independent good achieved by uniformity with other courts, such as stability or predictability across jurisdictional lines“.

<sup>165</sup>Cf Guillaume (n. 36), 15.

<sup>166</sup>Cf the examples given by Guillaume (n. 36), 20-1.

may be seen as an instance of the uncoerced coercion of the better argument<sup>167</sup>. This clear difference in the citing practice between common law courts and Germanic courts however is, in the present context, less important than the fact, to be documented below, that Germanic courts (also) cite other (foreign) courts.

However, it should be noted that the style of reasoning of Germanic decisions is quite different from some common law judgments. Especially, it is quite common, even the rule<sup>168</sup>, for a court to cite a concurring or opposing view, whether academic or judicial, without discussing it<sup>169</sup>. On the face of it, this style of reasoning misses what has been called the hallmark of persuasive authority ie “engagement with the *reasons* for ... a decision“<sup>170</sup>. It also misses the chance to “improve the quality of decision-making“ by “making [the Court’s] choices more clear“, as has been claimed for decisions discussing foreign opinions<sup>171</sup>. Still, it seems fair to assume that a Germanic court which cites a foreign decision will have considered that decision including, outside the reach of CIL, its reasoning when it comes to its own conclusion so that it can be said that the foreign decision has some authority for that court which in the circumstances cannot be but persuasive.

#### cc) Practice

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<sup>167</sup>“... der zwanglose Zwang des besseren Arguments“: Jürgen Habermas, *Die Einbeziehung des Anderen: Studien zur politischen Theorie*, Frankfurt am Main: Suhrkamp (1999), 53.

<sup>168</sup>An exception is cited in n. 177.

<sup>169</sup>BG, judgment of 3 November 2006, *X. gegen Gesundheitsdirektion und Verwaltungsgericht des Kantons Zürich bzw. X. gegen Eidgenössisches Departement des Innern*, BGE 133 I 58, 69, is an example selected arbitrarily. And cf Maurice Adams, *The Rhetoric of Precedent and Comparative Legal Research*, *Mod L Rev* 62 (1999), 464, 465: “Belgian courts mostly cite precedents of case-law, if at all, in an opportunistic manner - when they confirm the position taken by the court“. Note however that there is a difference between “*in diesem Sinne*“, referring to the reasoning of the source, and “*im Ergebnis ebenso*“, referring to its conclusion.

<sup>170</sup>Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 *Harv. L. Rev.* 129 (2006) at 152 (author’s italics).

<sup>171</sup>Vicky C. Jackson, *Constitutional Engagement in a Transnational Era*, OUP 2010, 115.

Persuasive authority has a long history of going beyond one legal system<sup>172</sup>. The practice of cross-border references by one court to the decisions of another, and therefore the working of cross-border persuasive authority in practice, has been ably and amply demonstrated for jurisdictions of the Commonwealth and more generally for common law jurisdictions<sup>173</sup>. I want to add some examples from jurisdictions within the Germanic family of laws<sup>174</sup>. Indeed, it is remarkable how unselfconsciously courts from those jurisdictions cite foreign decisions. It is however not surprising: as in this family of laws it is common court practice to cite not only court decisions but also treatises and academic articles and as in the countries concerned most court decisions have persuasive authority only, it must come natural to courts to look also to foreign decisions.

The foremost court among them to cite foreign decisions appears to be the *Bundesgericht*<sup>175</sup>. Its citations concern the most diverse questions<sup>176</sup>: whether a person sentenced for an ongoing crime can be sentenced a second time if (s)he continues the same criminal act after the first sentence<sup>177</sup>, whether a decision by a high political authority not to grant a pardon is subject to judicial

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<sup>172</sup>Cf. eg Waldron (n. 159), 36, n. 67.

<sup>173</sup>Cf eg, with special stress on New Zealand, Waldron (n. 5), 17-19. One could add among many others decisions of the South African Constitutional Court e.g. *Case CCT 8/02, Minister of Health et al. v Treatment Action Campaign et al.*, judgment of 5 July 2002, paras. 107-11 on the question of the Court's power to issue injunctions. On the special situation of the South African Constitutional Court cf Waldron, *ibid*, 79. Cf also Jackson (n. 171), 73-7.

<sup>174</sup>Those are examples for the persuasive authority of foreign decisions in general, not specifically of decisions positivising a law of reason.

<sup>175</sup>For a detailed empirical review of Swiss case law, cf. notably Alexandra Gerber, *Der Einfluss des ausländischen Rechts in der Rechtsprechung des Bundesgerichts*, in: Publications of the Swiss Institute of Comparative Law (ed.), *The Responsiveness of Legal Systems to Foreign Influences. Reports presented to a colloquium on the occasion of the tenth anniversary of the Swiss Institute of Comparative Law (Zurich, 1992)*, 141-163.

<sup>176</sup>The following few examples are chosen quite arbitrarily.

<sup>177</sup>BG, judgment of 4 November 2008, BGE 135 IV 6, 9-10, citing FCC, 2 BvR 1895/05, chamber decision of 27 December 2006, EuGRZ 2007, 64. This is one of the rare examples in which the BG expressly indicates that it agrees with the reasoning of the FCC.

review<sup>178</sup>, whether exclusive reporting rights based on private contract may be restricted by a law granting short reporting rights to third parties<sup>179</sup>, and the legislature's freedom in deciding on the law of surnames<sup>180</sup>. Further the *Bundesgericht* cites common law courts on the question whether the presentation of goods can have ordinary distinctiveness<sup>181</sup>, on the question of the national exhaustion of products protected by intellectual property rights<sup>182</sup> and on the question whether the prevention of a suicide may infringe the right to privacy of the person concerned<sup>183</sup>.

The Austrian Constitutional Court (*Verfassungsgerichtshof*, VfGH) cites foreign decisions on the question whether the prohibition of nightwork of women is compatible with gender equality<sup>184</sup>, on some point concerning tax loss carry-forward<sup>185</sup>, on freedom of information<sup>186</sup> and on the question of

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<sup>178</sup>BG, judgment of 23 November 1981, BGE 107 Ia 103, 105, citing FCC, BVerfGE 25, 352.

<sup>179</sup>BG, judgment of 18 March 2009, BGE 135 II 224, 233, citing FCC, decision of 17 February 1998, 1 BvF 1/91, Rz. 105 et seq., and VfGH, judgment of 1 December 2006, Causa Sport 2007, 55 et seq.

<sup>180</sup>BG, judgment of 7 November 1996, BGE 122 III 414, 417, citing VfGH, judgment of 18 December 1993, EuGRZ 94, 498.

<sup>181</sup>BG, judgment of 23 May 2011, BGE 137 III 403, 411, cites US Supreme Court, judgment of 22 March 2000, *Wal-Mart Stores v. Samara Brothers*, in: 525 U.S. 205 [2000].

<sup>182</sup>BG, judgment of 7 December 1999, BGE 126 III 129, 147, cites US-Supreme Court, judgment of 9 March 1998, *Quality King Distributors vs. l'Anza Research International*, 523 U.S. 135 [1998].

<sup>183</sup>BG, judgment of 3 November 2006, BGE 133 I 58, 69, cites Supreme Court of Canada, Judgment of 30 September 1993, *Rodriguez v. British Columbia [Attorney General]*; (1993) 3 S.C.R. 513], opinion Sopinka as basis for the majority decision.

<sup>184</sup>VfGH, judgment of 12 March 1992, Slg. Nr. 13038, cites FCC, decision of 28 January 1992, 1 BvR 1025/82, 1 BvL 16/83, 1 BvL 10/91. This is another example of the citing court discussing the cited decision.

<sup>185</sup>VfGH, judgment of 3 March 1987, Slg. Nr. 11260, cites FCC, decision of 10 July 1970, 1 BvR 434/70, and of 8 March 1978, 1 BvR 117/78.

<sup>186</sup>VfGH, judgment of 6 March 1987, Slg. Nr. 11297, cites BG, judgment of 8 March 1978, EuGRZ 1979, 3.

jurisdictional immunity of international and inter-State bodies<sup>187</sup>. The FCC cites, international law questions apart<sup>188</sup>, foreign court decisions on the exercise of the right of assembly in an airport<sup>189</sup>, the admissibility of the privatisation of prisons<sup>190</sup>, on the equal weight of votes<sup>191</sup>, and, in a dissenting opinion, on the permissibility of abortion<sup>192</sup>. The Austrian Administrative Court (*Verwaltungsgerichtshof*, VfGH) cites the German Federal Administrative Court (*Bundesverwaltungsgericht*, BVerwG) on questions of the interpretation of the concept of access to information on the environment<sup>193</sup>, of the marketing authorisation for pharmaceuticals<sup>194</sup>, of environmental protection<sup>195</sup>, and on the law of asylum, more specifically on the question of

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<sup>187</sup>VfGH, judgment of 14 December 2004, Slg. Nr. 17415, cites the Belgian *Conseil d'Etat*, 17 November 1982, *Dalfino vs Governing Council of European Schools and European School of Brussels I*; the Queens's Bench Divison, 20 December 1996, *Lenzing AG's European Patent*, and the Dutch Supreme Court, 20 December 1985, *A.S. vs Iran-United States Claims Tribunal*.

<sup>188</sup>On which cf text at n. 208 et seq.

<sup>189</sup>FCC, judgment of 22 February 2011, BVerfGE 128, 226, 253 [English translation available at [http://www.bundesverfassungsgericht.de/entscheidungen/rs20110222\\_1bvr069906en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20110222_1bvr069906en.html), para. 70], cites Supreme Court of Canada, *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S. C. R. 139; US Supreme Court, *International Society for Krishna Consciousness [ISKCON] v. Lee*, 505 U.S. 672 [1992].

<sup>190</sup>FCC, decision of 18 January 2012, BVerfGE 130, 76, 121 [English press release available at <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-002en.html>], cites Supreme Court of Israel, judgment of 19 November 2009, *Academic Center of Law & Business v. Minister of Finance* - HCJ 2605/05.

<sup>191</sup>FCC, decision of 10 April 1997, BVerfGE 95, 335, 364, cites indirectly, via an expert report established by the Max Planck Institute, decisions of the Supreme Court of Ireland and of the US Supreme Court.

<sup>192</sup>FCC, judgment of 25 February 1975, BVerfGE 39, 1, diss. op. of judges Rupp-v. Brünneck and Dr. Simon, cites (on p. 71), VfGH, judgment of 11 October 1974, EuGRZ 75, 74, 76, and (on p. 74), the US Supreme Court, *Roe v. Wade*, 410 U.S. 113 [1973] = 93 S.Ct. 705 = 41 USLaw Week 4213.

<sup>193</sup>VwGH, judgment of 24 October 2013, 2013/07/0081, cites BVerwG, judgment of 21. February 2008, 4 C 13.07.

<sup>194</sup>VwGH, judgment of 18 November 2004, 2001/07/0166, cites BVerwG, judgement of 29. April 2004, 3 C 38.03.

<sup>195</sup>VwGH, judgment of 16 April 2004, 2001/10/0156, cites BVerwG, judgments of 31 January 2002, NuR 2002, 539, of 17 May 2002, 4 A 28.01, and of 14 November 2002, DVBl 2002, 534.

persecution by the State<sup>196</sup>. The *Bundesverwaltungsgericht* on its part repeatedly cites foreign decisions, mostly from the UK, on asylum questions<sup>197</sup> but also on the question of the admissibility of fees for university studies<sup>198</sup> and the necessity of a public hearing<sup>199</sup>. Finally, the German Federal Court (*Bundesgerichtshof*, BGH) cites foreign law and court decisions on the questions of the interrogation of a suspect by the police, more specifically on his *Miranda* rights<sup>200</sup>, of the use of the polygraph<sup>201</sup>, of the arbitrariness of the

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<sup>196</sup>VwGH, judgment of 3 May 2005, 99/01/0359, cites BVerwG NVwZ-RR 1995, 54, 55, and FCC, NVwZ 1990, 151.

<sup>197</sup>BVerwG, judgment of 29 May 2008, 10 C 11.07, cites House of Lords, judgment of 15 February 2006, *Januzi v Secretary of State for the Home Department*, [2006] UKHL 5, para. 47; BVerwG, decision of 9 December 2010, 10 C 19.09, cites House of Lords, judgment of 16 April 2004, [2004] UKHL 19; BVerwG, judgment of 24 November 2009, 10 C 24.08, cites House of Lords, judgment of 22 May 1996, *T v Secretary of State for the Home Department*, [1996] 2 All ER 856; BVerwG, decision of 7 February 200, 10 C 33.07, cites the Austrian *Unabhängiger Bundesasylsenat* (Federal Asylum Tribunal), decision of 5 December 2006, 224.674/0-VI/42/01, House of Lords, judgment of 10 March 2005, [2005] UKHL 19, and the Swiss *Asylrekurskommission* (Asylum Appeal Commission), decision of 5. July 2002, EMARK 2002/8, 53, 64; BVerwG, judgment of 31 March 2011 - 10 C 2.10, <http://www.bverwg.de/310311U10C2.10.0>, cites Immigration Appeal Tribunal, decision of 7 May 2004, KK [Article 1 F c Turkey] [2004] UKIAT 00101 para. 20; Supreme Court of Canada, *Pushpanathan v. Canada* [1999] INLR 36; BVerwG, judgment of 20 February 2013 - 10 C 23.12, <http://www.bverwg.de/200213U10C23.12.0> cites British Upper Tribunal (Immigration and Asylum Chamber), judgment of 14 November 2012 - *MN and others* [2012] UKUT 00389(IAC) para. 79) and judgment of Supreme Court of the United Kingdom, judgment of 7 July 2010 (*HJ <Iran> <FC> <Appelat> v. Secretary of State for the Home Department* [2010] UKSC 31 para. 82; BVerwG, judgment of 7 July 2011 - 10 C 26.10, English version available at [http://www.bverwg.de/informationen/english/decisions/10\\_c\\_26\\_10.php](http://www.bverwg.de/informationen/english/decisions/10_c_26_10.php), cites UK Supreme Court, judgment of 17 March 2010, [2010] UKSC 15, at 33.

<sup>198</sup>BVerwG, judgment of 29 April 2009 - 6 C 16.08, <http://www.bverwg.de/290409U6C16.08.0>, cites BG, judgments of 11 February 1994, BGE 120 Ia, 1, 13, and of 8 April 2004, BGE 130 I, 113, 123.

<sup>199</sup>BVerwG, decision of 4 August 2005 - 4 B 42.05, <http://www.bverwg.de/040805B4B42.05.0>, cites BG, judgment of 11 July 1997, EuGRZ 1998, 155, 158; BVerwG, decision of 25 September 2003 - 4 B 68.03, <http://www.bverwg.de/250903B4B68.03.0>, cites BG, EuGRZ 1995, 660, 662; EuGRZ 1993, 465.

<sup>200</sup>BGH, decision of 27 February 1992, BGHSt 38, 214, 229-30 cites the laws of France, Italy, England and Denmark as well as US Supreme Court, *Miranda v. Arizona*, 384 US 436 (1966); *Berkemer v. McCarthy*, 468 US 420 (1984) and the Dutch *Hoge Raad*, *Nederlandse Jurisprudentie* 1979, No 286, 567; 1980 No 243; 1985 No 37, 885; 1990 No 258.

deprivation of life<sup>202</sup>, and whether punitive damages are to be seen as part of civil as opposed to criminal law<sup>203</sup>. This survey of Germanic court decisions citing foreign court decisions should suffice to show that the latter are accepted as persuasive authority not only by common law jurisdictions but also by many important courts within jurisdictions belonging to the Germanic family of laws.

c) The legitimacy of cross-border reliance

There is thus an important practice of courts from quite different jurisdictions relying, in some way or other, on foreign decisions. The legitimacy of such cross-border reliance is however not undisputed. The main objection against it is based on the relationship between the law and its (democratic) legislator: an interpretation of domestic law that looks to foreign decisions is not democratically legitimised<sup>204</sup>. Whatever one may think of that objection<sup>205</sup> it does not concern the reliance on foreign court decisions having positivised a law of reason in the field of international law which is by definition not made

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<sup>201</sup>BGH, judgment of 17 December 1998, BGHSt 44, 308, 312, cites US Supreme Court, judgment of 31 March 1998, *US v Scheffer*, No 96-1133; Court of Appeal of the Canton of Basel-Stadt, judgment of 26 November 1997, No 371/1995; US District Court Arizona, judgment of 15 April 1998, *US v Orians*, No CR-96-534 PHK RCB.

<sup>202</sup>BGH, judgment of 3 November 1992, BGHSt 39, 1, 20-1, cites US Supreme Court, *Tennessee v Garner*, 471 US 1 (1985).

<sup>203</sup>BGH, judgment of 4 June 1992, BGHZ 118, 312, 337, cites US Supreme Court indirectly, by citing Peterson IPrax 1990, 187.

<sup>204</sup>Cf. also Jackson (n. 171), 80: “the gravitational pull of other countries’ constitutional law ... may require a theory of constitutional law that depends less exclusively on concepts of binding law and legal sanctions“.

<sup>205</sup>There is a vast literature on this subject. Suffice it to mention Jackson (n. 171), especially 86 et seq, 99; Waldron (n. 5), makes an extended argument to dispute the position that the “meaning [of an American Constitution] ... by definition cannot be determined by reference to foreign law“ (ibid, 2-3). Cf. especially ibid, 142 et seq. Thomas Coendet, Of Judges and Jurisdictions. An Overture to Comparative Legal Reasoning in National Case Law, ANCILLA IURIS (anci.ch) 2014: 1, who undertakes to demonstrate the legitimacy of reliance on foreign law on the basis of Derrida’s philosophy of deconstruction.

by a single democratic legislator<sup>206</sup>. Rather, it should be self-evident that a municipal court having to decide a question in the field of international law may look also at foreign decisions having decided the same question as those decisions form part of the international law the court has to apply. Insofar as it is given the task to apply international law at all it cannot act otherwise.

aa) This is certainly the way some courts look at the question, as is amply demonstrated by the example of the FCC which has, for reasons of constitutional law<sup>207</sup>, a particularly rich jurisprudence on international law. This jurisprudence offers an all-encompassing review of foreign court practice on the question of jurisdictional State immunity for *acta jure gestionis*<sup>208</sup>, as well as wide-ranging reviews on the questions of sovereign immunity from execution<sup>209</sup>, of the purpose of an ongoing diplomatic immunity<sup>210</sup>, of the exception from immunity in cases of grave violations<sup>211</sup>, of no *erga omnes*

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<sup>206</sup>But cf Armin von Bogdandy & Ingo Venzke, On the Democratic Legitimation of International Judicial Lawmaking, 12 German Law Journal 1341-1370 (2011), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1364>.

<sup>207</sup>Under Article 100 (2) of the Basic Law (n. 44), “[i]f, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court“. Article 25 provides: “The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.“

<sup>208</sup>Cf n. 98.

<sup>209</sup>FCC, decision of 13 December 1977, BVerfGE 46, 342, 400-1, cites the French *Cour de cassation, Englander c. Statni Banka Ceskoslovenska*, Clunet 96 [1969] 923-4 and *Clerget c. Representation commerciale de la Republique democratique du Viet-Nam*, Clunet 99 [1972] 267-8, the *Bundesgericht, Republique Arabie Unie c. dame X.*, BGE 86 I [1960] 23 et seq., the Court of Appeal of Florida, *Harris & Co. Advertising Co., Inc. v. Republic of Cuba*, 127 So. 2 d 687 [1961], and the Supreme Court of New York, *New York World’s Fair 1964-1965 Corp. v. Republic of Guinea*, AJIL 63 [1969] 343.

<sup>210</sup>FCC, decision of 10 June 1997, 2 BvR 1516/96, BVerfGE 96, 68, 80, *Ambassador of the GDR case*, cites the Court of Appeal for England and Wales, *Zoernsch v. Waldoock*, International Legal Materials [ILM] 1964, 425.

<sup>211</sup>FCC, *Ambassador of the GDR case*, *ibid*, 84, cites the Court of Appeals for the District of Columbia, *Hugo Princz v. Federal Republic of Germany*, ILM 33 [1994], 1485, 1491 et seq., the Court of Appeals for the Second Circuit, *Bruce Smith, Paul S. Hudson et al. v. Socialist People’s Libyan Arab Jamahiriya*, ILM 36 [1997], 102, 104 et seq.

effect of diplomatic immunity<sup>212</sup>, of the Act of State doctrine<sup>213</sup>, of the waiver of immunity<sup>214</sup>, of the immunity of the ground of a legation<sup>215</sup>, of the immunity of an embassy's bank account<sup>216</sup>, of an international law cross-

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<sup>212</sup>FCC, *Ambassador of the GDR case*, *ibid*, 88, cites the Queen's Bench Division, *The New Chile Gold Mining Company v. Blanco*, 27 February 1888, British International Law Cases 6 [1967], 236 241, the Cour d'appel d'Amiens, *Leon c. Diaz*, 29 March 1892, Clunet 19 [1892], 1137 1138, the Tribunal civile de la Seine, *Sickles c. Sickles*, 13 March 1909, Clunet 37 [1910], 529, 531, and *Sto esco c. Sto esco*, 9 November 1917, Clunet 45 [1918], 656, the Tribunal de premiere instance de Geneve, *V. et Dicker c. D.*, 29 March 1929, Clunet 54 [1927], 1179, 1181, 1183, the Cour d'appel de Rouen, *Salm c. Frazier*, 12 July 1933, English translation in: AJIL 28 [1934], 382-3.

<sup>213</sup>FCC, *Ambassador of the GDR case*, *ibid*, 90, cites the US Supreme Court, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S., 398, 421 et seq.

<sup>214</sup>FCC, decision of 6 December 2006, 2 BvM 9/03, available at [http://www.bverfg.de/entscheidungen/ms20061206\\_2bvm000903.html](http://www.bverfg.de/entscheidungen/ms20061206_2bvm000903.html), cites the Tokyo District Court, decision of 30 November 2000, H.J.<1740> 54 <2000>, The Japanese Annual of International Law [2001], 204, 205, the High Court (Queen's Bench Division), *A Company Ltd. v. Republic of X*, 21 December 1989, 87 International Law Reports [1992], 412, 416, the US District Court for the District of Columbia, 18 November 1980, *n Birch Shipping Corporation v. Embassy of the United Republic of Tanzania*, 63 International Law Reports [1980], 524, the Cour d'Appel de Paris, 10 August 2000, La Semaine Juridique Entreprise et Affaires 2001, 223, and an unpublished decision of 27 June 1996, *Stés Qwinzy c/ République du Congo*, reported by Baars/Böckel, Argentinische Auslandsanleihen vor deutschen und argentinischen Gerichten, ZBB 2004, 445, 454, and the Swedish Supreme Court, 21 December 1972, *Tekno-Pharma AB v. the State of Iran*, an English excerpt being available at [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/public\\_international\\_law/state\\_immunities](http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/state_immunities).

<sup>215</sup>FCC, Decision of 30 October 1962, 2 BvM 1/60, BVerfGE 15, 25, 36, cites the Swedish Supreme Court, *Beckmann v People's Republic of China*, 1 March 1957, International Law Reports 1957, 221 et seq., the Austrian Supreme Court, 5 January 1920, Entscheidungen des Obersten Gerichtshofs in Zivil- und Justizverwaltungssachen [S. Z.], Vol. II, 3, 4, and 11 September 1928, S. Z., Vol. X, 427, 429, the Athens Court of Appeal, Annual Digest and Reports of Public International Law Cases 1949, 291 et seq., the Tribunale civile Roma, Cf Harvard Law School, Research in International Law, Supplement to the American Journal of International Law [AJIL] Vol. 26 [1932] 579, and the Oberste Ruckerstattungsgericht (ORG) für Berlin, 10 July 1959, AJIL 54 [1960] 165, 178 et seq.

<sup>216</sup>FCC, Decision of 12 April 1983, 2 BvR 678, 679, 680, 681, 683/81, BVerfG 64, 1, cites the Bundesgericht, Decision of 22 June 1966, *République italienne, Ministère italien des transports et Chemins de fer d'Etat italiens c. Beta Holding S.A. et Autorité de sequestre de Bale-Ville*, SchwJbIntR XXXI [1975], 219, 221 et seq., and decision of 27. April 1977, *Banque commercial arabe S.A.*, BGE 103 III 1, 4; SchwJbIntR XXXIV [1978], 119, 121; 15 November 1978, *Banque Centrale de la République de Turquie c. Weston Compagnie de Finance et d'Investissement S.A.*, BGE 104 Ia 367; judgment of 19 June 1980, *Sozialistische Libysche Arabische Volks-Jamahiriya gegen Libyan American Oil Company (LIAMCO)*, BGE 106 Ia 142, the French Court of Cassation, 7 December 1977, *Caisse d'assurance vieillesse des non-salariés c. Caisse nationale des barreaux français*, Rev. crit. dr. int. pr. 67 [1978], 532 et seq., AFDI 1978, 1070-1, the Court of Appeals Brussels, 14 July 1955, *Szczesniak v. Backer et Consorts*,

border prohibition of double jeopardy<sup>217</sup>, and of the effects of a violation of the Vienna Convention on Consular Relations<sup>218</sup>.

bb) What may still be required, in addition to this evidence, is a brief justification of the legitimacy of relying at all on the merely persuasive authority of other decisions as a means of judicial construction<sup>219</sup>. Persuasive authority is similar to analogy<sup>220</sup> in that also “analogies provide non-conclusive reasons for reaching a particular outcome”<sup>221</sup>. The justification for analogical reasoning may therefore be used also for justifying the reliance on persuasive authority.

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Pas. 1957 II 38, the Tribunal of civil executions Brussels, 27 July 1971, *N.V. Filmpartners*, Pas. 1971 III 80, the District Court Amsterdam, 18 May 1978, *Kingdom of Morocco v. Stichting Revalidatie Centrum "de Trappenberg"*, NYbIL 10 [1979], 444-5, and the Court of Appeal for England and Wales, *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria* ([1979] 2 Lloyds Rep. 277, C.A.; BYbIL 50 [1979], 221 et seq.

<sup>217</sup>FCC, Decision of 31 March 1987, 2 BvM 2/86, BVerfGE 75, 1, 33, cites the Federal District Court for New York, 1 May 1973, *In re Ryan*, 360 F. Supp. 270, 274, 275 [1973], and the confirmation of that court’s decision by the Court of Appeals, 478 F. 2 d 1397 [2 d Cir. 1973], further the Federal District Court for Connecticut, 8 March 1977, *United States v. Galanis*, 429 F. Supp. 1215 [1977].

<sup>218</sup>FCC, Decision of 19 September 2006, 2 BvR 2115/01, available at [http://www.bverfg.de/entscheidungen/rk20060919\\_2bvr211501.html](http://www.bverfg.de/entscheidungen/rk20060919_2bvr211501.html), cites the Supreme Court of the United States, *Sanchez-Llamas v. Oregon*, Opinion of the Court of 28 June 2006 - No. 04-10566, as well as the dissenting opinion of Justice Breyer, and the ICJ, *LaGrand Case, Request for the Indication of Provisional Measures*, Order of 3 March 1999, *Germany v. United States of America*, ICJ-Reports 1999, 9; ICJ, *LaGrand Case*, Judgment of 27 June 2001, *Germany v. United States of America*, ICJ-Reports 2001, 464; ICJ, *Case concerning Avena and other Mexican Nationals*, Judgment of 31 March 2004, *Mexico v. United States of America*, ILM 43 [2004], 581. For constitutional reasons, it grants the ICJ case-law quasi-mandatory authority. The decision is commented by Jana Gogolin, *Avena and Sanchez-Llamas Come to Germany*. The German Constitutional Court Upholds Rights under the Vienna Convention on Consular Relations, 8 German LJ 262 (2007).

<sup>219</sup>Jackson (n. 171), 81-6, lists the following as viable “jurisprudential frameworks for understanding different forms of engagement“: positivism, pragmatism, law as inquiry and justified reasoning, and the interdependences of constitutions and the international system.

<sup>220</sup>Jacob (n. 39), 1022, with further references.

<sup>221</sup>Grant Lamond, Precedent and Analogy in Legal Reasoning, *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2014/entries/legal-reas-prec/>>, sub 6 (p. 18).

“The strongest justification for analogical reasoning ... lies in the value of replicability [which] ... is often put in terms of the importance of ‘coherence’ in the law ... There are two important characteristics of legal decision-making. The first is the *fragmentary* nature of legal materials. The second is the *plurality* of decision-making bodies. Legal materials - precedents, statutes, conventions, principles - are fragmentary in two senses: (a) they are the work of many different hands at different times and with different outlooks and (b) different areas of law owe more to some hands and times than others. ... The pluralism of decision-makers is also two-fold: (a) there are many individuals making decisions using the same body of materials, and (b) these individuals do not share a uniform evaluative outlook. ...

Analogical reasoning helps to make the outcome of cases more predictable by giving weight to existing legal decisions and doctrines. But it only does so against a certain background, one where ... there is a large measure of agreement on the existence and importance of certain values.<sup>222</sup>

Transferring this reasoning to the reliance on the persuasive authority of foreign municipal decisions on international law, it is evident that both the fragmentary nature of legal materials and the plurality of decision-making bodies is here even more pronounced than in municipal law. For a court to rely on a foreign decision in an analogous international law case which will have been known to an informed party therefore will make the outcome of the case at hand more predictable<sup>223</sup>, provided, however, that there is a measure of agreement on the existence and importance of certain values between the different decision-makers involved which in international law is not a given<sup>224</sup>. The use of foreign municipal decisions on international law as persuasive authority thus “serves to compensate for some of the indeterminacy which flows from fragmented materials and the pluralism of decision-makers<sup>225</sup>. That suffices

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<sup>222</sup>Lamond (n. 221), 17.

<sup>223</sup>Waldron (n. 5), 115, considers this a weak argument for transnational harmonisation. It is. But it is a strong argument for the legitimacy of cross-border reliance on the persuasive authority of foreign decisions.

<sup>224</sup>This “measure of agreement“ is taken into account when considering the level of persuasiveness of a foreign decision. Cf. especially the quotation at n. 159.

<sup>225</sup>So Lamond (n. 221), 17, for the use of analogies in law.

to establish the legitimacy of the cross-border reliance here considered, and goes even some way to found its requiredness.

cc) The requiredness of cross-border engagement with foreign decisions has been a much disputed subject especially of American constitutional law for quite a while<sup>226</sup>. In the field of international law it is very plausible that a court not only, as noted above, may but also ought to look at foreign decisions. “Precedents in international law are best thought of not as normative obligations but as argumentative burdens on the party seeking a different result from that reached in a pertinent previous decision.”<sup>227</sup> This point may be further buttressed, if need be, by some of the arguments developed in favour of cross-border engagement with foreign decisions in constitutional law. There it has been argued that the principle of fairness requires such an engagement if (a) the laws of the jurisdictions involved are roughly similar, and (b) the rights holders form, or have merged to a sufficient degree into, a single community<sup>228</sup>. A rough similarity exists undoubtedly between the basically identical versions of international law applicable in different jurisdictions, any particular JMIL notwithstanding. The second condition will be fulfilled especially in cases in which individuals in different countries have been the object of similar State actions ie are victims of violations of human rights or international humanitarian law, or are subject to the authority of similar international bodies eg are accused before a similar international tribunal.

#### d) Examples

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<sup>226</sup>This requiredness has been argued for under different aspects. For Jackson (n. 171), 80, “relational engagement may ... embody ... an idea that providing justifications for following or departing from transnational norms is a means to enhance the normative legitimacy of legal decisions“. Waldron (n. 5), 125 et seq, makes an extended enquiry into the application of the principle of fairness for the case that the treatment whose fairness is considered is handed out by different agents, especially independent courts from different jurisdictions.

<sup>227</sup>Jacob (n. 39), 1023.

<sup>228</sup>Waldron (n. 5), 132.

There are many instances of court decisions building on, or at least engaging with, decisions positivising a law of reason. An example of international courts of different jurisdictions building upon one another's decisions is the obligatory effect of interim measures decided, or indicated, by such courts<sup>229</sup>. A poster child of JMIL is in *Jurisdictional Immunities* where the ICJ relies on seven court decisions from around the Western world not as State practice but, as the court stresses, because they had been each taken "after careful consideration", to conclude that *jus cogens* has not the effect of displacing State immunity<sup>230</sup>. In the context of restrictive State immunity, one instance is the early decision of the *Bundesgericht*<sup>231</sup>, referring to the still earlier Italian and Belgian decisions. Another is the opinion of Lord Denning<sup>232</sup>. A further example is *Ferrini*'s engagement with the *Distomo* judgment whose reasoning however the *Corte* found dissuasive<sup>233</sup>.

A borderline case between the engagement with decisions positivising a law of reason and the application of CIL is the *Claim against the Empire of Iran* case<sup>234</sup> in which the FCC decided in favour of restrictive State immunity by finding that there was no longer a CIL rule requiring absolute immunity. The decision starts by setting out the reasons for the attrition of State immunity since WW I, quoting different authors to that effect<sup>235</sup>. It goes on to relate the

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<sup>229</sup>Cf Karin Oellers-Frahm, Expanding the Competence to Issue Provisional Measures - Strengthening the International Judicial Function, 12 German Law Journal 1279-1294 (2011) 1285-7, available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1361>, referring *inter alia* to ICJ, *LaGrand Case*, Merits, ICJ Reports 2001, 466, 502, para. 100 et seq., and ECtHR, *Mamatkulov v. Turkey*, Judgment of 6 February 2003.

<sup>230</sup>ICJ, *Jurisdictional Immunities* (n. 2), para 96.

<sup>231</sup>n. 97.

<sup>232</sup>n. 94. The passage there quoted continues: "One country alone may start the process. Others follow. At first a trickle, then a stream, last a flood."

<sup>233</sup>*Corte die Cassazione, Ferrini* (n. 38), para 8.

<sup>234</sup>FCC (n. 13).

<sup>235</sup>*Ibid*, at 33-4.

relevant court practice from around the world to demonstrate that the said practice “does not allow to deduce that according to general international law States still have a claim to absolute immunity before domestic courts”<sup>236</sup>. It cites the decisions forming that practice, both *pro* and *contra* absolute immunity, sometimes relating the various courts’ reasoning, but without engaging with it. It concludes this part of its reasoning by stating that it cannot be said that the granting of absolute immunity can still be seen as a custom followed by a greater-by-far number of States with *opinio juris*<sup>237</sup>.

While the FCC clearly intends to apply CIL<sup>238</sup> its judgment can still be seen, taking into account the idiosyncrasies of the Germanic practice<sup>239</sup>, as building on decisions positivising a law of reason. Indeed, those idiosyncrasies make it effectively impossible to distinguish between Germanic judgments applying JMIL and those applying CIL as either way there is no open engagement with the reasoning of the decisions cited.

### 3. Interim conclusions

JMIL based on a law of reason has been shown to exist as well in some municipal court decisions setting a precedent as in ones building upon such a precedent. Such court decisions rely on the faculty of judicial borderline institutions to decide against normally binding customary international law (CIL). This implies for the first group that they may positivise a law of reason, and for the second group they may defer to thus positivised laws of reason, both

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<sup>236</sup>Ibid, 34 (my translation).

<sup>237</sup>Ibid, 51-2. In German court decisions, the result comes first, the reasoning thereafter.

<sup>238</sup>The FCC applies Article 38 (1)(b) of the ICJ Statute in finding that it cannot be deduced from court practice that the granting of absolute immunity is still a custom followed by a greater-by-far number of States because of their *opinio juris*. The “greater-by-far number of States“ is the “nose-counting“ yardstick the FCC has deduced from the municipal term of art “general rules of international law“ used in Article 25 of the German Basic Law (n. 207) which it interprets basically as the equivalent of the rules of CIL.

<sup>239</sup>Cf text at n. 168.

irrespective of contrary CIL. This raises further questions about the relationship between JMIL and CIL.

### III. The relationship between JMIL and CIL

#### 1. Two different secondary rules

##### a) *Jurisdictional Immunities*

A good starting point for considering the relationship between JMIL and CIL is *Jurisdictional Immunities* which can be usefully contrasted with *Ferrini*. In *Jurisdictional Immunities*, the ICJ had to decide whether Italy had violated its international law obligations to Germany by its judicial practice, in first line by the *Corte's Ferrini* decision. In its judgment, based squarely on the traditional scope of CIL, the ICJ finds almost no State practice in support of Italy's argument that the gravity of the acts committed by Germany deprived the latter of its entitlement to immunity<sup>240</sup> but a substantial body of State practice, "particularly evident in the judgments of national courts"<sup>241</sup>, going against it<sup>242</sup>. The same body it finds also to go against the dependence of a State's entitlement to immunity upon "the peremptory nature of the rule which it is alleged to have violated"<sup>243</sup> ie its *jus cogens* character. The ICJ relies on the results of the municipal decisions it cites<sup>244</sup> without engaging with their reasoning. It refers to them as to simple facts considering them as State practice. For elements of evidence of *opinio juris* it refers mainly to statements of States during the elaboration of the UN Convention on Jurisdictional Immunities of

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<sup>240</sup>Ibid, para 83.

<sup>241</sup>Ibid, para 85.

<sup>242</sup>Ibid, para 84.

<sup>243</sup>Ibid

<sup>244</sup>ICJ, *Jurisdictional Immunities* (n. 2), para 85: "Arguments ... have been rejected by the courts ...".

States and Their Property<sup>245</sup> which it considers to indicate that at the time of the Convention's adoption "States did not consider that customary international law limited immunity in the manner now suggested by Italy"<sup>246</sup>. It refuses to discuss any value reasons for restricting State immunity<sup>247</sup>. The closest the ICJ comes to a discussion of values is by reporting the argument "that no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule, even in the absence of a direct conflict". But instead of engaging with this argument, explicitly made in *Ferrini*, "the Court [simply] sees no basis for such a proposition"<sup>248</sup> (*viz.* in CIL). The ICJ "concludes that, under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict"<sup>249</sup>.

b) The methodological question

*Jurisdictional Immunities* thus sharply disagrees with *Ferrini*<sup>250</sup>. The *Corte*, setting a precedent based on a law of reason, claims that there is a *jus cogens* exception to jurisdictional State immunity<sup>251</sup> which the ICJ, as a matter of CIL, denies, it is submitted correctly<sup>252</sup>. It is therefore tempting to conclude that the decision of the *Corte* was simply wrong in international law. But such

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<sup>245</sup>of 2 December 2004, Doc. A/59/508.

<sup>246</sup>ICJ, *Jurisdictional Immunities* (n. 2), para 89.

<sup>247</sup>ICJ, *Jurisdictional Immunities* (n. 2), paras 82, 94.

<sup>248</sup>ICJ, *Jurisdictional Immunities* (n. 2), para 95.

<sup>249</sup>ICJ, *Jurisdictional Immunities* (n. 2), para 91.

<sup>250</sup>It even treats it with some disdain. Cf ICJ, *Jurisdictional Immunities* (n. 2), para 87: "The Court does not consider that the United Kingdom judgment in *Pinochet (No. 3)* ([2000] 1 AC 147; *ILR*, Vol. 119, p. 136) is relevant, notwithstanding the reliance placed on that judgment by the Italian Court of Cassation in *Ferrini*."

<sup>251</sup>Cf text at n. 145.

<sup>252</sup>Cf text at n. 134.

a conclusion would be facile. While on the face of it the disagreement between the *Corte* and the ICJ appears to be about the relevant substantive law in truth it goes to the question of how to recognise what the applicable law is. The two courts disagree, quite fundamentally, on the methodological question of how to determine the law applicable in a given case. For the ICJ, what is decisive in CIL is State practice and *opinio juris*. Here, as in customary law generally, “things are done this way because they are done this way”<sup>253</sup>. Reasoning from values has no place in this conception of CIL<sup>254</sup>.

For the *Corte*, in contrast, such reasoning is decisive. Its main point is that the antinomy between the recognition of jurisdictional State immunity and the non-derogable norms at the apex of the international legal system protecting basic human rights against particular intense or systematic violations must be resolved in favour of the protection of those rights<sup>255</sup>. In this way, as it virtually admits<sup>256</sup>, it does not apply CIL but decides on the basis of a law of reason which is largely unsupported by State practice and State *opinio juris*<sup>257</sup>, ie that

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<sup>253</sup>Christoph Kletzer, Custom and positivity: an examination of the philosophic ground of the Hegel-Savigny controversy, in: *The Nature of Customary Law* (n. 4), 125 at 147.

<sup>254</sup>Still, reliance on deductive reasoning is not foreign to court decisions applying CIL. In *Jurisdictional Immunities*, the ICJ resorts to deductive reasoning repeatedly. It observes “that the proposition that the availability of immunity will be to some extent dependent upon the gravity of the unlawful act presents a logical problem” [ICJ, *Jurisdictional Immunities* (n. 2), para 82] before rather reluctantly inquiring “whether customary international law has developed to the point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict” (ibid, para. 83). Its rejection of Italy’s claim that the *jus cogens* prohibition of certain acts take precedent over State immunity is based foremost on logic (ibid, para 93-5), and its reference to a host of court decisions buttressing its conclusion notes that those decisions were taken “after careful consideration” (ibid, para 96) which implies that the ICJ did not use them, in this instance, as simple facts. On Germany’s claim that its jurisdictional immunity was also violated by decisions of the Italian courts declaring enforceable in Italy judgments rendered by Greek courts against Germany in proceedings arising out of the *Distomo* massacre (ibid, para 121) the ICJ extensively sets out its view (ibid, paras 125-9) and then cites, in brackets, two municipal decisions, preceded by a “see to this effect”, without however engaging with them.

<sup>255</sup>Cf text at n. 144.

<sup>256</sup>Cf the quotation in the text at n. 142.

<sup>257</sup>Indeed, ICJ *Jurisdictional Immunities* (n. 2), para 95, “sees no basis for such a proposition”.

the prohibition of international crimes must sweep away all obstacles preventing victims of such crimes from obtaining damages. While its decision is clearly wrong under CIL, as suggested by *Jurisdictional Immunities*<sup>258</sup>, it is well arguable as JMIL<sup>259</sup>. It is on the books and may be used in future court decisions as reference<sup>260</sup>, *Jurisdictional Immunities* notwithstanding<sup>261</sup>.

### c) The consequence

The acceptance of a concept of JMIL based on a law of reason thus implies to accept that two sets of norms coexist, relatively autonomously, within what is generally called CIL. Their norms may be recognised according to two different methodologies, or secondary rules, one being Article 38 (1) (b) of the ICJ Statute, the other, very general and unspecific, referring to laws of reason. The

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<sup>258</sup>ICJ, *Jurisdictional Immunities* (n. 2), para. 76-7.

<sup>259</sup>There are many authors who disagree with *Jurisdictional Immunities* and/or agree with *Ferrini*. Cf eg Nagan and Root (n. 24), 449 et seq.; Amnesty International, *Germany v. Italy: The Right to Deny State Immunity When Victims Have No Other Recourse* (2011) available at <http://www.amnesty.org/en/library/asset/IOR53/006/2011/en/ce60b84b-e3a7-4266-a1c3-1fb0277f039f/ior530062011en.pdf>; Pavoni (n. 16), *à propos* of Tribunale Ordinario di Firenze, *Ordinanza di 21 gennaio 2014 nella causa Marcella Alessi, Gualtiero Alessi, Luigi Bellini contro Repubblica federale tedesca*, available at [http://www.magistraturademocratica.it/mdem/qg/doc/ordinanza\\_trib\\_firenze\\_21\\_1\\_14\\_nazisti.pdf](http://www.magistraturademocratica.it/mdem/qg/doc/ordinanza_trib_firenze_21_1_14_nazisti.pdf): “Game over? Is it true that this unprecedented involvement of international courts in immunity cases has the effect of silencing turbulent domestic courts and freezing the law, at least until the same or other international courts have overruled the decisions at issue? Not at all, in my view. That would be contrary to the dynamics and methods which have always shaped international law and its evolution. The latter takes place according to a complex, relentless and dialectical interplay between State practice and its confirmation at the international level, including between domestic and international courts.”

<sup>260</sup>*Jones* (n. 93), of course, has declined to follow *Ferrini*, rather following CIL. - To claim that *Ferrini* “presciently shows the direction in which customary international law on immunity is heading” as Nagan and Root (n. 24), 448, do requires prophetic powers. But “it is possible that further exceptions to State immunity will continue to develop in the future”: ICJ, *Jurisdictional Immunities* (n. 2), sep. op. Koroma, para. 2.

<sup>261</sup>In quite the same sense, it has been said of an important decision of ICTY, *Tadic Jurisdiction Appeal Decision [Prosecutor v Tadic, IT-94-I-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995]*, para. 77, that it was not without its shortcomings but that it is an important source of law in its own right: Steven Ratner, Jason Abrams and James Bischoff, *Accountability for Human Rights Atrocities in International Law*, 3rd ed. OUP 2009, 104. On justifications for requiring courts to follow erroneous decisions of earlier courts under the common law doctrine of precedent cf. Lamond (n. 221), sub 3.

relationship between those two sets of norms may be conceptualised, somewhat like the early<sup>262</sup> relationship between common law and equity, as two distinct norm systems within one jurisdiction in this sense that both systems apply to the same set of persons within the same territory and even to the same set of facts. This conceptualisation appears especially apposite because the laws of reason on which the JMIL in question is based and early equity have that in common that they are aimed at remedying “the narrow and unjust decisions“ of the courts<sup>263</sup> and of CIL respectively by resorting to a more or less unstructured concept of justice. In marked contrast however to the existence, in the historical item of comparison, of the Lord Chancellor and his court on the one hand and the common law courts on the other, there exists no distinct set of institutions to apply JMIL. Even if that law is applied by a specific subset of international law institutions ie the courts that subset is also charged with applying the rest of international law, especially CIL. While the distinction between CIL and JMIL is arguably as clear-cut as that between early equity and common law, judgments on international law are often ambivalent or mix arguments relating to both sets of norms<sup>264</sup>.

## 2. The influence of JMIL on CIL

### a) The transitory nature of the divergence between norms of the two sets

It remains to consider whether and how JMIL can lead to a development of CIL. As noted above<sup>265</sup>, JMIL created by a judgment positivising a law of reason will diverge from CIL. But in the development of international law, this

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<sup>262</sup>ie before the 1616 decision of King James I on equity’s primacy, on which cf. eg William Blackstone, *Commentaries on the Laws of England*, vol. 3 (1768), 53, and thereby “in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves ... had arrogated to themselves such unlimited authority, as has been totally disclaimed by their successors“ (ibid at 433).

<sup>263</sup>Blackstone (n. 262), 433.

<sup>264</sup>Cf n. 254.

<sup>265</sup>Cf. text at n. 81.

divergence may be a merely transitory phenomenon. Indeed, the more of a judicial following a judgment positivising a law of reason generates, and the more established the JMIL norm in question thereby becomes, the more likely it will be that, in a parallel development for which, as State practice, only the results of the judgments matter<sup>266</sup>, State *opinio juris* will accommodate that practice. So it is the judgments at the origin of JMIL, not the latter directly, that can influence the development of CIL. Elements of evidence of the *opinio juris* necessary for such a development can be found in “positions taken by States”<sup>267</sup>. Of particular importance in this context is the reaction of the State or States directly concerned by the relevant judgment(s)<sup>268</sup>. Especially, acquiescence by States in those judgments may be seen as the expression of an *opinio juris* accepting the State practice the latter constitute as reflecting the state of the law<sup>269</sup>. In this respect, there is a decisive difference between the early Italian and Belgian decisions and the other municipal court decisions on restrictive State immunity on the one hand and *Ferrini* on the other. The former did not give “as a rule, ... occasion for protest on the part of the foreign states concerned”<sup>270</sup>, although they “explicitly discussed and addressed immunity”<sup>271</sup> and thus “allowed courts and executive branches from other

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<sup>266</sup>This means eg that *Distomo* and *Ferrini*, although they stand for the positivisation of different laws of reason, could form, once accommodated by State *opinio juris*, the basis for a new CIL exception to jurisdictional State immunity, as indeed has been envisaged eg by Nagan and Root (n. 24), 468.

<sup>267</sup>ICJ, *Jurisdictional Immunities* (n. 2), para 76-7.

<sup>268</sup>“*Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States” (ICJ, *Jurisdictional Immunities* (n. 2), para. 55) and those other States’ reaction to such assertion.

<sup>269</sup>Indeed, according to Jürgen Bröhmer, *State Immunity and the Violation of Human Rights*, Brill Leiden 1997, 20, “Most of ... [those states which had to defend themselves due to the change from absolute to restrictive immunity] realised that the new distinction between *acta jure imperii* and *acta jure gestionis* would - at least in principle - also serve their interests.”

<sup>270</sup>Lauterpacht (n. 96), 221.

<sup>271</sup>Ingrid Wuerth, *Pinochet’s Legacy Reassessed*, AJIL 106 (2012), 731, 759.

states the chance to read, evaluate and challenge or emulate the reasons for denying or conferring immunity<sup>272</sup>. Thus there is acquiescence by States which can be taken to reflect a corresponding *opinio juris*. Taken together with the State practice which are the court decisions that should suffice to make the doctrine of restrictive State immunity CIL according to the standard definition<sup>273</sup>. *Ferrini*, in contrast, led to a vigorous protest on the part of the foreign State concerned ie Germany which brought, in *Jurisdictional Immunities*, a successful action against Italy before the ICJ and thereby stopped, for the time being, a CIL development *Ferrini* otherwise might have initiated<sup>274</sup>.

b) Another arguable way of influence of JMIL on CIL

aa) There is another way in which the judgments at the origin of JMIL, as State practice, may arguably influence the development of CIL. Once a certain amount of State practice in the form of municipal judgments accepting the positivisation of a law of reason (or coming for different reasons to the same result) has accumulated it may be argued to create a new “grey zone“ in which CIL becomes uncertain. This seems to be the role that the *Bundesgericht* has given to the different items (not all of them State practice) it opposed to the then majority opinion of absolute State immunity, among them the early Italian and Belgian decisions, as it concludes that there could be no objections against

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<sup>272</sup>Ibid.

<sup>273</sup>ICJ, *Jurisdictional Immunities* (n. 2), para 59-60, had not to decide on that question.

<sup>274</sup>Cf Pavone (n. 16), as quoted in n. 258. - This appears also to be the decisive difference between the developments originated by *Holubek* (Supreme Court of Austria, *Holubek v. Government of the United States of America*, *Juristische Blätter* (Wien), Vol. 84, 1962, p. 43; *ILR*, Vol. 40, p. 73) and those intended by *Ferrini*: while the US in *Holubek* apparently acquiesced in the Austrian decision, Germany acted strongly against the *Ferrini* decision. To claim that the ICJ in *Jurisdictional Immunities*, by upholding the German application, nipped a promising development in the bud (Judge Yussuf, diss. op., para. 45) is therefore a bit disingenuous: it is less the Court’s decision than the German protest, certainly upheld by that decision, which, for the time being, prevented State immunity from becoming further restricted in CIL. Cf also *Lotus* (n. 13), 29.

affirming Swiss jurisdiction over the facts before it<sup>275</sup>. On a different construction, the FCC in the *Claim against the Empire of Iran case*, summing up its review of municipal cases, concludes that “it cannot be deduced from the practice of the courts that the granting of absolute immunity can still be seen as a custom followed by a greater-by-far number of States with *opinio juris*”<sup>276</sup>. The FCC does not focus on the emergence of a (then relatively) new exception to the rule of absolute State immunity permitting the exercise of jurisdiction over a foreign State for *acta jure gestionis* which would have required to show that a greater-by-far number of States<sup>277</sup> adhere to the rule of restrictive immunity - a claim that, depending on what constitutes such a number, might not have been borne out by its review of State practice. Instead, it focusses on the obsolescence of that rule insofar as it prohibited such exercise<sup>278</sup>. The FCC appears to accept that accumulated State practice is able to shatter a pre-existing *opinio juris* and thereby destroy the corresponding norm of CIL<sup>279</sup>. Seen from a positivist point of view, both the *Bundesgericht* and the FCC have applied a secondary rule according to which a norm of CIL may be disapplied in the face of contrary State practice in the form of, mostly, municipal court decisions.

bb) It is rather doubtful whether this secondary rule is part of CIL. Arguably,

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<sup>275</sup>BG (n. 97), 54-5. Cf also ICJ, *Jurisdictional Immunities* (n. 2), diss. op. Yusuf, para 24.

<sup>276</sup>FCC, *Claim against the Empire of Iran case* (n. 13), 51-2 (my translation).

<sup>277</sup>Cf n. 238.

<sup>278</sup>In the same vein Austrian Supreme Court (*Oberster Gerichtshof*), judgment of 10 May 1950, Ob. 167/49; Ob. 171/50, *Hoffmann v. Dralle*, German version available at <http://www.ratg.at/de/staat-entscheidung-gerichtsbarkeit-705.aspx>, in other respects quoted by Lauterpacht (n. 96), 257. Cf. also Tomuschat (n. 92), 1133, who relates (only to refute it), *à propos* another exception from State immunity, the “contention ... that the traditional rule has been weakened to such an extent that the *opinio juris*, essential for the existence of a rule of customary international law, is eroded ...”.

<sup>279</sup>This view matches well the view of Reisman (n. 82), 108, that the three components of lawmaking communications - policy content, authority signal and control intention - “*must continue to be communicated* for the prescription, as such, to endure“ (author’s italics).

in the *Claim against the Empire of Iran case*, it would have been more natural, and more true to CIL, for the FCC, as absolute immunity undisputedly used to be the CIL rule, to look for a greater-by-far number of States in favour of a change or a restriction of that rule instead of contenting itself with stating the lack of such a number in favour of the old rule. According to the view adopted by the ICJ in *Military and Paramilitary Activities*<sup>280</sup>, State practice alone, without a corresponding change of *opinio juris*, can never be sufficient to obsolesce or to change an extant CIL norm<sup>281</sup>. As long as the original *opinio juris* endures (and the mere accumulation of incompatible practice as such does not show a change of State *opinio juris*<sup>282</sup>), that practice does not change CIL but rather infringes it<sup>283</sup>. Only a change of *opinio juris* accompanying the change in State practice can change CIL. The latter secondary rule appears to be more true to CIL and also has the support of some State practice, at least in the case of a single item of State practice contravening a well-established CIL norm<sup>284</sup>. It follows that the secondary rule applied by the *Bundesgericht* and the FCC does not appear to be part of CIL and therefore must be JMIL. In sum, we note again<sup>285</sup> two diverging secondary rules, one of JMIL, the other of CIL, identifying different norms as applicable in a concrete case.

Whether the norms identified by the JMIL secondary rule as applicable are themselves JMIL or CIL, or both, has to be determined separately according to

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<sup>280</sup>Cf ICJ, *Military and Paramilitary Activities* (n. 23), 87-8.

<sup>281</sup>But inconsistent State practice may prevent the emergence of a new rule of CIL. Details are disputed; cf eg Andrew T. Guzman, *Saving Customary International Law*, 27 *Michigan Journal of International Law* 115 (2005), 124-5.

<sup>282</sup>But State acquiescence in such a practice may; cf text at n. 269.

<sup>283</sup>In this sense Heintschel von Heinegg (n. 37), 487. Cf also the German Memorial (n. 17), para 55: “no general practice, supported by *opinio juris*, exists as to any enlargement of the derogation from the principle of State immunity in respect of violations of humanitarian law committed by military forces during an armed conflict”.

<sup>284</sup>The German protest against *Ferrini* is an example for such a case.

<sup>285</sup>Cf text before n. 262.

their respective source. The norm identified in the *Claim against the Empire of Iran case* as applicable to *acta jure gestionis* - restrictive State immunity - originated as JMIL but became, by State acquiescence in the many court decisions applying it, CIL. Therefore, had the FCC applied the CIL secondary rule the result would have been the same. This raises the question whether, in such cases, a primary CIL norm supplants a corresponding JMIL norm or whether both primary norms coexist, and to what effect.

c) The coexistence of norms of JMIL and of CIL

Insofar as CIL develops a norm, by adding the necessary State *opinio juris* to a State practice constituted by municipal judgments which are at the origin of a parallel norm of JMIL, there is no reason to assume that the latter norm is thereby supplanted by, or absorbed into, CIL. Rather, it appears reasonable to assume that at that stage two norms, one of JMIL and one of CIL, coexist and largely coincide. Such a coincidence is demonstrated in those cases in which a court relies on what was originally a law of reason in addition to, or instead of, relying on a State custom that would lead to the same result. An example taken from judgments on restrictive State immunity is the speech of Lord Wilberforce in *I Congreso del Partido*<sup>286</sup> where he notes “I have so far discussed this matter upon such English decisions as are relevant, and upon principle. But since, in this area, English courts are applying, or at least acting so far as possible in accordance with, international law, it is necessary to see what assistance can be gained“.

Still, there may be some divergence between the two norms, according to the characteristics proper to their respective categories. For instance, the persistent objector doctrine of CIL can have no equivalent under JMIL which is not based on State practice and *opinio juris* but on a law of reason. A hypothetical

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<sup>286</sup>n. 129, especially 265.

example may illustrate the point. China, in Explanations<sup>287</sup>, claims to have always adhered to the absolute version of State immunity. This claim is undisputed<sup>288</sup>. Let us assume that, before a foreign independent court, a claim is brought against China which falls outside a State's restrictive immunity as generally applied by that court<sup>289</sup>. Would China's claim to absolute immunity, as persistent objector to the rule of restrictive immunity, be of any avail? Under CIL, one might be inclined to think so. Indeed, the persistent objector rule has exactly the function to protect the objector against new developments of customary law to which it objects. However, things would be different under a JMIL approach. The court dealing with China's claim to absolute immunity would be in the very same position as the early Italian and Belgian courts which, nearly one and a half centuries ago<sup>290</sup>, "invented" restrictive immunity. In those cases, the defendant States also relied on their traditional absolute immunity. The reasons which led those courts to restrict the States' hitherto absolute immunity still apply with the same force<sup>291</sup>. There is no reason whatsoever to assume that China's position, under a JMIL approach, is any stronger than that of the early defendant States, or that it has been improved by the development of a parallel ICL norm.

d) A court's choice between norms of JMIL and of CIL

A norm of JMIL, it has been noted above, will at least originally diverge from CIL. As the same set of courts which must apply CIL ought also to engage with

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<sup>287</sup>n. 310.

<sup>288</sup>Cf. eg Verdross and Simma (n. 13), para 1172 n. 21.

<sup>289</sup>In *Jackson v. People's Republic of China*, United States District Court, N.D. Alabama, E.D. October 26, 1984, available at [http://www.leagle.com/decision/1984982596FSupp386\\_1917](http://www.leagle.com/decision/1984982596FSupp386_1917), the court held that the rule of restrictive immunity as laid down in the Foreign Sovereign Immunities Act could not apply retroactively and thus not to the case before it.

<sup>290</sup>The earliest case quoted by Lauterpacht (n. 96), 253, is from 1879.

<sup>291</sup>Cf. n. 129.

JMIL<sup>292</sup> a court dealing with a case may be confronted with one norm of CIL and a divergent norm of JMIL, as our hypothetical example just has shown. This raises the question of how a court's choice between norms of the two sets is to be made<sup>293</sup>. There does not appear to be any international legal rule which would govern that choice. This absence is expression of the ineluctably law-making role courts have once they have started on the way to JMIL<sup>294</sup>. However it appears that municipal law may have something to say on the question. In Germany, the FCC is competent only, under Article 100 (2) of the Basic Law<sup>295</sup>, “[if], in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25)“<sup>296</sup>. This implies that the hierarchical superiority of the FCC within the German court system translates, within Germany, into a primacy of the “rules of international law“ which must be read, by force of the reference to Article 25, as “general rules of international law“ which the FCC interprets as equivalent to CIL. Similarly, the late acceptance by the English courts of restrictive State immunity<sup>297</sup> and their reaction to *Ferrini* in *Jones*<sup>298</sup> appear to indicate that English law will not easily accept JMIL. In contrast, Italian law, as demonstrated by *Ferrini*, as well as Belgian and Swiss law, to go by the early decisions of their courts, appear to be rather open to JMIL.

In the absence of an international legal metric for the courts' choice one may

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<sup>292</sup>Cf. text after n. 226.

<sup>293</sup>Similarly, a court may be in the position, as the *Corte* was in *Ferrini*, of either applying a norm of CIL or positivising a law of reason, in the latter case setting a precedent of JMIL.

<sup>294</sup>Cf text at n. 100.

<sup>295</sup>n. 44.

<sup>296</sup>Article 25 is quoted in n. 207.

<sup>297</sup>Cf. Lord Denning (n. 94), 367: “Are we to wait until every other country save England recognises the change?”

<sup>298</sup>Cf. text at n. 303 et seq.

look for a normative one. Seen normatively, a judgment based on CIL, itself based on the custom of States, stands a better chance to be accepted by States than a judgment based on a law of reason<sup>299</sup>. Inversely, a judgment based on a law of reason, whether positivised by an earlier judgment or not, while possibly losing authority for States, may be required by justice as understood by the deciding court<sup>300</sup> and by stakeholders and may also contribute to the development of international law in general<sup>301</sup>. In practical terms, there appears to be a certain appeal, at least for municipal courts, in relying on JMIL based on a law of reason rather than on State practice and *opinio juris*. While some “nose-counting“ is necessarily involved in the international law method required by the application of Article 38 (1) (b) of the ICJ Statute, the reliance on laws of reason requires the application of interpretative tools, which, it is submitted, is more congenial to the municipal<sup>302</sup> judicial mind. The distinction between the two methods is well captured by Lord Hoffmann in *Jones*, quoted below.

An example of such a choice made is implied in the speeches of Lords Bingham and Hoffmann in *Jones*<sup>303</sup>, which both declined to apply JMIL ie to follow

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<sup>299</sup>Cf eg the explanations sought Jackson (n. 171), 175-177, for the USSC’s refusal to accept the ICJ’s jurisprudence on State obligations under the Vienna Convention on Consular Relations. Cf. also, on the question of “l’autonomisation des règles de reconnaissance en droit humanitaire“, Jean d’Aspremont, An Autonomous Regime of Identification of Customary International Humanitarian Law: Do Not Say What You Do or Do Not Do What You Say? (March 8, 2013), in R. van Steenberghe (ed.), *Droit international humanitaire: un régime spécial de droit international?* (Bruylant, 2013). Available at SSRN: <http://ssrn.com/abstract=2230345>. On a similar concern concerning the construction of constitutional documents by the courts they constitute cf Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 *Yale J. Int’l. L.* 289 (2013).

<sup>300</sup>Cf text at n. 91.

<sup>301</sup>According to *v. Bogdandy & Venzke* (n. 32), 983, “the absence of judicial innovation ... might actually be just as problematic as more audacious instances of judicial lawmaking”.

<sup>302</sup>But Judge Yussuf has argued similarly. Cf. ICJ, *Jurisdictional Immunities* (n. 2), diss. op. Yussuf, para 24, asking whether “customary international law [is] a question of relative numbers“.

<sup>303</sup>n. 93.

*Ferrini*. Lord Bingham notes that “[t]he Ferrini decision cannot in my opinion be treated as an accurate statement of international law as generally understood; and one swallow does not make a rule of international law”<sup>304</sup>. Lord Hoffmann notes “that the Ferrini case should be seen rather as giving priority to the values embodied in the prohibition of torture over the values and policies of the rules of state immunity. I think that this is a fair interpretation of what the court was doing and, if the case had been concerned with domestic law, might have been regarded by some as ‘activist’ but would have been well within the judicial function. ... But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to ‘develop’ international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states”<sup>305</sup>.

### 3. Interim Conclusion

Norms of JMIL and of CIL are determined according to different secondary rules. Therefore, court decisions which are plain wrong under CIL may be valid as JMIL and thus may still have an influence on the development of the former. Such a development presupposes that States acquiesce in a JMIL norm and thereby accept the State practice embodied in the court decisions underlying it as reflecting the state of the law. It does not result in supplanting a JMIL norm by a corresponding CIL norm but leads to a coexistence of both norms. Insofar as those norms diverge a court seised with the matter has the choice, not governed by any international law rule, of which norm to apply.

### Conclusion

The doctrine of the emergence of new CIL norms and of the obsolescence of

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<sup>304</sup>Ibid., para. 22.

<sup>305</sup>Ibid., para. 63.

old ones is one of the life lies of international law<sup>306</sup>. There is a fundamental contradiction at the basis of any idea of a development of CIL<sup>307</sup> between the indisputable fact, particularly visible in the development of the law of State immunity, that CIL is a “living tree“<sup>308</sup> on the one hand<sup>309</sup> and the obligation of its subjects and its adjudicating bodies, especially municipal courts, to apply the law as it is on the other<sup>310</sup>. It is logically impossible that actors bound by law, by acting according to that law as they must, can change that law. In logic, CIL as a regime lacking a distinct legislative authority must

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<sup>306</sup>On the generally recognised problems of CIL cf eg Guzman (n. 281), 124-8.

<sup>307</sup>This contradiction is mentioned in virtually every international law text-book. Cf. eg Josef L. Kunz, *The Nature of Customary International Law*, 47 AJIL 662 (1953); Kimminich (n. 13), 240; Besson (n. 87), 179; David Lefkowitz, *The Sources of International Law: Some Philosophical Reflections*, *ibid*, 187, 201-3; Antonio D’Amato, *The Concept of Custom in International Law*, Ithaca: Cornell UP 1971; but cf. John Tasioulas, *Customary International Law and the Quest for Global Justice*, in: *The Nature of Customary Law* (n. 4), 307, 320-4. Cf. also Lord Denning, quoted at n. 94.

<sup>308</sup>This imagery apparently has first been used by the Privy Council in the *Persons Case (Edwards v. Canada [Attorney General])*, [1929] UKPC 86, [1930] A.C. 124 [18 October 1929], P . C . [ o n a p p e a l f r o m C a n a d a ] ) , a v a i l a b l e a t [http://www.bailii.org/uk/cases/UKPC/1929/1929\\_86.htm](http://www.bailii.org/uk/cases/UKPC/1929/1929_86.htm): “The British North America Act planted in Canada a living tree capable of growth and extension within its natural limits.”

<sup>309</sup>Cf. eg Mendelson (n. 13), 188; Lord Denning (n. 94), 365: “It is certain that international law does change.” This is a trait CIL has in common with the common law; cf eg Matthew Steilen, *The Democratic Common Law*, 2011 J. Juris 437, 439: “... the process of constant revision typical of the common law ...”.

<sup>310</sup>On this obligation, cf. Tomuschat (n. 92), 1137; Heintschel von Heinegg (n. 37), 487 para 48. By some, the conundrum is seen as a paradox. The paradox is that State practice to become custom must be done with *opinio juris*; State practice that is to develop custom ie to change extant custom can be done with *opinio juris* only if this *opinio* is erroneous; as a new custom can supersede an extant one only if it is used by a great number of States that presupposes that all those States err about the law. There are several ingenious proposals around about how to avoid that paradox. It can be avoided by not requiring *opinio juris*; if State practice is enough for the formation of CIL [cf. Mendelson (n. 13), 292-3], the paradox disappears. But it suffices to sever the connection between State practice and *opinio juris* (cf. text at n. 23). State practice in the form of “wrong“ court decisions does not require *opinio juris*. *Opinio juris* in the form of State acquiescence in those decisions can thus form over time; a State that first considered those court decisions as incorrect may later on change its mind. Such a (future) change of mind is considered eg in “The Explanations of the Draft Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress”, available at [http://www.basiclaw.gov.hk/en/materials/doc/2011\\_08\\_24\\_e.pdf](http://www.basiclaw.gov.hk/en/materials/doc/2011_08_24_e.pdf), p. 8.

be immutable. In practice however it changes (ie is changed) constantly<sup>311</sup>, is “dragged around from place to place“<sup>312</sup>. The possibility of a change in CIL in accord with logic requires an Archimedean point outwith that body of law, that is an outside legislator with the legislative authority to initiate a change of CIL. Such a legislator may be *inter alia* a CIL actor contravening, or uttering an *opinio juris* contravening, extant CIL (although its authority must be doubtful)<sup>313</sup>, or the implicit authority of some courts to make law. The first example would try to change CIL directly and thereby clash with extant CIL, with necessarily dubious results. In contrast, JMIL should be conceived of as a distinct body of international law whose norms may coexist with diverging or coinciding CIL norms. At the same time, the judgments at the basis of JMIL are State practice for the purposes of CIL. Therefore, CIL can develop norms parallel to JMIL norms once State *opinio juris* aligns itself with those judgments. Such a realignment is not by itself a violation of CIL. Therefore a change of the latter on the basis of judgments at the origin of JMIL is compatible with logic. It is submitted that it would be conducive to greater conceptual clarity in the field discussed to admit JMIL as a distinct body of international law.

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<sup>311</sup>“I would use of international law the words Galileo used of the earth: ‘But it does move’“: Lord Denning (n. 94), 365.

<sup>312</sup>Johann Wolfgang Goethe, *Faust I*, line 1975, A.S. Kline, transl.

<sup>313</sup>One recent example is the UK Government legal memorandum on humanitarian intervention, [a v a i l a b l e a t https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-versio](https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-versio).