

AUGUST REINISCH

The International Relations of National Courts: A Discourse on International Law Norms on Jurisdictional and Enforcement Immunity

1. Introduction

In a contemporary strand of international relations theory, non-state actors as well as sub-state entities receive considerable attention. In particular, infra-state actors, such as central banks, ministries other than foreign ministries, parliaments but also national courts are increasingly recognized as actors that have the potential to conduct their own ‘foreign policy’. They do so primarily through an increase in direct contacts with corresponding institutions abroad without involving the traditional external relations channels that states have established over the centuries. The communication tools required for such contacts have resulted from technical improvements that are sometimes identified as an important aspect of globalization. But it is not only because of practical feasibility that direct links between partner institutions in other countries are developed, it is also the willingness of these actors to use such means and the information gained through them which creates networks that may embody new forms of governance structures.

This contribution will focus on one particular form of sub-state entities, particularly dear to lawyers: national courts. Because it is written in honor of an international relations specialist and international lawyer this contribution will also focus on two specific international law topics addressed in the dialogue between courts in different states. One of them is the immunity of states from enforcement measures and the other concerns the jurisdictional immunity

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of international organizations. Of course, there are far more diverse themes, deeply reaching into core aspects of domestic law, ranging from real property and family law to constitutional law problems that may form the subject-matter of a judicial conversation crossing national borders. International law topics are chosen not only because they form a topic to which the reader and the present writer are most familiar. There is a far more ‘fortuitous’¹ and subjective, but also more ‘justified’ reason for this choice.

It was Hanspeter Neuhold who encouraged and persistently supported me in analyzing the case-law of national courts on the status and immunity of international organizations leading to my habilitation² as the first of his ‘Schüler’.³ I owe to his guidance and counsel that I focused my attention on such rather specific international law issues before national courts. This allowed me to perceive the wealth of different approaches that can be adopted by national courts towards similar legal problems. This international law micro-perspective further permitted me to understand not only the different doctrinal avenues pursued by different courts in different countries, but it also offered a view on the underlying policy issues and on how courts modify or re-emphasize certain well-established doctrinal concepts in order to arrive at different judicial outcomes.

The second topic of state immunity covers a vast field of traditionally well-documented international law problems. This contribution will thus focus on a more narrow aspect of it, on the question of immunity from enforcement measures,⁴ in order to trace potential trans-judicial dialogues between courts in different states.

2. The Aim of this Contribution

There are various perspectives from which one might look at the international relations role of national courts. One, adopted by the *Institut de Droit International* in 1993,⁵ primarily focuses on the question as to whether

¹ Does any non-lawyer know what ‘fortuitous’ means? Cf. Secretariat Survey, ‘*Force majeure*’ and ‘*Fortuitous Event*’ as Circumstances Precluding Wrongfulness: Survey of State Practice, International Judicial Decisions and Doctrine, Yearbook ILC 1978, Vol. II, Part One, 61. Now that the final version of what has become Art. 23 of the ILC Articles on State Responsibility is solely entitled *force majeure* and refers only to ‘unforeseen events’ fortuitous may become even less known.

² A. Reinisch, *International Organizations before National Courts* (2000).

³ One of these untranslatable German concepts of academic genealogies against which Hanspeter Neuhold will certainly have some justified reservations. But things get worse if one tried to use incongruous translations such as ‘disciple’, ‘pupil’ or ‘follower’.

⁴ See in more detail A. Reinisch, *State Immunity from Enforcement Measures*, in G. Hafner, M. Kohen & S. Breau (eds.), *European State Practice Regarding State Immunities* 151 (2006).

⁵ IDI, *The Activities of National Judges and the international relations of their State*, 65 AnnIDI,

national courts may (or should) interfere with the foreign affairs powers of the executive. The Institut's resolution thus mainly dealt with the advantages and disadvantages of judicial abstention doctrines. Interestingly, the resolution endorsed a rather assertive role of national courts by rejecting both political questions⁶ and act of state⁷ as a barrier to the exercise of jurisdiction.

At the same time, during the 1990s more and more international lawyers and international relations specialists became attracted to the idea of looking at national courts as distinct actors in the field of international relations. Some expressed high hopes with regard to the potential of cross-border judicial exchanges. Some found a special form of 'transjudicial communication'⁸ in the way courts started to look at each other, or rather at each others' decisions. Others suggested that the increased cross-references and mutual taking-into-account might lead to a "functional synergy comparable to that found in a mature federal system."⁹ In the words of a US Supreme Court justice – and this was remarkable – such a mature system could develop into a relationship between domestic courts and transnational tribunals which might be described in Kantian terms as "the federalism of free nations."¹⁰

As it often happens, these high hopes have not been fulfilled and, given the neo-parochial attitude of other US Supreme Court justices to whom the mere citation of foreign authorities is anathema,¹¹ it is very unlikely that a free

328-444 (1993 I). See also E. Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EJIL 159 (1993).

⁶ See Art. 2 of the IDI Resolution on The Activities of National Judges and the international relations of their State, *supra* note 5:

National courts, when called upon to adjudicate a question related to the exercise of executive power, should not decline competence on the basis of the political nature of the question if such exercise of power is subject to a rule of international law.

⁷ See Art. 3 of the IDI Resolution on The Activities of National Judges and the international relations of their State, *supra* note 5:

1. National courts, when called upon to apply a foreign law, should recognize themselves as competent to pronounce upon the compatibility of such law with international law. They should decline to give effect to foreign public acts that violate international law.
2. No rule of international law prevents national courts from acting as here above indicated.

⁸ A.-M. Slaughter, *A Typology of Transjudicial Communication*, 29 U. Rich. L. Rev. 99 (1994).

⁹ T. M. Franck & G. H. Fox, *Introduction: Transnational Judicial Synergy*, in T. M. Franck & G. H. Fox (eds.), *International Law Decisions in National Courts* 4 (1996).

¹⁰ S. D. O'Connor, *Federalism of Free Nations*, in T. M. Franck & G. H. Fox (eds.), *International Law Decisions in National Courts* 18 (1996).

¹¹ According to A.-M. Slaughter, *A Brave New Judicial World*, in M. Ignatieff (ed.), *American Exceptionalism and Human Rights* 277, at 279 (2005), "a number of Supreme Court justices feel actively threatened by the citation of foreign judicial decisions." See also the Keynote

federalism of national judges will unite in order to create a new international legal order.

However, it is less the politics, or rather its rhetorical side, which should be of interest here. Rather, a more bottom-up, empirical approach is suggested in order to find out whether and, if so, to what degree national courts communicate with each other. For this purpose, it is suggested to focus on the two immunity topics which are likely to arise before national courts with certain regularity and where a 'mutual inspiration' would often be helpful even if for no other reason than that of judicial economy.

Thus, as a first step, the actual interrelation between national courts, best evidenced through acknowledged (or even unacknowledged) citation of foreign judgments should be ascertained. If it can be shown that national courts – regardless of their professed position on the relevance of precedents – do in fact rely on reasoning adopted by other, including foreign, courts, this would strongly support the claim that a transnational judicial communication actually takes place. Clearly, in the absence of a formal acknowledgement of foreign authorities one has to analyze whether national courts have developed a common vocabulary and common concepts. This is a difficult task, which is, of course, feasible only where the subject matter of the investigation is limited to certain specific fields.

In addition, this contribution will further inquire whether one may indeed find a 'political' purpose or design behind the way national courts use foreign court decisions. Of course, here the inquiry enters a rather speculative field since a deliberate use of foreign court decisions for political ends presupposes that courts may omit certain foreign court decisions which they are aware of but which do not suit their purposes, overemphasize others or reinterpret some. Nevertheless, such reflections should be added since they might lead to at least some tentative conclusions concerning the foreign policy and international relations of national courts.¹²

3. National Case-Law on State Immunity from Enforcement Measures

During the last 50 years many national courts have adapted their rules on state immunity from an absolute to a restrictive jurisdictional immunity concept.¹³ Today, in jurisdictions following a restrictive immunity theory, foreign states

Address of Supreme Court Justice Antonin Scalia, 98th Annual Meeting of the American Society of International Law 2004, ASIL Proceedings (2004).

¹² Cf. A.-M. Slaughter, *The Real New World Order*, 76 *Foreign Affairs* 183, at 183 (1997), who speaks of 'judicial foreign policy.'

¹³ See H. Fox, *The Law of State Immunity* (2002); H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 *BYIL* (1951) 220; I. Pingel-Lenuzza, *Les Immunités des*

are normally amenable to suit concerning their *iure gestionis*, commercial or non-sovereign activities. Other courts have been more hesitant, however, to equally restrict the scope of enforcement immunity. As a result, enforcement measures will be permissible only vis-à-vis certain types of state property, not serving public purposes. This means that contrary to the requirements of immunity from jurisdiction, the distinctive criterion for immunity from execution is not the nature of the act at issue but rather the purpose of the property that is subjected to enforcement measures.

This rather restrictive judicial approach is also reflected in the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property.¹⁴ Article 19 of the UN Convention, dealing with post-judgment measures of constraint, permits such enforcement measures basically only in case of consent, with regard to allocated or earmarked property, and in certain limited cases of property not serving public purposes.¹⁵

This development of the law of enforcement immunity is largely a product of national court decisions and it is here that one can clearly discern a fairly well-identifiable genealogy of judicial reasoning.

3.1. Are Foreign Decisions Taken into Account in National Case-Law?

The leading case is the so-called *Philippine Embassy Bank Account* case in which the German Constitutional Court found that:

Etats en Droit International (1997); C. Schreuer, *State Immunity: Some Recent Developments* (1988); I. Sinclair, *Law of Sovereign Immunity – Recent Developments*, 167 RdC 113 (1980).

¹⁴ UN GAOR, 59th Session, Supp. No. 22 (A/59/22), 16 December 2004, Annex I; available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/54/PDF/N0447854.pdf?OpenElement>.

¹⁵ Art. 19 UN Convention, *supra* note 14, provides:

- No post-judgment measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
- (a) the State has expressly consented to the taking of such measures as indicated:
 - (i) by international agreement;
 - (ii) by an arbitration agreement or in a written contract; or
 - (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;
 - (b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
 - (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

[t]here is a general rule of international law that execution by the State having jurisdiction on the basis of a judicial writ of execution against a foreign State, issued in relation to non-sovereign action (*acta iure gestionis*) of that State upon that State's things located or occupied within the national territory of the State having jurisdiction, is inadmissible without assent by the foreign State, insofar as those things serve sovereign purposes of the foreign State at the time of commencement of the enforcement measure.¹⁶

More specifically with regard to embassy accounts the Court held:

Claims against a general current bank account of the embassy of a foreign State which exists in the State of the forum and the purpose of which is to cover the embassy's costs and expenses are not subject to forced execution by the State of the forum.¹⁷

With regard to the question how to determine the sovereign vs. non-sovereign purpose of state property the Court laid down the following rule:

Because of the difficulties of delimitation involved in judging whether that ability to function is endangered, and because of the potential for abuse, general international law makes the area of protection enjoyed by the foreign State very wide and refers to the typical, abstract danger, but not to the specific threat to the ability of the diplomatic mission [...]. [...] for the executing authorities of the receiving State to require the sending State, without its consent, to provide details concerning the existence or the past, present or future purposes of funds in such an account would constitute interference, contrary to international law, in matters within the exclusive competence of the sending State.¹⁸

The *Philippine Embassy Bank Account* judgment is a very thoroughly reasoned decision that cautiously weighs the various arguments in favor of and against immunity. In itself it is an outstanding example of a national court decision carefully and extensively analyzing both legal writings and domestic as well as foreign case-law on the subject matter to be decided.¹⁹ Thus, it is not surprising that also non-German courts have found the German Constitutional Court's reasoning helpful and have started to use it in their own jurisprudence. Various parts of the *Philippine Embassy Bank Account* judgment have been adopted almost in a copy/paste fashion by different courts – though partly before the advent of such advanced computer techniques.

In England the *Alcom* decision closely followed the reasoning of the German Constitutional Court. Lord Diplock expressly referred to the “comprehensive

¹⁶ Philippine Embassy Case, Germany, Federal Constitutional Court, 13 December 1977, 46 BVerfG, 342; 65 ILR 146, at 164.

¹⁷ 65 ILR 146, at 150.

¹⁸ 65 ILR 146, at 186, 189.

¹⁹ The judgment extensively cites legal writings starting with Grotius and Bynkershoek as well as decisions of the PCIJ, the ICJ, and national courts decisions from Austrian, Belgian, Czech, Dutch, French, Greek, Italian, Norwegian, English, Swedish, Swiss, and US courts.

and closely reasoned judgment of the Constitutional Court of the German Federal Republic” that he considered to be “particularly helpful” and that he found “wholly convincing”.²⁰

With regard to the purpose of embassy accounts the House of Lords held that

the head of the diplomatic mission’s certificate that property is not in use or intended for use by or on behalf of the state for commercial purposes is sufficient evidence of that fact unless the contrary is proved.²¹

Also the Austrian Supreme Court followed the lead of the German Constitutional Court and held that the execution of a judgment on bank accounts of an embassy is only rarely permitted if the plaintiff proves that the account serves exclusively private purposes of the embassy. The Austrian Court considered that

[...] although there was no rule in international law which prohibits execution against foreign States in general, there is such rule as to the execution on property which serves the performance of sovereign (embassy) functions. Due to the difficulties involved in judging whether the ability of a diplomatic mission to function was endangered international law gave wide protection to foreign States and referred to the typical, abstract danger to the ability of the mission to function and not to the specific threat in a particular case.²²

The Austrian Supreme Court expressly relied on the German *Philippine Embassy Bank Account* and on the English *Alcom* decisions and held that mixed accounts, which also cover expenses and costs of a mission, are not subject to execution in Austria without the consent of the foreign state and that thus the creditor would have to prove that an embassy bank account “was only used for the exercise of private functions and therefore [...] not beyond execution.”²³

Other courts have followed the reasoning of the German Constitutional Court in the *Philippine Embassy Bank Account* case without expressly acknowledging this source. For instance, a Dutch court relied on the qualification of running an embassy as a governmental purpose in line with the German precedent. It held:

[...] that – pursuant to an (unwritten) international law – a foreign State is entitled to immunity from execution when execution measures are employed against the state concerned involving the attachment of property intended for the public service of that State. Establishing, maintaining and running embassies is

²⁰ *Alcom Ltd v. Republic of Colombia*, UK, House of Lords, 12 April 1984, [1984] 2 All ER 6, 74 ILR 170, at 182.

²¹ 74 ILR 170, at 187.

²² *L-W Verwaltungsgesellschaft mbH & Co. KG v. DVA*, Austrian Supreme Court, 30 April 1986, 77 ILR 489; 116 ILR 526.

²³ 77 ILR 489, at 494.

an essential part of the function of government and hence of the public service. Moneys intended for the performance of this function must therefore be treated as property intended for the public service.²⁴

The reasoning of the German Constitutional Court in the *Philippine Embassy Bank Account* case was again almost literally followed by the Dutch Council of State which held that it was

[...] beyond doubt that rules of customary law prescribe immunity from execution in respect of the enforcement of a judgment, even if the court which gave the judgment was competent to do so under these rules (as in the present case) if this execution relates to assets intended for public purposes. [...].²⁵

In addition, the Dutch court considered that

to require the Turkish mission in the Netherlands to provide a further and more detailed account of the uses to which the account will be put [...] would amount under international law to an unjustified interference in the internal affairs of this mission.²⁶

Though the wording of this decision is very close to the German judgment the latter is not cited.

A similar approach can also be found in Italian Cases. In *Banamar-Capizzi v. Embassy of the Republic of Algeria*, for instance, the Italian Court of Cassation held that

[a]ttachment or enforcement proceedings are therefore excluded because the funds in question appear to be devoted to financing the expenses necessary to fulfill sovereign purposes. Therefore any attempt to check if such funds are effectively used in whole or in part for those purposes would inevitably result in an undue interference in the affairs of the diplomatic mission.²⁷

The Italian court came to this conclusion by referring to a “prevailing international tendency to grant complete immunity for bank accounts held in the name of foreign embassies” without expressly mentioning the German *Philippine Embassy Bank Account* case.

Probably, one could continue and find additional examples of direct and indirect quotes from the *Philippine Embassy Bank Account* case. But this is not necessary. The preceding quotes have shown that national courts are apparently very willing to accept the legal reasoning of other, including foreign, courts if they find it convincing and helpful. Apparently, foreign judgments may

²⁴ State of the Netherlands v. Azeta B.V., District Court of Rotterdam, 14 May 1998, KG 1998, 251, English summary: NYIL 264, at 266 (2000).

²⁵ M. K. v. State Secretary for Justice, The Netherlands, Council of State, President of the Judicial Division, 24 November 1986, 94 ILR 357, at 360.

²⁶ *Id.*

²⁷ Banamar-Capizzi v. Embassy of the Republic of Algeria, Italy, Court of Cassation, 4 May 1989, 87 ILR 56, at 60.

carry such persuasive authority²⁸ that courts are willing to follow them in the absence of any strict requirement to do so.

Of course, there might be also a more doctrinal explanation for the *de facto* case-law in some areas of international law crossing national jurisdictions. National court decisions may be regarded as “subsidiary means for the determination of rules of [international] law” in the sense of Article 38 (1)(d) Statute of the ICJ and, in the case of state immunity, also as state practice and thus as elements of customary international law. This would mean that foreign court decisions on international law issues may be legitimately relied upon in order to ascertain the content of such international law.²⁹

4. National Case-Law on the Immunity of International Organizations

Another set of examples of national courts communicating with their counterparts in other states is provided by legal issues arising from the special status of international organizations before national courts.

As a rule international organizations enjoy immunity from legal process. Such immunity regularly results from treaty provisions found in their constituent agreements,³⁰ in special multilateral privileges and immunities treaties,³¹ and/or in bilateral host country agreements.³² In addition, national legislation may provide for jurisdictional immunity and there is a widely shared opinion that international organizations enjoy immunity from suit also as a matter of customary international law.³³

²⁸ See H. P. Glenn, *Persuasive Authority*, 32 McGill L.J. 261 (1987).

²⁹ See K. Knop, *Here and There: International Law in Domestic Courts*, 32 NYU J. Int'l L. & Pol. 501, at 519 (2000).

³⁰ E.g. Art. 105 UN Charter (“The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.”); similar clauses can be found in Art. 133 OAS Charter, Art. 67 (a) WHO Constitution and Art. VIII para. 2 Agreement Establishing the WTO.

³¹ E.g. according to Art. II (2) Convention on the Privileges and Immunities of the United Nations, 1946, 1 UNTS 15, the organization “shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.” See also General Agreement on Privileges and Immunities of the Council of Europe, 1949, 250 UNTS 14; Art. 2 Agreement on Privileges and Immunities of the OAS, 15 May 1949, OAS Treaty Series 22.

³² E.g. Art. VIII Sec. 16 Agreement regarding the Headquarters of the FAO, 1950, 1409 UNTS 521 (“immunity from every form of legal process”); Sec 26 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, 1947, US-UN, 11 UNTS 11.

³³ E.g. the US International Organizations Immunities Act 1945, 59 Stat. 669, 22 USCA §§ 288 *et seq.*

Sometimes, different sources may apply at the same time and things may become complicated when different instruments contain different immunity standards. In fact, this happens more often than one might expect since some instruments provide for 'functional' immunity, others for an unqualified, probably 'absolute' immunity, while yet others refer to the same immunity granted to states. Thus, national courts often have a genuine choice what kind of and degree of immunity they consider appropriate for international organizations.³⁴

Therefore they frequently have to engage in a policy analysis, assessing the pros and cons of adjudication in a particular case. Two major conflicting considerations are predominant: on the one hand, there is the need to guarantee the independent functioning of international organizations, which requires judicial abstention, i.e. immunity. On the other hand, the fairness to third parties and their rights of access to justice calls for adjudication, i.e. the denial of immunity.

4.1. The Length of Decisions

Before focusing on the central issue as to whether and to what degree national courts consider decisions of other national courts in the field of immunity of international organizations, it is useful to bear in mind the different styles of legal reasoning in various jurisdictions. A rather obvious aspect is the mere length of decisions. The space devoted by domestic courts to legal reasoning as to whether they should or should not exercise their adjudicative power over disputes involving international organizations varies considerably. Sometimes they quite leisurely state that international organizations enjoy immunity and that thus they would abstain from adjudicating a dispute brought before them, while in other instances they might engage in a broad doctrinal discussion of the legal rules applicable, the policy reasons *pro* and *contra* abstention, and the like. A survey of cases partly confirms commonly held knowledge. While civil law courts have a propensity to be brief, Anglo-American courts tend to support their decisions with lengthy reasoning. Paradigmatic are the extensive 'dialogues' between the Law Lords in the English House of Lords, for instance, in *Attorney General v. Nissan*,³⁵ or in *Arab Monetary Fund v. Hashim* (No. 3).³⁶ Similarly long decisions can be found in lower English courts, in particular in some *Tin Council* cases.³⁷

³⁴ See in more detail Reinisch, *supra* note 2, at 35 *et seq.*

³⁵ *Attorney General v. Nissan*, House of Lords, 11 February 1969, [1970] AC 179, [1969] 1 AllER 629, [1969] 2 WLR 926; 44 ILR 359-392 (1972).

³⁶ *Arab Monetary Fund v. Hashim* (No. 3), [1991] 1 AllER 871; [1991] 2 WLR 729, H. L.

³⁷ *E.g.* In *Re International Tin Council*, High Court, Chancery Division, 22 January 1987; [1987] 2 WLR 1229; [1987] 1 AllER 890; [1987] 1 Ch 419; 77 ILR 18-41 (1988), or in *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, High Court,

A clear tendency towards thorough legal reasoning can also be found in a number of US cases.³⁸ On the whole, however, and probably as a result of the possibility to refer to precedents in a number of cases, US courts are also often content with a short reasoning.

Other jurisdictions, in particular French courts, frequently demonstrate brevity that sometimes borders on the cryptic.³⁹ In such cases the extreme shortness of certain decisions may, of course, lead to a lesser quality of the legal argument. Thus, the ‘intentional brevity’ of *Weiss v. Institute for Intellectual Cooperation*⁴⁰ has led a seemingly exasperated commentator to conclude that “[i]t is true that the judgment gives no indication on the meaning and scope of this not very explicit formula [the lack of jurisdiction of the Conseil d’Etat in disputes involving actes de gouvernement] but an examination of the facts of the case sheds some light on the question.”⁴¹ Another brief reasoning of the Conseil d’Etat in *Girod de l’Ain*⁴² led a reviewer to the conclusion that the Conseil was simply wrong in its finding that no human rights violation had taken place when the Conseil had argued that this was so ‘because’ no way of redress was provided for. The reviewer clearly suggested that it should have been the other way round.⁴³

The counter-examples of very long and thoroughly argued decisions appertain not only to the Anglo-American jurisdiction, as can be seen from the Swiss *Westland Helicopters* case⁴⁴ or the German *EUROCONTROL Flight*

Queen’s Bench Division (Commercial Court), 24 June 1987; [1987] Butterworths Company Law Cases 667; 77 ILR 56-106 (1988), and the appellate decision in *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry, J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others, and Related Appeals*, Court of Appeal, 27 April 1988; [1988] 3 WLR 1033; 80 ILR 47-180 (1989).

³⁸ E.g. *Marvin R. Broadbent et al. v. Organization of American States et al.*, 628 F.2d 27 (D.C.Cir. 1980), *Mendaro v. The World Bank*, 717 F.2d 610 (D.C.Cir. 1983), and *International Association of Machinists v. OPEC*, 477 F.Supp. 553 (C.D. Cal. 1979), *affirmed on other grounds*, 649 F.2d 1354 (9th Cir. 1981).

³⁹ E.g. *Bellaton v. Agence spatiale européenne*, Cour de Cassation, Chambre sociale, 24 May 1978, No. 76-41.276, 25 AFDI 894 (1979); *In re Dame Adrien and Others*, Conseil d’Etat, 17 July 1931, Sirey part 3, 81 (1932); 6 Ann. Dig. 33 (1931-1932); *Hintermann v. Union de l’Europe occidentale*, Cour d’appel de Paris, 10 April 1990, Cour de Cassation, 1. ch. civ., 14 November 1995, Bull. Civ. I, No. 413, 288; 124 JDI, 141-142 (1997).

⁴⁰ *Weiss v. Institute for Intellectual Cooperation*, Conseil d’Etat, 20 February 1953, 81 JDI 745 (1954).

⁴¹ Case note by Huet, 81 JDI (1954), 749.

⁴² *Girod de l’Ain*, Conseil d’Etat, Section de Contentieux, 8^{eme} et 9^{eme} sous-sections, 25 July 1986, Nos. 52699, 52738, 55316, 2 *Revue française de droit administrative* 956-958 (1986); 33 AFDI 905-906 (1987); 82 ILR 85-90 (1990).

⁴³ D. Ruzié, *La France et l’Organisation européenne de recherche nucléaire*, 2 *Revue française de Droit administratif*, 956-960, at 960 (1986).

⁴⁴ *Arab Organization for Industrialization, Arab British Helicopter Company and Arab Republic of Egypt v. Westland Helicopters Ltd., United Arab Emirates, Kingdom of Saudi Arabia and*

Charges cases.⁴⁵ However, even where judges use ample space to deliver their judgments this is not always mandated by explanatory necessity but may also be inspired by a certain judicial inclination towards narrative breadth.

4.2. Reliance on Legal Writings

It is interesting to note the different styles in asserting legal authority when interpreting international law – a body of legal rules that is of course beyond the daily business of domestic courts. Although sometimes these observations merely affirm the expected prejudices generally held, they are frequently quite illuminating. While, for instance, judges from civil law countries tend to quote the opinions of learned scholars to prove the content of international law, the common law bench is more at ease with citing precedents, even of foreign jurisdictions,⁴⁶ relying on legal doctrine only as a last resort.

A good example from the law of jurisdictional immunities of international organizations is a number of decisions addressing the question whether such immunity might find its basis in customary international law. For instance, in the *Hetzel v. EUROCONTROL* case, which dealt with a staff dispute against Eurocontrol, a German appellate Administrative Court relied greatly on a monographic study of Schlüter⁴⁷ as well as on a legal opinion concerning the existence of a customary rule of jurisdictional immunity of international organizations by Seidl-Hohenveldern,⁴⁸ Hanspeter Neuhold's predecessor at the Department of International Law and International Relations of the University of Vienna.⁴⁹ Also the lengthy reasoning of the appellate Administrative Court in a case involving the *European School Munich*⁵⁰ is an example of a rather extensive discussion of scholarly opinions, quoting Wenckstern,⁵¹ Seidl-

State of Qatar, Judgment No. 443, Switzerland, Court of Justice of Geneva, 23 October 1982, Federal Supreme Court (First Civil Court) 19 July 1988; 80 ILR, 622-666 (1989).

⁴⁵ *EUROCONTROL Flight Charges*, Federal Administrative Court, 16 September 1977, BVerwGE 54, 291-305, Federal Constitutional Court, Second Chamber, 23 June 1981, BVerfGE 58, 1-45, as well as in the employment dispute concerning *Hetzel v. EUROCONTROL*, Federal Constitutional Court, Second Chamber, 10 November 1981, 2 BvR 1058/79, BVerfGE 59, 63-95.

⁴⁶ See *infra* in text starting at note 98.

⁴⁷ B. Schlüter, *Die innerstaatliche Rechtsstellung der internationalen Organisationen unter besonderer Berücksichtigung der Rechtslage in der Bundesrepublik Deutschland* (1972).

⁴⁸ I. Seidl-Hohenveldern, *Die Immunität internationaler Organisationen in Dienststreitfällen*, Rechtsgutachten für Eurocontrol. Schriften zum Völkerrecht, Vol. 71. (1981).

⁴⁹ *Hetzel v. EUROCONTROL*, Verwaltungsgerichtshof (Administrative Court) Baden Württemberg, 7 August 1979 (IV 1355/79): "vgl die Ausführungen im Gutachten Seidl-Hohenveldern, S 5ff, an deren Richtigkeit zu zweifeln der Senat keinen Anlaß hat."

⁵⁰ *X. et al. v. European School Munich*, Bayerischer Verwaltungsgerichtshof, 7th Chamber, München, 15 March 1995, 7 B 92.2689-2693, 2743, DVBl 448 (1996).

⁵¹ M. Wenckstern, *Handbuch des Internationalen Zivilverfahrensrechts*. Vol. II/1 (1994).

Hohenveldern & Loibl,⁵² Schermers,⁵³ Dupuy,⁵⁴ Kunz-Hallstein,⁵⁵ Henrichs,⁵⁶ and others reasoning on the question of a customary immunity of international organizations.

In a case concerning the plans to enlarge the existing test site of CERN near Geneva⁵⁷ the Swiss Federal Tribunal heavily relied on the opinion of learned authors. Since this Swiss Supreme Court decision belongs to those rendered in French, most of the writers cited in it had published in French. The Court's conclusion in favor of immunity was supported by works of Dominicé,⁵⁸ Glavinis,⁵⁹ Lalive,⁶⁰ Imhoof,⁶¹ and Valticos.⁶²

An extensive debate of expert opinions provided by both sides can be found in the Dutch *Eckhardt v. EUROCONTROL* case.⁶³ While Eurocontrol relied on an 'advisory memorandum' by Professor Bos from Utrecht University, the claimant received support from Drs. Terra and Mr. Vierdag from the University of Amsterdam.⁶⁴

Finally, the Austrian Supreme Court's decision in a case concerning the scope of immunity in a dispute over arrears in rental payments by the European Patent Organization is of interest.⁶⁵ It relied mainly on two international

⁵² I. Seidl-Hohenveldern & G. Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften* (1992).

⁵³ H. G. Schermers, *International Institutional Law* (1980).

⁵⁴ R.-J. Dupuy (ed.), *Manuel sur les Organisations Internationales* (1988).

⁵⁵ H. P. Kunz-Hallstein, *Privilegien und Immunitäten internationaler Organisationen im Bereich nicht hoheitlicher Privatrechtsgeschäfte*, NJW 3069 (1992).

⁵⁶ H. Henrichs, *Zur rechtlichen Stellung der Europäischen Schulen und ihrer Lehrer*, 29 EuR 358 (1994).

⁵⁷ *Groupement d'entreprises Fougerolle & consorts v. CERN*, Federal Tribunal, 21 December 1992, ATF 118 Ib 562; SJ 278 (1993); Bulletin ASA 259 (1993); Pratique Suisse 1992; 4 SZIER 691 (1993); Arbitrage Internationale/Jurisprudence, SZIER 143 *et seq.* (1994); 102 ILR 209-215 (1996).

⁵⁸ C. Dominicé, *L'Immunité de Jurisdiction et d'Exécution des Organisations Internationales*, 187 RdC (1984 IV), 145, and C. Dominicé, *La Nature et l'Étendue de l'Immunité de Jurisdiction des Organisations Internationales*, in *Völkerrecht – Recht der Internationalen Organisationen – Weltwirtschaftsrecht*, Festschrift für Ignaz Seidl-Hohenveldern 77 (1988).

⁵⁹ P. Glavinis, *Les Litiges Relatifs aux Contrats Passés entre Organisations Internationales et Personnes Privées* (1990).

⁶⁰ J.-F. Lalive, *L'Immunité de Jurisdiction des États et des Organisations Internationales*, 84-III RdC 205 (1953).

⁶¹ R. Imhoof, *La Personnalité et le Statut des Institutions de Caractère International – Exemples Tirés de la Pratique Suisse*, 46 Schw. Jb. int. R. 93 (1989).

⁶² N. Valticos, *Les Contrats Conclus par les Organisations Internationales avec des Personnes Privées, Rapport Provisoire et Projet de Résolution - Rapport Définitif et Projet de Résolution*, AnnIDI 1 (1977).

⁶³ *Eckhardt v. EUROCONTROL*, District Court of Maastricht, 12 January 1984, 16 NYIL 464-471 (1985).

⁶⁴ 16 NYIL 464, at 466 (1985).

⁶⁵ *E. GesmbH v. European Patent Organization*, Austrian Supreme Court, OGH/Z, 11 June 1992, 7 Ob 627/91, 47 ÖJZ 661, No. 161 (1992).

law textbooks in order to demonstrate that, unlike states, international organizations in principle enjoy absolute immunity before Austrian courts.⁶⁶ It may be noted here that one of them is the leading Austrian international law treatise initiated and co-edited by Hanspeter Neuhold, the *Handbuch des Völkerrechts*.⁶⁷ Incidentally, his name was the only one that was correctly spelled in the Supreme Court judgment.

Though reliance on scholarly writings is less frequent in common law jurisdictions, there are examples of such reliance in particular in cases where rules of customary international law are at issue.

An early example concerned the legal status of the League of Nations within the domestic legal order, in particular, its capability to acquire property by way of bequest. Only very reluctantly an English judge accepted the expert opinions of McKinnon Wood and Corbett on the legal nature of the League of Nations under domestic law. In the absence of precedents the judge relied on “[s]ome evidence as to the nature of the League of Nations [...] given by Mr. Hugh McKinnon Wood, an expert in international law [...]” However, since the court formed its own opinion on the matter after having read the Covenant of the League and concluding that “it does not appear to [him] necessarily to follow that any juristic person was formed by [the Covenant]” it took another authority to convince him: “[b]ut the opinion of Mr. McKinnon Wood is supported by other jurists, particularly Mr. Corbett. I must accept those views and conclude that for the purpose of the acquisition of property the League was a juristic person and capable of holding property.”⁶⁸

The judicial sequel to the insolvency of the International Tin Council before English courts was to a large extent a battle of legal experts, exchanging opinions on whether there were rules of customary international law providing for a subsidiary liability of member states for the debts of an international organization.⁶⁹ However, the impact of these expert opinions on

⁶⁶ *Id.*

[...] daß internationale Organisationen im Gegensatz zu ausländischen Staaten [...] weitergehende Vorrechte genießen (vgl. Neuhold-Humer-Schreiner [sic!], *Österreichisches Handbuch des Völkerrechtes* I, 162). Beizupflichten wäre auch der Lehrmeinung Seidl-Hohenveldern's, daß die Immunität internationaler Organisationen, anders als jene von Staaten im Rahmen ihrer funktionellen Beschränkung, die mit dem eigentlichen Zweck der Organisation übereinstimmen, grundsätzlich als absolut anzusehen ist (vgl. Seidl-Hohenveldern, *Lehrbuch des Völkerrechts* 6 Rz 1498f).

⁶⁷ Since its first edition in 1983 this widely used book on international law combines the continental legal tradition of a textbook (first volume) with a common law-type of a case-book (second volume). Its most recent edition dates from 2004. H. Neuhold, W. Hummer & C. Schreuer (eds.), *Österreichisches Handbuch des Völkerrechts* (2004).

⁶⁸ *In re the Estate of Whitell, deceased, Crouch v. The League of Nations Union and Others*, 20 July 1950, (unreported), Case note by Lyons, 27 BYIL 434, at 437 (1950).

⁶⁹ See also the work of the Institut de droit international (IDI) whose interest in this question

the English judges does not appear to have been overwhelming. Though the Court of Appeal in *Maclaine Watson v. Department of Trade and Industry*⁷⁰ briefly mentions that Professor Schermers had submitted his view, the overall assessment of the opinions of international lawyers is rather disappointing:

The preponderant view of the relatively few international jurists to whose writings we were referred, since we were told that there are no others, appears to be in favour of international organisations being treated in international law as 'mixed' entities rather than bodies corporate. But their views, however learned, are based on their personal opinions; and in many cases they are expressed with a degree of understandable uncertainty.⁷¹

Also the House of Lords apparently did not regard the various legal opinions as very helpful. Rather, Lord Oliver of Aylmerton stated:

[...] the authorities to which your Lordships were referred, which consisted in the main of an immense body of writings of distinguished international jurists, totally failed to establish any generally accepted rule of the nature contended for. Such writings as tended to support the supposed rule were in publications taking place since the affairs of the ITC came before the courts in 1986 and express simply the views of particular jurists about what rule of international law ought to be accepted. They were, in any event, unclear whether the liability suggested was primary or secondary, whether it was joint or several and whether it was to be contributed to equally or in some other proportions.⁷²

One may wonder whether these are the distant echoes of the 1778 English admiralty case which characterized an international lawyer in a rather uncomplimentary way: "A pedantic man in his closet dictates the law of nations; everybody quotes, and nobody minds him."⁷³

In fact, the dissenting judge in *Maclaine Watson*, Nourse L. J., paid more tribute to the legal experts whose works were relevant to the issue whether member states of an international organization could be made liable for its debts.⁷⁴ Not only did he expressly cite relevant works by Adam,⁷⁵ Shihata,⁷⁶

was triggered by the collapse of the Tin Council. Many of the experts involved in the English Tin Council litigation were members of the IDI and had a possibility to comment on the work of the IDI's rapporteur Mme Higgins who served as counsel in some of the proceedings. On the work of the IDI see R. Higgins, *The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of their Obligations toward Third Parties*, 66 AnnIDI 249-469 (1995-1).

⁷⁰ *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry, J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others, and Related Appeals*, Court of Appeal, 27 April 1988; [1988] 3 WLR 1033; 80 ILR 47-180, at 109 (1989).

⁷¹ *Id.*, 80 ILR 47, at 108 (1989).

⁷² *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, House of Lords, 26 October 1989, [1990] 2 AC 418, [1990] 3 WLR 969, 3 AllER [1989], 523, at 554.

⁷³ *The Renard*, 1 Hay & M. 222, at 224, 1 Rose. P.C. (1778).

⁷⁴ *Maclaine Watson & Co. Ltd.*, *supra* note 70, 80 ILR, 47, at 130 ff.

⁷⁵ H.-T. Adam, *Les Organismes Internationaux Spécialisés* (1965).

⁷⁶ I. F. I. Shihata, *The Legal Problems of International Public Ventures*, 25 Rev. Egypt. de Droit

Schermers⁷⁷ and Seidl-Hohenveldern,⁷⁸ he also extensively quotes from them and discusses their opinions.⁷⁹

One of the issues also addressed in the course of these proceedings was the question whether domestic insolvency law could be applied to the insolvency of an international organization. Since no English case-law authority could be found, the High Court made use of legal writings and, in *Re International Tin Council*,⁸⁰ quoted at length Jenks⁸¹ for the proposition that national insolvency law was not applicable to an international organization. The same extensive quote later reappears in the English *Westland Helicopters v. Arab Organisation for Industrialisation* case,⁸² an attempt to challenge an arbitral award rendered against the organization. Another piece of Jenks⁸³ was cited in the extensive Tin Council-related appellate decision in *Maclaine Watson v. Department of Trade and Industry*.⁸⁴

In the broad discussion of the law in the US *Mendaro* case,⁸⁵ the D.C. Circuit Court referred to works of Plantey,⁸⁶ Jenks,⁸⁷ Seyersted⁸⁸ and to the Restatement of the Foreign Relations Law,⁸⁹ marking the immunity of international organizations from persecution by its employees as an “accepted doctrine of customary international law.”⁹⁰

Though the preceding examples might suggest the contrary, on the whole, a more detailed analysis of scholarly writings in court decisions remains the exception rather than the rule.

Int. 119 (1969).

⁷⁷ H. G. Schermers, *supra* note 53.

⁷⁸ I. Seidl-Hohenveldern, *Corporations in and under International Law* (1987).

⁷⁹ *Maclaine Watson & Co. Ltd.*, *supra* note 70, 80 ILR 47, at 136-146. Similarly, Gibson L. J., at 159-161.

⁸⁰ *In Re International Tin Council*, High Court, Chancery Division, 22 January 1987; [1987] 2 WLR 1229; [1987] 1 AllER 890; [1987] 1 Ch 419; 77 ILR 18-41, at 35 *et seq.* (1988).

⁸¹ C. W. Jenks, *The Proper Law of International Organizations* 3, at 8 (1962).

⁸² *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, High Court, Queen’s Bench Division, 3 August 1994, [1995] 2 AllER 387, at 410.

⁸³ C. W. Jenks, *The Legal Personality of International Organizations*, 22 BYIL 267 (1945).

⁸⁴ *Maclaine Watson & Co. Ltd.*, *supra* note 70, 80 ILR 47, at 94 (1989).

⁸⁵ *Mendaro v. The World Bank*, 717 F.2d 610 (D.C.Cir. 1983).

⁸⁶ A. Plantey, *The International Civil Service - Law and Management* (1981).

⁸⁷ C. W. Jenks, *International Immunities* (1961).

⁸⁸ F. Seyersted, *Jurisdiction over Organs and Officials of States, the Holy Sea and Intergovernmental Organizations*, 14 ICLQ 493 (1965).

⁸⁹ Restatement of the Foreign Relations Law of the United States (Revised) (1983).

⁹⁰ *Mendaro v. The World Bank*, 717 F.2d 610, at 615 (D.C.Cir. 1983).

4.3. Adherence to Precedents vs. Policy Analysis

Whether a national judicial system is based on a formal *stare decisis* principle of binding precedents or not, judiciaries tend to respect the case law they have created. This is, of course, particularly true for the relevant US case law where certain leading cases are constantly invoked as guiding authorities. For instance, the *Broadbent* decision,⁹¹ a leading case concerning the immunity of an international organization in an employment dispute is relied upon in a number of subsequent cases.⁹² Similarly, the *Mendaro* case⁹³ is frequently relied upon in US case law.⁹⁴

The *IRO* case,⁹⁵ dealing with the question whether an international organization had the legal capacity to institute legal proceedings before American courts, is also broadly followed in American case law.⁹⁶

What is more interesting for present purposes is the fact that, in the context of cases involving international organizations, the reliance on precedents sometimes transgresses national boundaries. Domestic courts rely upon and cite foreign and international decisions. An example of the latter can be found in *Attorney General v. Nissan*⁹⁷ where the House of Lords held that “[t]he United Nations is not a super-State nor even a sovereign state.”⁹⁸ This is a quotation, although not acknowledged by Lord Pearce, from the *Reparations Case* of the International Court of Justice where it appears in the context of the

⁹¹ *Marvin R. Broadbent et al. v. Organization of American States et al.*, 628 F.2d 27 (D.C.Cir. 1980).

⁹² *Broadbent* was relied upon in *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, at 71 (E.D.N.Y. 1987), in *Chiriboga v. IBRD*, 616 F.Supp. 963, at 965 (D.D.C. 1985), in *Donald v. Orfila*, 618 F.Supp. 645, at 648 (D.D.C. 1985), in *Mendaro v. The World Bank*, 717 F.2d 610, at 613 (D.C.Cir. 1983), in *Morgan v. IBRD*, 752 F. Supp. 492, at 493 (D.D.C. 1990), in *Tuck v. Pan American Health Organization*, 668 F.2d 547, at 550 (D.C.Cir. 1981), in *Weidner v. International Telecommunications Satellite Organization*, 392 A.2d 508, at 511 (D.C. App. 1978).

⁹³ *Mendaro*, *supra* note 85.

⁹⁴ The *Mendaro* case is relied upon in *Chiriboga v. IBRD*, 616 F.Supp. 963, at 96 (D.D.C. 1985), in *De Luca v. United Nations Organization*, *Perez de Cuellar, Gomez, Duque, Annan, et al.*, 841 F. Supp. 531, at 536 (S.D.N.Y. 1994), as well as in *Morgan v. IBRD*, 752 F. Supp. 492, at 493 (D.D.C. 1990).

⁹⁵ *IRO v. Republic Steamship Corp.*, 92 F. Supp. 674 (D. Md. 1950), 189 F.2d 858 (4th Cir. 1951).

⁹⁶ The *IRO* case is quoted in *Boimah v. United Nations General Assembly*, 664 F. Supp. 69, at 71 (E.D.N.Y. 1987), in *Marvin R. Broadbent et al. v. Organization of American States et al.*, 628 F.2d 27, at 30 (D.C.Cir. 1980), and in *UNKRA v. Glass Production Methods, Inc. et al.*, 143 F. Supp. 248, at 249 (S.D.N.Y. 1956).

⁹⁷ *Attorney General v. Nissan*, House of Lords, 11 February 1969, [1970] AC 179, [1969] 1 ALLER 629, [1969] 2 WLR 926; 44 ILR 359-392 (1972).

⁹⁸ Lord Pearce at 1 ALLER [1969], 647; 44 ILR 359, at 377 (1972).

Court's implied powers discussion.⁹⁹ A few decades later the same passage is quoted in full in some of the *International Tin Council* cases.¹⁰⁰

Courts in European states, already conditioned by preliminary rulings and the necessity to follow the authority of the ECJ, have relied on ECJ interpretations also in immunity cases where they were not strictly bound to do so. This is apparent in two cases involving Eurocontrol: the Belgian case of *Soc. dr. allem. S.a.t. Fluggesellschaft mbH v. EUROCONTROL*¹⁰¹ and the English case of *Irish Aerospace (Belgium) NV v. European Organisation for the Safety of Air Navigation and Civil Aviation Authority*.¹⁰² The respective national courts had to solve the difficult issue of legally characterizing the nature of securing air traffic. They found that it constituted an exercise of public power which could not be considered a commercial activity and thus fell outside the field of application of the competition rules of Article 86 of the then E(E)C Treaty. In their findings they were explicitly guided by the ECJ's judgment in *LTU v. EUROCONTROL*.¹⁰³

It is clear, however, that reliance on international decisions is rather rare in the context of the immunity of international organizations. Of course, this mainly results from the fact that international courts and tribunals seldom have an opportunity to address this issue directly. The ICJ's advisory opinion on the immunity of a UN Special Rapporteur,¹⁰⁴ though dealing with a somewhat different issue, is exceptional.

Most interesting are cases where national courts use foreign decisions to support their own reasoning. For instance, the American decision in *International Tin Council v. Amalgamet Inc.*¹⁰⁵ relied among others on a similar case presented before a Malaysian court¹⁰⁶ as well as on judicial pronouncements in the course of the English Tin Council litigation.¹⁰⁷ Similarly, in the course of its extensive discussion of the governing law, the US *Mendaro* decision relied upon a number of, albeit rather dated, French and Italian cases in order

⁹⁹ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 174, at 179 (1949).

¹⁰⁰ *In re International Tin Council*, High Court, Chancery Division, 22 January 1987; [1987] 2 WLR 1229; [1987] 1 AllER 890; [1987] 1 Ch 419; 77 ILR 18-41, at 26 (1988). Also in *Maclaine Watson & Co. Ltd.*, *supra* note 70, 80 ILR 47, at 95 (1989).

¹⁰¹ Cour d'appel de Bruxelles, JT 254(1991); 25 RBDI 611 (1992).

¹⁰² Queen's Bench Division (Commercial Court), 6 June 1991, [1992] 1 Lloyd's Rep 383.

¹⁰³ Case 29/76, 14 October 1976, ECR [1976] 1541.

¹⁰⁴ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, ICJ Reports 62 (1999).

¹⁰⁵ *International Tin Council v. Amalgamet Inc.*, 524 NYS 2d 971, at 975 and 976 (1988).

¹⁰⁶ *Bank Bumiputra Malaysia Bhd. v. International Tin Council and Another*, High Court, of 13 January 1987; [1987] 2 Malaya Law Journal 732; 80 ILR 24-30 (1989).

¹⁰⁷ *Arab Banking Corporation v. International Tin Council and Algemene Bank Nederland and Others (Intervenors) and Holco Trading Company Ltd. (Intervenors)*, High Court, Queen's Bench Division, 15 January 1986; 77 ILR 1-8 (1988), also in *Maclaine Watson & Co. Ltd.*, *supra* note 70, 80 ILR 47, at 95 (1989).

to support its finding that “[c]ourts of several nationalities have traditionally recognized [the] immunity [of international organizations from suit by its employees in actions arising out of the employment relationship].”¹⁰⁸

One of the reasons for this form of ‘transjudicial communication’¹⁰⁹ may be the implied recognition that problems of legal personality and immunity of international organizations are issues of a genuine non-national, i.e. international, nature. It is clear that the reliance upon such non-domestic cases cannot be based on any formal rule of decision like *stare decisis*, but rather rests on their persuasive authority.¹¹⁰

4.4. Reasons for Considering Foreign Court Decisions Involving International Law

Foreign court decisions may be used in order to increase the authority and legitimacy of decisions where the law is unclear and if there are no (national) precedents. Normally, the adherence to precedents will largely eliminate any discussion of policy considerations. Courts resort to arguments concerning the rationale of a norm usually only in cases that cannot be solved on the basis of existing (case) law. It is here that on a level comparable to the assessment of policy arguments foreign court decisions will be considered.

A factor likely to contribute to a higher acceptance of foreign court decisions in the field of international law than in other areas might be the usual lack of familiarity with such issues on the part of the average national court. The fact that there are simply relatively few instances where international law issues have to be decided by national courts leads to a lack of expertise of such courts. This lack of special knowledge might then be compensated by a higher willingness to accept foreign expertise.

The persuasive authority of foreign court decisions is likely to be higher in cases involving international law than in cases dealing with domestic legal issues, which have been addressed in a comparable way by foreign courts. In these latter instances, it is merely the quality of the reasoning that may lead a national court to consider or to follow the decision of a foreign tribunal. Ultimately, it remains an interpretation and application of national law not binding upon any court in another jurisdiction. In the case of international legal

¹⁰⁸Mendaro v. The World Bank, 717 F.2d 610, at 615 (D.C.Cir. 1983), citing Institut international pour l’agriculture v. Profili, Corte di Cassazione of 13 May 1931, 5 Ann. Dig. 413-415 (1929-1930); Chemidlin v. Bureau international des Poids et Mesures, Tribunal Civil of Versailles, 27 July 1945, 12 Ann. Dig. 281 (1943-45), In re Dame Adrien and Others, Conseil d’Etat, 17 July 1931, 6 Ann. Dig., 33; Branno v. Ministry of War, Corte di Cassazione, 14 June 1954, 22 ILR 756 (1955), and Mazzanti v. HAFSE and Ministry of Defense, Tribunal Florence, 2 February 1954, RivDI 354 (1955), 22 ILR 758 (1955).

¹⁰⁹Slaughter, *supra* note 9.

¹¹⁰H. P. Glenn, *Persuasive Authority*, 32 McGill L.J. 261 (1987).

issues, while also being far from constituting formally binding precedents, foreign decisions construe and implement international law, which is, at least ideally, a single body of law to be applied uniformly everywhere. In theory this uniform international law is binding for other national tribunals as well. They may, as a matter of fact, interpret its content differently, but, again ideally, they are not dealing with different international rules, but rather with one uniform body of international norms, which should be applied in an identical way. In the absence of a federalist system with an ultimate arbiter deciding questions of interpretation and application of international law, these issues will be governed by judicial interpretations on a national level – preferably by taking into account the reasoning of other tribunals and thereby resulting in a *communis opinio*.

Of course, one should not over-emphasize such principled reasons for judicial cross-fertilization and mutual respect for foreign interpretations of international law. Instead, one must also consider more practical reasons for the fact that national court judgments are mutually taken into account. The attitude of national courts and their receptiveness towards foreign decisions is not only a question of will but also, to a considerable extent, of technical possibilities. The potential and actual availability of foreign decisions plays a crucial role. This potential has increased enormously over the last few years. The advent of sophisticated case-law data-bases as well as of the largely freely available internet resources, containing national and international decisions, considerably changed the traditional way of legal research. Foreign decisions are simply far easier to access than in the past.¹¹¹ Thus, whoever is willing to undertake additional research will be rewarded by a wealth of comparative case material.

The scope and limits of the guidance by foreign case-law being dependent upon the practical availability or non-availability of foreign or international decisions can be aptly shown in some of the cases discussed above. For instance, all the foreign cases cited in the 1983 US *Mendaro* case,¹¹² from a technological perspective clearly a pre-Lexis, pre-Westlaw and definitely a pre-internet decision, could be found either in the Annual Digests, later the International Law Reports, the most widely available compilation of decisions of domestic and international courts and tribunals.¹¹³

5. Conclusion

The rather high convergence of outcomes in cases before national courts addressing similar international law issues is a clear indication of the existence

¹¹¹ See also Knop, *supra* note 29, 520.

¹¹² *Mendaro v. The World Bank*, 717 F.2d 610 (D.C.Cir. 1983).

¹¹³ See the specific Annual Digest and ILR quotes in *Mendaro*, *supra* note 107.

of a trans-judicial dialogue. The examples drawn from the two specific fields of jurisdictional and enforcement immunity demonstrate that national courts interact on a remarkably high level. They tend to take into account decisions of other national courts as supportive evidence of their own findings. Often the influence of such foreign decisions appears to go beyond a merely persuasive authority and indicates that foreign court decisions are regarded either as elements of customary law – evidence of state practice or *opinio iuris* or even both – or as subsidiary means for the determination of the rules of international law.

With the increasing availability of the technical preconditions for such a dialogue between national courts, the interaction between judges is likely to increase as well. Whether national courts are also making judicial (foreign) policy with such trans-judicial dialogues is a question that can only be cautiously affirmed. It does appear that national courts, at least where they are transgressing the fine line between applying and making the law, are willing to rely on the argumentative support of other, including foreign, decisions. This may confer additional legitimacy on their findings and reduce potential allegations of judicial activism. It seems plausible to conclude that, in the long run, national courts will increasingly shape international law through their transnational exchanges.

