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Judicial Dialogue between International Courts in the Interpretation of Customary International Human Rights Law

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1 Introduction

The identification and interpretation of customary international law (CIL) by both domestic and international courts and tribunals has been thoroughly studied in legal scholarship. However, little is known about the engagement in judicial dialogue by, in particular, international human rights courts and the impact that it has on the interpretation of custom in this particular field. In the international legal order, international bodies protecting human rights were conceived to be formally independent, in contrast with domestic tribunals governed by a hierarchical principle of organisation. Indeed, except for the International Court of Justice (ICJ), which has general jurisdiction in matters related to international law, international courts exercise limited jurisdiction, usually determined by a constitutive treaty. Many judicial and quasi-judicial bodies co-exist independently of each other across the many legal systems that protect human rights, be it globally or at regional level. Despite the horizontality of this ordering, judicial dialogue has emerged as a spontaneous practice in the case law of international courts, part of a larger judicial globalization phenomenon. Judicial globalization involves interacting judicially 'across, above and below borders, exchanging ideas and cooperating in cases involving national as much international law'.[1] Although judicial globalization is becoming more common, binding precedent still does not exist in the international

[1] A Slaughter, 'Judicial Globalization' (2000) 40 VJIL 1104.

legal order,[2] rather, judicial dialogue has arisen within the context of the jurisdictionalisation of international human rights law at both domestic and international levels.

There is no universal agreement on the meaning of judicial dialogue. Judicial dialogue can be defined as merely the spontaneous reference to the case law of other courts and tribunals by a particular judicial body, whether domestic or international. It can be described also as a comparative and interpretative approach to cross-cutting issues faced by multiple legal systems – this is the case with the protection of human rights. Indeed, judicial dialogue can be understood as a practice engaged in spontaneously by courts, either in a sporadic fashion through occasional references to the case law of other courts or as part of a more systematic approach in which references to foreign case law are used repeatedly and consistently over time in the process of interpretation. For the purpose of this contribution, the notion of judicial dialogue encompasses the notion of cross-referencing,[3] These terms are used interchangeably to describe the reference to case law or international instruments that are outside the international court's own judicial system and that are used for interpretation purposes.[4]

References to international instruments and to other courts' case law are often intertwined, as the interpreter tends first to contextualise the legal norms within the broader system of analogous rules that are part of other systems, then afterwards refers to or quotes extensively the relevant case law which interprets the analogous rules. Therefore, the practice of

[2] G Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 JIDS 5.

[3] A Jones, 'Judicial Cross-Referencing and the Identity of the International Criminal Court' (2018) 43 NCJIL 72; E Maculan, 'Judicial Definition of Torture as a Paradigm of Cross-Fertilisation: Combining Harmonisation and Expansion' (2015) 84(3) NJIL 456.

[4] S Cocan, *Le dialogue entre juridictions et quasi-juridictions internationales de protection des droits de la personne: L'exemple de la prohibition de la torture et autres peines ou traitements cruels, inhumains ou dégradants* (LGDJ 2020); EF Mac-Gregor, 'What Do We Mean When We Talk about Judicial Dialogue? Reflections of a Judge of the Inter-American Court of Human Rights' (2017) 30 HHRJ 89; C Burchard, 'Judicial Dialogue in Light of Comparative Criminal Law and Justice' in P Lobba and T Mariniello (eds), *Judicial Dialogue on Human Rights: The Practice of International Criminal Tribunals* (Brill 2015) 56; J Allard and L Van Eynde, 'Le dialogue des jurisprudences comme source du droit: Arguments entre idéalisation et scepticisme' in I Hachez (ed), *Les sources du droit revisitées*, vol 3: *Normativités concurrentes* (Anthemis 2013); C Romano 'Deciphering the Grammar of the International Jurisprudential Dialogue' (2009) 41(4) NYUJILP 755; B Frydman, 'Conclusion: Le dialogue des juges et la perspective idéale d'une justice universelle' in *Le dialogue des juges: Actes du colloque organisé le 28 avril 2006 à l'Université Libre de Bruxelles* (Bruylant 2007).

judicial dialogue leads to a contextualization of rules within the international legal order as a whole and the taking account of judicial practice and the interpretation given by other courts to analogous rules in the field of international human rights law. Firstly, it sets out the basis for a normative contextualisation, interpreting legal rules protecting human rights within the broader context of international instruments such as treaties, customs, soft law documents and general principles of international law. Secondly, it facilitates systemic contextualisation in the process of interpreting human rights obligations through the overall logic and perspective of the universal and regional systems while taking into account their common coherence and scope based on the universality of human rights in spite of each legal system's independence. On the one hand, judicial dialogue is a tool for normative contextualisation of rules protecting human rights, whether written or unwritten, according to the interpretation of their scope and content given by other international bodies in comparable legal matters. On the other hand, the practice of judicial dialogue reflects the search for a systemic contextualisation that would anchor the interpretation process in the light of other analogous systems – as all the systems protecting human rights in the international legal order have a common purpose based on an overarching principle that is the limitation of state power through the promotion and the protection of rights inherent to all human beings, without discrimination.

When the interpreter sets out the basis for normative and systemic contextualisation by taking into account external references when engaging in the interpretation process, the approach follows the following steps: (1) the interpreter compares two analogous rules and realises that other judicial bodies have interpreted the same rules in other legal disputes; (2) this comparative approach leads the interpreter to take into account in the interpretation process the general coherence of the foreign system protecting human rights; (3) the interpreter evaluates if references to the rules and the case law established in this analogous system outside the interpreter's own judicial system could be relevant – according to principles, rules and methods commonly admitted in that particular system; and finally (4) the interpreter possibly decides to incorporate external elements such as judicial decisions of other systems if they meet the objective of the interpreter's legal reasoning, which is subject to constraints imposed by the interpreter's own system. Given all this, the belief that fragmentation negatively affects international law is perhaps exaggerated, at least insofar as international human rights law is

concerned. Indeed, the aim of universality and the interdependent character of the rights affirmed in the Universal Declaration of Human Rights in 1948,[5] leads one to think that the universal and regional systems protecting human rights are more likely to have practices in common and intersections, making combinative and overarching interpretations not only possible but inevitable.[6]

Section 2 discusses the role of judicial dialogue in the identification and the interpretation of customary international human rights law. It highlights how customary rules of human rights law arise through the practice of international courts as they interpret written provisions codified in universal or regional instruments while taking into account other courts' case law. Section 3 addresses the issue of judicial dialogue as an interpretation approach that ensures judicial objectivity and judicial dialogue's impact on customary international human rights law. In conclusion, Section 4 provides a forward-looking analysis of how judicial dialogue may play a role in ensuring a higher degree of normative convergence on cross-cutting issues in the protection of human rights.

2 The Use of Judicial Dialogue in the Identification and the Interpretation of Customary International Human Rights Law

In the field of international human rights law, the identification and interpretation of customary rules are often interlinked. International courts interpret international instruments, state practice and *opinio juris* in order to ascertain whether there exists a general rule belonging to customary international law alongside the written rule codified in a treaty. For instance, judicial dialogue has been used as a tool in the identification and interpretation of *jus cogens* norms protecting human rights, such as the prohibition of torture, which is also part of CIL. By engaging in judicial dialogue, judges have taken into account the case law of other courts to identify customary rules crystallised through the practice of international bodies. This process allowed the judges to conclude that the binding nature of provisional measures has become a common practice across many systems of human rights protection.

[5] UNGA Res 217A(III) (10 December 1948) UN Doc A/RES/3/217 A, 71.

[6] L Burgorgue-Larsen, '"Decompartmentalization": The Key Technique for Interpreting Regional Human Rights Treaties' (2018) 16(1) IJCL 187.

2.1 *Blurred Lines between the Identification and the Interpretation of Customary International Human Rights Law*

2.1.1 General Considerations on the Identification and the Interpretation of Customary Rules

A distinction is not always clearly drawn in human rights case law between the recognition of a written norm as customary and its judicial interpretation. If the rule is codified in a treaty that is the source of the judicial body's jurisdiction, the existence of the rule is not in question, and yet the rule needs to be interpreted before it is applied to a specific factual situation. If we are in the presence of an unwritten norm that might be considered customary international human rights law, the judicial body establishes, at a precise moment, that a rule has become customary because of widespread ratification of relevant international instruments, state practice and *opinio juris* while also taking into account other relevant materials such as case law, soft law instruments, resolutions, reports of international institutions and legal doctrine. Through this process, the rule is identified as being part of customary law and binding on states without prior or explicit consent. Within this framework, international courts not only evaluate state practice and *opinio juris* in identifying a customary rule, but very often include references to fundamental values, considerations of humanity and the case law of other courts, whether domestic or international, so as to clarify the content and the scope of international obligations.

The International Law Commission (ILC) highlighted in its 2018 report on the identification of customary international law[7] that it is necessary to ascertain the presence of two elements: state practice and *opinio juris*. The report includes an assessment of evidence indicative of each element.[8] The ILC examined state conduct and state practice in order to determine the existence of a customary rule[9]. It has also stated that '[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the

[7] ILC, 'Fifth Report on Identification of Customary International Law' (30 April–1 June 2018 and 2 July–10 August 2018) UN Doc A/CN.4/717 paras 96–100.

[8] ibid, Annex: 'Draft conclusions adopted on first reading, with the Special Rapporteur's suggested changes', Conclusions 1–3.

[9] ibid, Annex, Conclusion 5: 'State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.'

determination of such rules'.[10] The ILC pointed out that the process of determining the existence and content of customary rules could also take into account decisions of national courts, but that they would have a less important role, depending on the context.[11]

This acknowledgement on the identification of customary rules has specific implications in the field of human rights. Indeed, the practice of international tribunals and the emergence of customary international human rights law mark a reversal of the logic informing the process of identifying customary rules. In contrast to other fields of international law, in which customary law appeared first and was codified afterwards in binding treaties, 'in international human rights law, custom did not precede treaty, it followed it'.[12] Consequently, normative convergence in the practice of human rights bodies may lead to cross-cutting rules that are common to all the systems, whether at universal or regional level, and which could also be part of positive law in domestic legal orders. It can reveal the substantive interdependence of international obligations laid down in the case law of international courts to protect human rights. The way in which the courts' case law and interpretative statements have contributed to the process of identifying customary rules can be illustrated by considering the scope and content of peremptory norms.

2.1.2 The Intersection between the Identification and the Interpretation of Human Rights and *Jus Cogens* Norms

Although Article 53 of the Vienna Convention on the Law of Treaties[13] (VCLT) clarified what is meant by *jus cogens* norms in international law, no concrete examples were given of these norms, leaving it up to international bodies to define what these norms are. For instance, in 1994, in its General Comment 24, the Human Rights Committee observed: 'Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter*

[10] ibid, para 99 ('it seems difficult to deny that greater caution is called for when seeking to rely on decisions of national courts, which may reflect a particular national perspective and may not have international law expertise available to them').

[11] ibid.

[12] WA Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021) 2.

[13] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.'[14] In the Committee's view, 'provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations.'[15] The Human Rights Committee lists the customary rules found in the Covenant as follows:

> Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.[16]

However, in its subsequent general comments, the Human Rights Committee did not restate this conclusion nor renew this affirmation concerning customary rules that cannot be subject to any reservations. Furthermore, no other human rights body has made a similar statement declaring all these human rights to be *jus cogens*. Therefore, it is difficult to identify with certainty the customary rules of human rights that are both part of positive law, alongside conventional provisions, and have a peremptory character.

In this context, identification and interpretation of customary rules can be seen as 'interconnected judicial operations'[17] that are explicitly differentiated throughout the process of legal reasoning. As international courts refer to customary rules in their case law, there is indeed a 'distinction between customary norms and State practice

[14] HRC, 'General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant' CCPR/C/21/Rev.1/Add.6 (1994) para 8.

[15] ibid.

[16] ibid.

[17] M Fortuna, 'Different Strings of the Same Harp: Interpretation of Customary International Rules, Their Identification and Treaty Interpretation' (2020, revised 2021) University of Groningen Faculty of Law Research Paper 48/2020, 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3798476> accessed 6 March 2022.

with *opinio juris*'.[18] In scholarship it has been pointed out that, when applied to treaty law, 'interpretation and identification are two separate processes'; whereas 'with regard to customary rules, since they are unwritten, it is difficult to distinguish their identification from their interpretation'.[19] Moreover, the existence of customary international law 'is determined inductively through an examination of two elements, state practice and *opinio juris*'.[20] In other words, a state practice must implicitly be interpreted as being general and repeated throughout time and this general practice must be accepted as law in accordance with Article 38(1)(d) of the Statute of the International Court of Justice.[21] Once customary rules have been identified, they can, like treaties, also be subjected to interpretation, their unwritten nature allowing a more flexible interpretation where their content is uncertain or vague. As pointed out by Judge Tanaka

> Customary law, being vague and containing gaps compared with written law, requires precision and completion about its content. This task, in its nature being interpretative, would be incumbent upon the Court. The method of logical and teleological interpretation can be applied in the case of customary law as in the case of written law.[22]

This statement allows us to reach the conclusion that not only are unwritten customary rules open to interpretation so as to become fully applicable to a particular matter, but also that the process of interpretation can follow a teleological approach informed by the object and purpose of the rule. When the customary rule's object and purpose is to protect human dignity and integrity by constraining states in their behaviour, an extensive interpretation would be one that leads to a broadening of the content of state obligations in order to enhance the protection of the individual. On the other hand, a restrictive interpretation would tend to limit the scope of application of legal rules by giving much weight to State practice and explicit consent.

[18] ibid 6–7.

[19] R Di Marco, 'Customary International Law: A Foreword to Identification v. Interpretation' (2019) TRICI-Law Research Paper 009/2019, 14 <www.academia.edu/43325436/Customary_International_Law_a_Foreword_to_Identification_v._Interpretation> accessed 6 March 2022.

[20] P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 ICLR 129.

[21] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119.

[22] *North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands)* (Merits) [1969] ICJ Rep 3, 181 (Dissenting Opinion of Judge Tanaka).

2.2 *Judicial Dialogue as a Tool in the Identification and Interpretation of* Jus Cogens *Norms Protecting Human Rights*

The ILC's special rapporteur Dire Tladi recalled that if 'a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection'.[23] However, the ILC emphasised that 'the persistent objector rule does not apply to peremptory norms of general international law (*jus cogens*)'.[24] This conclusion 'flows from both the universal application and hierarchical superiority of [these norms] . . . that apply to all States'.[25] In its 2019 report on the peremptory norms of general international law, the ILC affirmed that '[c]ustomary international law is the most common basis for peremptory norms of general international law (*jus cogens*)'.[26] adding that '[t]reaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*)'.[27] It also observed that '[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for determining the peremptory character of norms of general international law',[28] as is the case with the determination of CIL. In the ILC's 2022 report Dire Tladi provided the most recent list of norms considered to be part of *jus cogens* and which reflect fundamental values for the international community as a whole. They include the prohibition of aggression; the prohibition of genocide; the prohibition of crimes against humanity; the basic rules of international humanitarian law; the prohibition of racial discrimination and apartheid; the prohibition of slavery; the prohibition of torture; and the right of self-determination.[29] It is interesting to note that this list partially overlaps with customary rules identified as

[23] ILC, 'Draft Conclusions on Identification of Customary International Law' (adopted by the ILC at its seventieth session, in 2018) Conclusion 15, para 1 <https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf> accessed 26 May 2024.

[24] ILC, 'Report of the International Law Commission: Seventy-First Session (29 April–7 June and 8 July–9 August 2019)' (2019) UN Doc A/74/10, 145, Conclusion 14, para 3.

[25] ILC, 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*), with Commentaries' (adopted by the ILC at its seventy-third session, in 2022) 58 <https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf> accessed 26 May 2024.

[26] ILC, 'Report of the International Law Commission' (n 24) 143, Conclusion 5, para 1.

[27] ibid, Conclusion 5, para 2.

[28] ibid, Conclusion 9, para 1.

[29] ILC, 'Fifth Report on Peremptory Norms of General International Law (*jus cogens*)' (2022) UN Doc A/CN.4/747, 76.

such in legal scholarship, examples of which are 'the prohibition of genocide and torture, the prohibition of slavery and piracy, the rules on State responsibility, the principle of non-refoulement and the no-harm rule'.[30]

In Conclusion 14, the special rapporteur pointed out that '[a] rule of customary international law not of a peremptory character ceases to exist if and to the extent that it conflicts with a new peremptory norm of general international law (*jus cogens*)'.[31] This statement could be relevant in future cases dealing with the relationship between legal norms that are not at an equivalent hierarchical level. It could determine the effect of a *jus cogens* norm when there is a conflict with a customary rule, such as the normative interaction between the prohibition of torture and the rule on state immunity before foreign jurisdictions. An extensive interpretation of Conclusion 14 would lead to neutralisation of the CIL immunity rule's precedence over the peremptory norm when the application of the first rule renders ineffective in its scope the customary rule that has *jus cogens* status. However, for that to be the case, one must first consider that there is an existing conflict between, on the one hand, international customary law on immunities and, on the other, *erga omnes* obligations and *jus cogens* norms. The main uncertainty lies in the relationship between customary rules related to state immunities and the hierarchical character of *jus cogens* norms that should entail effective legal consequences. The ILC's special rapporteur stated:

> The hierarchical superiority of peremptory norms of general international law (*jus cogens*) over customary international law was . . . recognized in *Al-Adsani v. the United Kingdom*,[32] in which the European Court of Human Rights (ECtHR) determined, having considered *Prosecutor v. Furundžija*,[33] that peremptory norms of general international law (*jus cogens*) are those norms that enjoy 'a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules'.[34]

The ECtHR affirmed that 'the right under Article 3 not to be subjected to torture or to inhuman or degrading treatment or punishment enshrines

[30] Merkouris (n 20).
[31] ILC, 'Report of the International Law Commission' (n 24) 145 Conclusion 14, para 2. See also ibid 183–84.
[32] *Al-Adsani v United Kingdom*, App no 35763/97 (ECtHR, 21 November 2001) [60].
[33] *Prosecutor v Furundžija*, ICTY-95-17/I-T (10 December 1998) [144]–[147], [151]–[154]. See also *Prosecutor v Delalic and ors*, ICTY-96-21-T (16 November 1998) [454]; *Prosecutor v Kunarac*, ICTY-96-23-T and ICTY-96-23/1 (22 February 2001) [466].
[34] ILC, 'Report of the International Law Commission' (n 24) 182.

one of the fundamental values of democratic society' and that '[i]t is an absolute right, permitting of no exception in any circumstances'.[35] If the special rapporteur was indeed recalling the well-established case law of the European Court, it could have been criticised for its contradictions and limited legal consequences in terms of state accountability.

This precedent established by the ECtHR has led to a legal loophole in the case of grave human rights violations that occur extraterritorially and implicate a foreign state. Even in such exceptional circumstances, the customary law on immunities exercises a constraining effect on the legal consequences in terms of state responsibility, as individuals will have no access to justice. Indeed, as affirmed by the ECtHR itself:

> Notwithstanding the special character of the prohibition of torture in international law, the Court is] unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[36]

The dissent of Judges Rozakis and Caflisch from the *Al-Adsani* v. *the United Kingdom* solution, which was adopted by only nine votes in favour and eight against, showed the division among the judges at the time. The following words in the dissenting opinion show that the adoption of a radically different interpretation could have been possible:

> By accepting that the rule on prohibition of torture is a rule of *jus cogens*, the majority recognise that it is hierarchically higher than any other rule of international law . . . For the basic characteristic of a *jus cogens* rule is that . . . it overrides any other rule which does not have the same status. In the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails.[37]

On the one hand, the ICJ followed the ECtHR's precedent and ruled in its *Jurisdictional Immunities of the State* case[38] that there was no conflict between the rule on state immunities in civil proceedings and *jus cogens* norms, as the former is of a procedural nature while the latter are of a substantive nature. This case dealt with both a debate around the

[35] *Al-Adsani v United Kingdom* (n 32) [59].
[36] ibid [61].
[37] *Al-Adsani v United Kingdom* (n 32) Joint Dissenting Opinion of Judges Rozakis and Caflisch (joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić).
[38] *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Judgment) [2012] ICJ Rep 99 [92]–[93].

identification of an exception to state immunities where there are violations of *jus cogens* norms, as affirmed by the Italian Supreme Court in its *Ferrini* case,[39] and the resolution of a possible conflict of norms between the customary rule on immunities and the absolute prohibition of torture. An analysis of domestic and international case law led the ICJ to reject any exception to the regime of state immunity from foreign jurisdiction, even in the case of violations of peremptory norms. As a result of this restrictive interpretation, the prohibition on torture becomes devoid of substance in an extraterritorial context: its peremptory nature is illusory and impracticable, its legal effects and effective sanctions existing only in a theoretical imaginary, given that state immunity prevails as a *sine qua non* prior to any judicial proceedings.

On the other hand, with regard to peremptory norms, the case law of other international courts and tribunals has also been used to identify the emergence of customary international legal rules determined by other courts that are binding on all states and not limited in their application. In the *Furundžija* case, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) found that the prohibition of torture had not only become part of customary international law but had also reached the status of a *jus cogens* norm.[40] The ICTY has also stated that the prohibition of rape within the context of an armed conflict had become a rule of customary international law despite the lack of a universal definition of rape in international law,[41] the tribunal using the principle of the protection of human dignity to define the act of rape after analysing contradictory national legislations.[42] The tribunal also defined the criteria of torture in armed conflict after recalling that '[t]he broad convergence of … international instruments and international jurisprudence demonstrates that there is now general acceptance of the main elements contained in the definition set out in article 1 of the Torture Convention',[43] applicable in times of both peace and armed conflict.

It is also interesting to note that when the case law of international tribunals refers to the prohibition of torture as a customary norm that is part of *jus cogens*, the formula used is usually 'prohibition of torture' and

[39] P De Sena and F De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case' (2005) 16 (1) EJIL 89.
[40] *Prosecutor v Furundžija* (n 33) [154].
[41] ibid [168].
[42] Fortuna (n 17).
[43] *Prosecutor v Furundžija* (n 33) [161].

not the universal treaty's broader wording, which reads 'the prohibition of torture and other cruel, inhuman or degrading treatment or punishment'.[44] Therefore, it is not clearly stated whether the proscription of inhuman or degrading treatment characterised by a minor gravity as compared with torture also fall under customary international law and could be qualified as a peremptory norm. For instance, in *Questions Relating to the Obligation to Prosecute or Extradite* case the ICJ stated that:

> the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).
>
> That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966 ; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.[45]

The court recalled that although Article 4 of the Convention against Torture requires states parties to criminalise such acts, 'the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned'.[46] Nevertheless, it is not clear whether only the prohibition of torture is part of customary international law as a *jus cogens* norm or whether this prohibition necessarily also entails procedural obligations strongly linked to the effectiveness of the prohibition as a customary norm. Furthermore, as regards the Convention against Torture, the definition of acts of torture is strongly linked to states obligations as it requires involvement of a public official, whereas this is not the case with torture defined as a crime against humanity involving the liability of individuals.[47]

[44] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[45] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422 [99].

[46] ibid [100].

[47] Y Tan, 'The Identification of Customary Rules in International Criminal Law' (2018) 34 (2) UJIEL 109. See Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, arts 7(f) and 8(2)(a)(ii).

Finally, in the *Prosecutor* v. *Furundžija* case, the ICTY analysed treaty provisions of international humanitarian law and human rights law,[48] recognised the numerous states parties to those treaties and, acknowledging that 'torture in time of armed conflict is prohibited by a general rule of international law', observed that '[i]n armed conflicts this rule may be applied both as part of international customary law and – if the requisite conditions are met – qua treaty law, the content of the prohibition being the same'.[49] With respect to the content of the prohibition of torture under conventional and customary international law, the tribunal remarked that states had the obligation not only to prohibit and punish torture but also to prevent any potential breaches of the prohibition of torture as well as any inhuman or degrading treatment, as had been 'authoritatively held by the European Court of Human Rights'[50] in the *Soering* case.[51] The ICTY concluded that 'international rules prohibit not only torture but also (i) the failure to adopt the national measures necessary for implementing the prohibition and (ii) the maintenance in force or passage of laws which are contrary to the prohibition'.[52] This conclusion is reinforced by the *jus cogens* nature of the prohibition of torture and the fact that it imposes *erga omnes* obligations designed to produce a 'deterrent effect'.[53] For the tribunal, the peremptory character of the prohibition of torture has effects at the inter-state level, such as de-legitimising any legislative, administrative or judicial act authorising torture,[54] and at the individual level, enabling every state 'to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction'.[55]

Analyses of the international case law related to the prohibition of torture have shown that its customary nature and content flow from the coherence of general principles of international law and treaty provisions applicable in international humanitarian and human rights law, analysed in the light of the international courts' case law. It also appears that the customary prohibition of torture has distinct content and scope, binding all states as a peremptory norm of international law and giving rise to *erga omnes* obligations.

[48] *Prosecutor v Furundžija* (n 33) [137]–[138].
[49] ibid [139].
[50] ibid [148].
[51] *Soering v United Kingdom,* App no 14038/88 (ECtHR, 7 July 1989).
[52] *Prosecutor v Furundžija* (n 33) [148].
[53] ibid [154].
[54] ibid [155].
[55] ibid [156].

2.3 *Cross-References and the Crystallisation of a New Customary Rule: The Example of the Binding Nature of Provisional Measures*

Consideration of other international instruments and the associated case law resulting from their interpretation by other courts can also lead to the identification of new customary rules, as exemplified by the binding nature of provisional measures. In the case of *Mamatkoulov and Askarov* v. *Turkey* before the ECtHR, the applicants alleged that their extradition to Uzbekistan by the Turkish authorities exposed them to a real risk of ill-treatment proscribed by Article 3 of the European Convention on Human Rights (ECHR). The court had indicated an interim measure in application of Rule 39 of its Rules of Court. The provisional measure requested a suspension of the extradition proceedings for the purpose of establishing whether the risk of ill-treatment existed. Turkey's failure to comply with the measure indicated by the Court raised the issue of the mandatory nature of interim measures and whether there was a breach of the effective exercise of the right of individual application guaranteed by Article 34 of the ECHR.

The *LaGrand* case[56] before the ICJ dealt with a dispute related to alleged violations of the Vienna Convention on Consular Relations of 24 April 1963 on the grounds that the applicants had been tried and sentenced to death without having been informed of their rights, as required under Article 36(1)(b) of the Vienna Convention. The ICJ indicated provisional measures, calling upon the United States to suspend the execution of the death penalty, but the respondent state failed to comply with the court's order made under Article 41 of the ICJ Statute. The court had therefore to determine whether the provisional measures had a binding effect. It reached the following conclusion:

> It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.[57]

[56] *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466.
[57] ibid [102]. The ICJ confirmed this interpretation in *Avena and Other Mexican Nationals* (*Mexico v United States of America*) (Judgment) [2004] ICJ Rep 12.

The ECtHR has referred extensively to the *LaGrand* case decided by the ICJ,[58] in which the mandatory nature of provisional measures was established after decades of doctrinal debates.[59] It should be noted that in its *Cruz Varas* case[60] the ECtHR took a different position as it considered that its procedural rules were not equal to a conventional instrument approved and adopted by states, making it impossible to affirm the binding nature of interim measures in comparison with other systems. Nevertheless, in the *Mamatkoulov* case the ECtHR emphasised that 'in the light of the general principles of international law, the law of treaties and international case-law, the interpretation of the scope of interim measures cannot be dissociated from the proceedings to which they relate or the decision on the merits they seek to protect'.[61] The ECtHR stressed the specificity of interim measures within the inter-American system, where the power of the Inter-American Court of Human Rights (IACtHR) to order such measures has an explicit conventional basis.[62] The ECtHR also recalled, however, that the ICJ in its *LaGrand* case, the IACtHR, the Human Rights Committee and the Committee against Torture

> have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law. Indeed, it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending.[63]

Although there was no change to the ECtHR's procedural rules over the years, nor any amendment to the ECHR, cross-references to the case law of other international bodies allowed the ECtHR to establish the mandatory nature of its provisional measures and to conclude that 'a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application

[58] *Mamatkulov and Askarov v Turkey*, App no 46827/99 and 46951/99 (ECtHR, 4 February 2005) [48].
[59] JM Pasqualucci, 'Interim Measures in International Human Rights: Evolution and Harmonization' (2005) 38 VJTL 1; J Kammerhofer, 'The Binding Nature of Provisional Measures of the International Court of Justice: The "Settlement" of the Issue in the *LaGrand* Case' (2003) 16 LJIL 67.
[60] *Cruz Varas and ors v Sweden*, App no 46/1990/237/307 (ECtHR, 20 March 1991).
[61] *Mamatkulov and Askarov v Turkey* (n 58) [123].
[62] ibid [49]–[53].
[63] ibid [124].

guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention'.[64]

In their joint partly dissenting opinion, Judges Caflisch, Türmen and Kolver criticised the court's reasoning. They noted that the ICJ, for instance, was interpreting Article 41 of the ICJ Statute, a provision of a constitutive treaty, whereas the ECtHR was interpreting its procedural rules, to which states have not given their consent.[65] They stressed that by relying on international instruments and precedents from other international bodies, the ECtHR departed from its own case law and exercised 'a legislative function, for the Convention as it stands nowhere prescribes that the States Parties to it must recognise the binding force of interim measures indicated'.[66] As regards crystallisation of the binding nature of provisional measures on the basis of normative convergence in the international legal order, the dissenting judges finally concluded:

> There must, however, be a *customary rule* allowing international courts and tribunals, even in the absence of a treaty provision, to enact Rules of Procedure, a rule which may include the power to *formulate* interim measures. But that rule cannot be taken to include the power to *prescribe* such measures.[67]

It is interesting to note that the ECtHR departed from its own precedent, set previously in the *Cruz Varas* case. It founded its legal reasoning, notably, not on state practice or *opinio juris* but on the general principles of international law, the law of treaties and international case law,[68] and on the fact 'the right of individual application is no longer dependent on a declaration by the Contracting States'.[69] Even though not affirmed explicitly, the court acknowledged this as a departure from its previous case law, the practice of international courts and tribunals having revealed the binding nature of interim measures to be now part of general international law.

In this example from the ECtHR, cross-references to the case law of other courts were used as a tool to counteract the negative consequences arising from so-called absolute state sovereignty and to bypass normative constraints. The co-ordination and harmonisation of international case law minimises divergent interpretations of a common legal rule such as

[64] ibid [125].
[65] ibid [148].
[66] ibid [151].
[67] ibid [162] (emphasis in original).
[68] ibid [123].
[69] ibid.

the binding nature of provisional measures. Interim measures ordered by judicial bodies are aimed at preventing irreversible damage to the rights of parties during executive, legislative and political decision-making processes. As a matter of fact, the binding nature of provisional measures is linked to their function, as the purpose of judicial proceedings is to ensure effective protection of human rights by state authorities required to act in accordance with the rule of law.

Therefore, the growth of multidimensional dialogue between international bodies protecting human rights, between national judges and between international bodies and national judges contributes to the emergence of a network within the international judiciary.[70] Although operating against the backdrop of distinct and independent legal systems in the international legal order, the international judiciary shares common judicial practices that help to define norms of reference and minimum standards of protection. Nevertheless, these norms and standards need to be incorporated into national legal orders for full applicability and effectiveness, since the primary responsibility to ensure the respect of human rights is devolved to national authorities. Even in the absence of an explicit written rule, international bodies, by applying and interpreting human rights obligations and by sanctioning violations implicating the international responsibility of states, aim to place limits on the exercise of power by framing executive, legislative and political process within the rule of law.

3 Judicial Dialogue as an Approach to Interpretation Leading to Jurisprudential Objectivism and Its Impact on Customary International Human Rights Law

If the will and consent of sovereign states remain at the very foundation of international law and legal systems protecting human rights, the examples previously mentioned and the practice of judicial dialogue show the emergence of jurisprudential objectivism – this arises from a judicial body's independence and impartiality regarding its nature and functions. Furthermore, jurisprudential objectivism is closely connected to increasing jurisdictionalisation in international law, as demonstrated by the multiplication of international courts and tribunals in

[70] G Ulfstein, 'Towards an International Human Rights Judiciary?' in J Ebbesson and Others (eds), *International Law and Changing Perceptions of Security: Liber Amicorum Said Mahmoudi* (Brill 2014).

diverse fields, especially human rights. Their protection was internationalised with the adoption of the Universal Declaration of Human Rights in 1948, which was the starting point for the internationalisation of human rights protection and has served as a source of inspiration for legally binding treaties. Thus, jurisprudential objectivism embodies a form of autonomy arising from judicial practice that does not depend on states' interests nor on political or diplomatic views. Moreover, jurisprudential objectivism asserts itself in the face of the will of states when an international court refers spontaneously to decisions or international instruments that are outside its own judicial system, and therefore not included in its constitutive treaty that has been ratified by states parties. The notion of jurisprudential objectivism reflects both the jurisdictionalisation of international obligations and the margin of appreciation exercised by international courts in the interpretation processes. The principles of limited jurisdiction and the required consent to jurisdiction are cornerstones of the very existence of international judicial bodies. The scope of the will and consent of states will be constrained by judicial practice, as the interpretation processes used in case law can lead to objective conclusions, binding on states and detached from the principle of voluntarism.

Jurisprudential dialogue can also be used to identify the emergence of CIL rules determined by other courts, binding on all states, not limited in their application and that do not need express consent – and a fortiori for *jus cogens* norms that entail *erga omnes* obligations. In contrast to conventional rules, which can be subject to reservations, 'this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour'.[71]

It is important to emphasise the persuasive authority of the international judiciary and its capacity to build normative convergence through the use of external sources that show an interpretive convergence in the first place. Not only does the practice of judicial dialogue create checks and balances in the international legal order through the comparison of multiple points of view in regard to the interpretation of a specific legal rule; it also enhances the quality of the judgments and their reasoning. When external sources are incorporated in the interpreter's decision, this improves the legal ruling not only with respect to the

[71] *North Sea Continental Shelf* (n 22) [63].

requirements of the interpreter's own system but also in light of the legal requirements that apply in other foreign systems. Consequently, the solution adopted in the court's decision will be strengthened by a more coherent legal argument, as it has relied on other judicial decisions that reached the same solution when faced with common legal issues.

A stronger legal argument can also enhance the persuasive authority recognised in supranational judgments and decisions that lack the power of enforcement attached to national tribunals and authorities. The legal reasoning and the arguments used in judicial decisions allow the addressees to better understand the extent of their obligations arising from conventional and customary international human rights law. In other words, the practice of referring to multiple sources of law when justifying a legal ruling, whether these sources are judicial decisions or international instruments that show a converging normative content, will enhance the authority of external sources where legal reasoning and justification demonstrate the existence of cross-cutting obligations that do not apply to only one specific legal system but are common to several of them or are part of general CIL.

Indeed, the notion of public international order can be linked to the development of case law of international bodies protecting human rights.[72] These bodies serve as a last resort to judge human rights violations when the action of national jurisdictions has been insufficient. At the national level, safeguarding public order and security can be used to justify legal restrictions and derogations from the general law in exceptional circumstances. At the international level, the notion of public international order embodies shared values and common principles arising from the necessity to protect human integrity and dignity as cornerstones of the universality of human rights. Public international order also implies the respect of minimum standards and norms of reference, notably through *jus cogens* norms and *erga omnes* obligations that are common to legal systems and of interest to the international community as a whole. It is also strongly linked to normative convergence and to jurisprudential objectivism. Normative convergence derived from case law leads to the emergence and the consolidation of jurisprudential objectivism, restraining voluntarism. International obligations that protect core human rights are not based on the will of states but are instead derived from the universality

[72] EJ Solares, 'Las normas internacionales convencionales de derechos humanos y su contribución al orden público internacional' (2014) 14 RDUNED 325; A Orakhelashvili, 'State Immunity and International Public Order' (2002) 45 GYIL 226.

attached to these rights and the protection of the rule of law[73] through the respect of minimum standards and norms of reference in light of which human rights violations have to be assessed.[74] Jurisprudential objectivism results from the practice of international human rights tribunals that leads to strengthening spontaneous international law, beyond binding written agreements, through the identification of cross-cutting customary rules. As judges' impartiality and independence are central to the scope and function of judicial power, even though political distrust or states' unwillingness to comply with international obligations may limit their margin of appreciation and lead to negotiated judicial decisions, the binding nature of international customary rules is not altered but rather its effects are being neutralised. Jurisprudential objectivism can also be illustrated by the role played by international courts and tribunals in the determination of customary rules, *erga omnes* obligations and *jus cogens* norms that are directly applicable in domestic legal orders, without requiring any legislative implementation or state consent, as they are not defined in conventional instruments but implicitly ensue from them.

Finally, judicial dialogue can be seen as a way to co-ordinate and harmonise the interpretation of key principles of international law, whether written or unwritten, and to acknowledge the international judiciary as a set of mutual interactions and influences between legal systems that strengthen governance in the realm of justice. International bodies, whether judicial or quasi-judicial, and national judges, whether ordinary or constitutional, should engage constantly and on a long-term basis in judicial dialogue, especially when common legal problems are at stake, as is often the case with human rights issues. This implies cooperation and solidarity among those courts and other stakeholders, counteracting the perception that there is a supranational government of judges emerging in the international legal order, in competition with national tribunals and undermining the sovereignty of states.

Nevertheless, there remains the challenge of disseminating the jurisprudential achievements and case law of international bodies in national legal orders, which is the primary responsibility of state authorities. Formal or informal meetings, exchanges and any other kinds of regular

[73] EU Petersmann, '"Constitutional Justice" Requires Judicial Cooperation and "Comity" in the Protection of "Rule of Law"' in F Fontanelli, G Martinico and P Carrozza (eds), *Shaping Rule of Law through Dialogue* (Europa Law 2010).

[74] S Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 (4) EJIL 749; H Keller and AS Sweet (eds), *A Europe of Rights: The Impact of the ECtHR on National Legal Systems* (Oxford University Press 2008).

interactions and relations that can be developed both between international and national judges could constitute an essential lever to the implementation of a multi-dimensional network spreading information about improvements, challenges and difficulties faced in human rights case law. Undoubtedly, judicial dialogue is a catalyst for strengthening the international judiciary in a globalised world marked by an ever-growing receptivity to external sources. Indeed, just as international bodies refer to one another, they also tend to incorporate references to national tribunals whose case law is relevant to a particular legal matter. National tribunals themselves tend to incorporate domestic norms, international treaties binding on their state, decisions and judgments from national or international jurisdictions and other non-judicial bodies in their interpretation processes. In parallel, many constitutional courts have taken to normative borrowings as a common practice in the process of applying and interpreting national constitutions.[75] This acknowledgement of their relevance shows an intensification of judicial dialogue at a multi-dimensional level, both horizontal and vertical, but always spontaneous, without any notion of hierarchy, the initiative of engaging in such dialogue and the implications to be drawn being at the discretion of the interpreters participating in such extraterritorial governance.

It is also important to note the role of national judges in defining, applying and taking into account customary international human rights law in domestic court decisions. The protection of human rights is left primarily to national state authorities and judges, with international tribunals intervening only after domestic remedies have been exhausted. Even in states where there is a dualist system of incorporating international law, it has been highlighted that customary international law is immediately applicable without any need of further proceedings or measures,[76] while ratified treaties require a specific law of implementation to enter into force in the national legal system.[77] Moreover, customary human rights rules are not only customary but also generally belong to *jus cogens* and give rise to *erga omnes* obligations.[78]

[75] T Groppi and MC Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges* (Hart 2013).

[76] PH Verdier and M Versteeg, 'International Law in National Legal Systems: An Empirical Investigation' (2015) 109 AJIL 528.

[77] *Nevsun Resources Ltd v Araya*, Supreme Court of Canada, 2020 SCC 5 [82]–[90]. See also *R. v Hape*, Supreme Court of Canada, 2007 SCC 26 [39].

[78] *Barcelona Traction, Light and Power Company Limited (New Application: 1962) (Belgium v Spain)* [1970] ICJ Rep 3 [33]–[34].

4 Concluding Remarks

The practice of judicial dialogue through references to external instruments and the case law of other courts reflects the existence of common standards that transcend the differences and independence between legal systems and emerge as a determining factor in the interpretation and application of rules shared by multiple treaties protecting human rights. Therefore, the eventuality of common standards and norms of references that could be identified in decisions or legal instruments coming under the jurisdiction of other international bodies results in a de facto expansion of possibilities offered to the power of interpretation. Consequently, judicial power attributed to a particular body is strengthened in its relations and interactions with other judicial powers in a mutual process of self-regulation embodied in the practice of judicial dialogue. Indeed, reference to the practice and achievements of other legal systems not only extends the margin of appreciation of the interpreter but also narrows it. Spontaneously, the interpreter will refer to other decisions and instruments that could limit their interpretive possibilities by showing a different state of law, a lack of consensus, or the existence of a strong alternative common interpretation regarding the legal matter at issue. The practice of judicial dialogue belongs within the multiplication of international tribunals and courts linked to the jurisdictionalisation of international human rights law. Far from resulting in a government of judges, it improves extraterritorial governance by a slow but constant movement towards harmonisation through openness to external sources when engaging in interpretation. This practice acquires legitimacy through the sovereign will of states that initially chose to create judicial bodies in the international legal order and to accept their jurisdiction and the margin of appreciation inherent in it.

If mutual inspiration and normative borrowings between international bodies protecting human rights do not always lead to more protective interpretations of human rights, legal precedents could be used as a bulwark against fragmentation by contributing to the realisation of a 'global community of courts'[79] through cross-referencing of legal norms and decisions. Indeed, the international legal system can be seen

[79] AM Slaughter, 'A Global Community of Courts' (2003) 44 HILJ 191; AM Slaughter, 'Building Global Democracy' (2000) 1 CJIL 223; AM Slaughter, 'Judicial Globalization' (2000) 40 VJIL 1103; AM Slaughter, 'A Typology of Transjudicial Communication' (1994) 29(1) URLR 99.

'as a collection of communities of practice',[80] each area of international law being embodied in a 'community of practice' sharing its own conventions, leading principles and rules concerning argumentation and authority. In the field of the protection of human rights, the universal system and the regional systems each represent one 'community of practice', co-existing but exercising different jurisdiction and having various functions, while still having a common object and purpose – namely, the protection of human dignity and integrity in accordance with the principle of universality. Indeed, as stated in the ICJ's famous obiter dictum in the *Barcelona Traction* case:[81]

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.[82]

Any judicial body interpreting human rights related to its jurisdiction, stands to gain from the global perspective of international law by integrating external sources in its margin of appreciation. Risks and issues arising from the fragmentation of international law were highlighted by Judge Gilbert Guillaume in his address to the General Assembly of the United Nations on 26 October 2000, in which he emphasised that establishing '[a] dialogue among judicial bodies is crucial'.[83] Fragmentation was also discussed thoroughly in the final report of the

[80] HG Cohen, 'International Precedent and the Practice of International Law' in MA Helfand (ed), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge University Press 2015) 185–86.

[81] *Barcelona Traction, Light and Power Company Limited* (n 78).

[82] ibid [33]–[34].

[83] 'Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly, 26 October 2000, 5 <www.icj-cij.org/public/files/press-releases/9/2999.pdf> accessed 11 May 2024.

study group of the ILC, adopted on 13 April 2006.[84] Discussions and conclusions emphasised the multiplication of international jurisdictions and positive legal rules in this decentralised order, seen as a threat to the unity and coherence of international law. During recent years, however, the development of judicial dialogue between international bodies protecting human rights has shown that in spite of their independence and the absence of a hierarchical principle of organisation, the power of interpretation that might lead to divergent jurisprudential achievements tends to self-regulate. Even though external references are not included systematically in all decisions and judgments of international courts and tribunals, they tend to be mentioned in important judgments and decisions, notably when common legal issues of great importance are at stake or when cross-cutting rules appear to be part of CIL. Spontaneous normative borrowings seem to extend the margin of appreciation and interpretative authority of any international court, for, in referring to instruments and decisions that are not initially part of its system, it goes beyond the limits set by the instrument defining its jurisdiction, functions and powers. However, the taking account of similar case law when ruling on analogous legal issues in human rights matters opens the way to common solutions reflecting normative convergence. This all contributes to the process of harmonisation in the application and interpretation of human rights instruments and identification of rules that have become part of customary international law. Moreover, because judicial dialogue is not a binding obligation, a particular body's openness to external sources illustrates a search for and willingness to embrace the implicit perspective of universal justice in reflection of the universality characterising fundamental human rights notwithstanding differences of culture, tradition and legal practice.[85]

[84] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682.

[85] Frydman (n 4) 157.