Journal of International Dispute Settlement, Vol. 2, No. 1 (2011), pp. 5–23
doi:10.1093/jnlids/idq025

The Use of Precedent by International Judges and Arbitrators†

GILBERT GUILLAUME*

In national legal systems, precedent constitutes the starting-point of judges' reasoning. Most of the time, judges hew closely to precedent for purposes of legal certainty and for fear that their decisions might be challenged before higher instances. This practice translates into the stare decisis rule in Common Law, and into the concept of jurisprudence constante in Roman-German Law. In international law, the stare decisis rule has been excluded since 1922, but permanent jurisdictions constantly refer to their previous decisions. Nonetheless, the former are still led to reassess their jurisprudence by various methods in order to take into consideration the evolutions of the law and of international society. Regional jurisdictions are more inclined to do so than global ones. As for arbitral tribunals, they have recourse to legal precedents in a very variable manner according to the area: interstate relationships, international trade, investment or sport. Furthermore, the increase in the number of courts and arbitral institutions introduces the question whether precedents from one dispute settlement institution are relevant to others. The question arises when two courts or tribunals apply the same national law or treaty and when they apply general international law. The challenge is to navigate between two risks: that of jurisprudential incoherence and that of government by judges. Legal precedent in international dispute settlement is neither to be worshipped nor ignored.

1. *Introduction*

The primary function of the national judge or arbitrator, like the international judge or arbitrator, is to adjudicate disputes. He rarely rules *ex aequo et bono*, and most often decides on the basis of the applicable law. In so doing, he interprets the legal rule he selects. However, the judge and the arbitrator are not machines that distribute judgments and awards. They enjoy a certain freedom in the exercise of their duties.

* Member of the Institut de Droit International, Former President of the International Court of Justice. Email: g.ma.guillaume@orange.fr.

† Text from a lecture delivered at The Graduate Institute of International and Development Studies, Geneva (Lalive Lecture, June 2, 2010). Translation by Brian McGarry, Student at the Geneva Master in International Dispute Settlement, 2010–11 class.

This freedom, however, cannot become a license. If judicial decisions are never fully predictable, they should never be arbitrary. Any system of law requires a minimum of certainty, and any dispute settlement system a minimum of foreseeability. Furthermore, these systems assume that persons in comparable situations are treated as comparable. Precedent plays an irreplaceable role in this respect. For the parties it is the guarantor of certainty and equality of treatment.

Yet to constantly follow precedent also freezes the law, and prevents it from progressing according to new demands of society. A balance must be found for the judge and arbitrator between the necessary certainty and the necessary evolution of the law.

In this respect, national law lays out the rules that are most often designed to uphold the security level of subordinate courts and to leave jurisprudential developments in the care of the highest courts. However, they seek to achieve this result by different routes.

We know that the English *Common Law* follows the rule of *stare decisis*, or more precisely, the rule of *stare rationibus decisis*: that courts are bound by the reasoning of the judgments already rendered. These judgments create the law, and that law must be respected.

Such a radical solution will obviously require accommodations. On the one hand, litigants and judges tirelessly seek to distinguish the cases they are dealing with from the precedents invoked. This is an exercise in which the Anglo-Saxon lawyers engage with delectation. On the other hand, the House of Lords, in a well known *practice statement* of 1966, recalled that it considered its earlier decisions 'as normally binding', but reserved its right 'to depart from a previous decision when it appears right to do so'.[1]

The situation is in principle very different in civil law countries, where the judge occupies a different role. In principle, the judge does not create law. For example, in France, Article 5 of the Civil Code forbids judges to proceed by way of *arrêt de règlement*, that is to establish a general rule in a specific proceeding.

The courts nevertheless inspire themselves in each case by solutions offered in previous instances. This is particularly true in case of *jurisprudence constante* or *ständige Rechtsprechung*. To ensure this, jurisprudence obviously needs a sufficient degree of clarity, continuity and permanence. However, some judgments on questions of principle rendered by high courts can quickly acquire such authority, while others will find it harder to obtain. This concept is clearly more flexible than the rule of *stare decisis*.

In the end, in all national laws, precedent is the starting point of judges' reflection. They hold on to it mostly for the sake of legal certainty, for fear of being censored by higher courts or even for intellectual laziness.

[1] Lord Denning, The Discipline of Law, 296 (1979).

What about international law?

For a long time, reflection on this issue has remained very incomplete. In 1967, Sir Robert Jennings could still note that 'Very little has-been done to elaborate principles governing the use of precedent in international law'.[2] This observation targeted the International Court of Justice and interstate arbitration tribunals. Yet it was true *a fortiori* with respect to international commercial arbitration, where the confidentiality of decisions was the rule.

The situation today is quite different because of the proliferation of international courts and the increasing institutionalization of arbitration. Globally, the International Court of Justice has found new life. Then came the International Tribunal for the Law of the Sea, international criminal courts, the Appellate Body of the World Trade Organization and many international administrative tribunals. At the regional level, the European Court of Justice and the European, Inter-American and African Human Rights Courts were created. The traditional forms of arbitration prospered, but new forms have emerged, with the Iran-US Claims Tribunal, the Court of Arbitration for Sport and the International Centre for Settlement of Investment Disputes (ICSID).

This development has led to increased attention to the issue of precedent in both public and private international law. It became obvious that, in these areas, the use of precedent poses two problems:

- as in domestic law, we must consider the methods followed by each of the judicial and arbitration bodies in the use of its own precedents; and
- further, due to the proliferation of autonomous jurisdictions, it is also necessary to investigate the extent to which each court or tribunal makes use of the precedent that other courts or tribunals create. A similar problem arises for arbitration institutions.

In the first case, the legal certainty in a given field is in question. In the second, it is the coherence of international law in its entirety.

2. *Each Jurisdiction's Use of its Own Legal Precedent*

A. *International courts*

Historically, the issue of precedent in international law was carefully considered for the first time at the time of the creation of the Permanent Court of Arbitration in the Hague Conventions of 1899 and 1907. The drafters of these agreements were certainly aware that the Court they had created was a court

[2] Robert Jennings, 'General Course on Principles of International Law, Academy of International Law' (1967) 121 Recueil des cours 2, 342.

in name only, and was not permanent. But they hoped, in the words of Louis Renault, that 'when a controversial issue has been settled in the same way by several arbitration tribunals, the chosen solution will enter the body of international law'.[3]

These hopes were disappointed in the years that followed and, as Hersch Lauterpacht observed shortly thereafter, 'the necessity of providing for a tribunal developing international law by its own decisions had been the starting point for the attempts to establish a truly permanent international court as distinguished from the Permanent Court of Arbitration'.[4]

In this perspective, questions necessarily arose as to the value of precedent. The drafters of the Statute of the Permanent Court of International Justice did not intend to give this Court authority to create law, and on this point the British experts were in agreement with the continental experts. Indeed, before the advisory committee of jurists responsible for the preparation of the statute, Lapradelle declared it would be useful to specify that 'the Court cannot act as legislator' and Lord Phillimore added that 'judicial decisions state, but do not create law'.[5]

The text of Article 38 of the Statute adopted by the Committee reflected these concerns. It provided in paragraphs *(a)* to *(c)* that the Court applies international conventions, international custom and general principles of law recognized by civilized nations. Then it specifies, in paragraph (*d*), that judicial decisions and teachings of the most qualified publicists are only a 'subsidiary means for the determination of rules of law.'

However, these precautions seemed insufficient to Balfour and Leon Bourgeois,[6] and the Council of the League of Nations added Article 59 to the text, whereby 'The decision of the Court has no binding force except between the parties and in respect of that particular case.' Furthermore, the Council amended Article 38 *(d)*, which now enabled the Court to refer only to judicial decisions 'subject to the provisions of Article 59'.[7]

Nevertheless, during the debates in the Assembly of the League of Nations, an Argentine amendment to prevent the Court's decisions from acquiring the authority of judicial precedent was rejected.[8]

Thus, according to the 1922 Statute, reproduced on that point in 1945, sources of international law explicitly exclude judicial decisions. At best, they can play an 'auxiliary' and 'indirect' role in the determination of the rule of

[3] Albert Lapradelle and Nicolas Politis, *Recueil des arbitrages internationaux (1798–1855)*, preface by Louis Renault, vii.

[4] Hersch Lauterpacht, 'The So-called Anglo-American and Continental Schools of Though in International Law', British Yearbook of International Law (1931) 59.

[5] Permanent Court of International Justice Advisory Committee of Jurists, Procès-verbaux of the proceedings of the Committee, June 16th – July 24th, 1920, with Annexes (1920), 584.

[6] Ibid 592–93, 745–46, 754.

[7] Ibid.

[8] Ibid 94.

law.[9] In developing its jurisprudence, the Court may refer to its precedent, but it has no binding character. The rule of *stare decisis* is ruled out.

The Permanent Court of International Justice, like the International Court of Justice, has over the last century developed a jurisprudence according to the rule thus stated.

The Court first repeatedly confirmed that it was not the role of the Court to create the law. Thus, in the *Fisheries* case, it clarified in 1973 that 'as a court of law, [it] cannot render judgment *sub specie legis ferendae* or anticipate the law before the legislator has laid it down'.[10] Similarly, in the 1996 advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court refused to replace a failing legislator, and consequently decided that, in view of the state of international law, it could not rule on the legality of the threat or use of nuclear weapons in 'an extreme circumstance of self-defence, in which the very survival of a State would be at stake'.[11] On numerous occasions, members of the Court in various statements or opinions have also recalled that 'that it is not the role of the judge to take the place of the legislator... [It] must limit itself to recording the state of the law without being able to substitute its assessment for the will of sovereign States.'[12]

The Court nevertheless takes full account of its previous decisions in its judgments.[13] From the outset, the Permanent Court had indeed recalled in 1926 that 'the object of [Article 59 of the Statute] is (...) to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes'.[14] This jurisprudence was taken up by the International Court of Justice, and it has solemnly confirmed it has no obligation to follow its precedent.[15]

Yet the Court refers to itself frequently to ensure 'consistency of jurisprudence'.[16] It sometimes does this by simply insisting on its 'settled

[9] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (vol I, 9th edn) 41, s 13.

[10] *Fisheries Jurisdiction (United Kingdom v Iceland)* (Merits) (Judgment) [1974] ICJ Rep 23–24, s 53.

[11] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 266, s 105(2)(E).

[12] See eg the opinions and statements of Judges Weiss (*The Case of the S.S. 'Lotus'*, Publications of the Permanent Court of International Justice, Collection of Judgments, Series A, No 10, 43 (7 September 1927), S Krylov (*Reparations for injuries suffered in the service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 219), Read (*Interpretation of Peace Treaties (second phase)* (Advisory Opinion) [1950] ICJ Rep 221, 244) and Gilbert Guillaume (separate opinion from which this quotation derives) (*Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 293).

[13] For a thorough analysis, see Mohamed Shahabuddeen, *Precedent in the World Court: Hersch Lauterpacht Memorial Lectures* (1996).

[14] *Case concerning certain German interests in Polish Upper Silesia (The Merits)* (Collection of Judgments) PCIJ Rep Series A No 7, 19 (25 May 1926); see also *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction)* PCIJ Rep Series A No 9, 20 (26 July 1927).

[15] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Application to Intervene, Judgment) [1984] ICJ Rep 3, 26, s 42.

[16] See the joint declaration of seven judges in the case of Kosovo. *Legality of Use of Force (Serbia and Montenegro v Portugal)* (Preliminary Objections, Judgment) [2004] ICJ Rep 1160, 1208.

jurisprudence' (*jurisprudence constante*)[17] and sometimes by mentioning judgments previously rendered.[18]

All these judgments, however, do not have the same value. There are first of all the extreme cases where the Court, adopting a decision, states that the solution does not create precedent.[19] Also, judgments or advisory opinions adopted as a full Court, unanimously or by a very large majority—as well as oft-cited decisions—naturally carry more weight than isolated judgments, adopted by Chambers, or decided by a narrow majority. Similarly, the reasons behind the operative paragraphs will weigh heavier than *obiter dicta* inserted to address one judge's concerns. However, it is difficult to generalize in this area. Everything is case by case, and the famous *obiter dicta* on *erga omnes* obligations—inserted in the *Barcelona Traction* judgment—have enjoyed a long posterity.[20]

In reality, the question that arises in each case to the Court is whether it should retain the solutions it previously adopted. This question arises when one party challenges these solutions, and sometimes when the Court considers that its jurisprudence must evolve. Two topical examples can be provided: one a confirmation of jurisprudence, the other a departure from precedent.

The first case was between Cameroon and Nigeria concerning the delimitation of their border. Nigeria had in 1965, accepted the compulsory jurisdiction of the Court by unilateral declaration, as stipulated in Article 36 section 2 of the Statute. In March 1994, Cameroon lodged such a declaration and, a few days later, filed an application before the Court. Nigeria opposed this application by objecting to the jurisdiction of the Court, arguing that Cameroon had acted prematurely, leaving Nigeria no opportunity to react—a breach of good faith and an abuse of law. Cameroon, in turn, opposed such objection by arguing from a decision rendered by the Court in similar circumstances in the 1957 case of the *Right of Passage over Indian Territory.* Nigeria then invoked Article 59 of the Statute, arguing that this decision could not be relied on against it, that in any event it was obsolete, and that, as a consequence, the objection that it had formulated should be maintained.

The Court first recalled the conclusion it had reached in 1957, somewhat expanding upon it. It then pointed out that, contrary to the contention of Nigeria, the ruling in the case of the right of passage was not an isolated judgment. It added: 'It is true that, in accordance with Article 59, the Court's

[17] *United States Diplomatic and Consular Staff in Tehran* (Judgment) [1980] ICJ Rep 3, 18, s 33 ; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73, 87, s 33.

[18] A solution very frequently adopted since the ruling in the case of the Mavrommatis concessions. *Case of the Readaptation of the Mavrommatis Jerusalem Concessions* (Collection of Judgments) [1927] PCIJ Rep Series A No 11, 18 (10 October 1927).

[19] *Panevezys-Saldutiskis Railway Case* PCIJ Rep Series E No 16, Sixteenth Report of the PCIJ Rep 190 (15 June 1939 to 31 December 1945); see also *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* (Judgment) [2007] ICJ Rep 659, 745, s 281.

[20] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, 32, s 33–34.

judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases'.[21]

Having considered at length the relevant arguments presented by Nigeria, the Court decided that the Court's previous solution should be maintained.

In contrast, the law of maritime delimitation, as fixed by the Court, has experienced such developments over the last 40 years that it is difficult not to see a departure from its jurisprudence.

We know two methods that have been recommended to produce such delimitations. Some looked to the 'equidistance method', pursuant to which the maritime boundary between States must follow the median line every point of which is equidistant from the nearest points on the coasts. Others have argued for the application of equitable principles or the search for equitable results.

In 1969, in the *North Sea Continental Shelf* case, the Court ruled for a delimitation of the continental shelf in accordance with the 'equitable principles, and taking account of all relevant circumstances,' including geological factors.[22] It had stepped away from the equidistance method. It again embraced such principles in 1982 for the delimitation of the same shelf between Tunisia and Libya,[23] then again in 1984 in the Gulf of Maine case,[24] but refusing to take account of too an uncertain geological situation. In this latter case, the Chamber of the Court specified that each was a *unicum* delimitation. The law appeared increasingly uncertain and even arbitrary.

The Court became aware of and progressively reversed its jurisprudence. In *Libya/Malta*,[25] it took the 1985 equidistance line as the starting point of the delimitation of the continental shelf, then moved it northwards, having regard to the equitable principles to be applied in the case, namely, the general configuration of the coasts and their different lengths. Then, in the case between Denmark and Norway regarding the maritime delimitation between Greenland and Jan Mayen,[26] it unified the law of maritime delimitation—whether the continental shelf, territorial sea or the exclusive economic zone—in holding that in all these cases it was necessary to first draw the line of equidistance, then adjust it to take account of relevant factors related mainly to

[21] *Land and Maritime Boundary between Cameroon and Nigeria (Preliminary Objections)* (Judgment) [1998] ICJ Rep 275, 290, s 21.
[22] *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep 3, 53, s 101.
[23] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18.
[24] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Judgment) [1984] ICJ Rep 299–300, s 112.
[25] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep 13.
[26] *Maritime Delimitation in the Area between Greenland and Jan Mayen* (Judgment) [1993] ICJ Rep 38.

the coastline. Finally, it generalized this solution in 2001 in *Bahrain/Qatar*,[27] and resumed it in the 2009 case of *Romania/Ukraine*.[28]

The solution adopted in 1969 was thus abandoned and the law of maritime delimitation was unified and specified. However, we observe that to do so, the Court did not explicitly reverse its jurisprudence. It proceeded by successive strokes without recognizing its original mistake.

This dual analysis clarifies a lesson: the International Court of Justice does not recognize any binding value to its own precedent. However, it takes it into great consideration. It is nonetheless prepared to reconsider jurisprudence on the request of the parties or *ex officio*. These reviews usually result in confirmation of earlier decisions, particularly in procedural matters. However, developments are not excluded, particularly with regard to substantive law, based on changes in the law and international society.

Turning now to other international jurisdictions, we arrive at similar legal conclusions. The courts have in fact no obligation to comply with precedent.[29] While they frequently refer to it,[30] they do not exclude deviations.[31] Two observations, however, must be presented.

The first concerns the courts whose decisions are subject to internal review mechanisms. In this case, the question arises whether the judgments after appeal to higher authority are not only mandatory in the case in question, but if, more generally, their rationales are binding upon chambers or courts subordinate to it. This issue was resolved in the affirmative by the Appeals Chamber of the Tribunals for the former Yugoslavia and Rwanda in *Aleksovski*.[32] It also seems to invoke a positive response to the judgments given by the Grand Chamber of the European Court of Human Rights, given the wording of Article 30 of the European Convention on Human Rights.[33] A negative answer seems to be called for in respect of the decisions of the Appellate Body of the WTO.[34] The situation, however, is uncertain for the

[27] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Merits)* (Judgment) [2001] ICJ Rep 40, 111, s 230.

[28] *Maritime Delimitation in the Black Sea (Romania v Ukraine)* (Judgment) [2009] ICJ Rep 61.

[29] Thus, for the International Tribunal for the Law of the Sea, art 196 of the Montego Bay Convention specifies that the decisions it makes have 'no binding force except between the parties and in respect of that particular case' (see art 59 of the Statute of the International Court of Justice).

[30] Art 21, s 2, of the Rome Statute of the International Criminal Court, specifies that '[t]he Court may apply principles and rules of law as interpreted in its previous decisions'.

[31] The Appellate Body of the WTO enunciated in its decision on US anti-dumping measures and designed stainless steel that '[a]bsent cogent reasons, an adjudicating body will resolve the same legal questions in the same way in subsequent cases.' WT/DS/344/AB/R (30 April 2008).

[32] Case No IT-95-14/1 *The Prosecutor v Zlatko Aleksovski* (Judgment in appeal) 24 March 2000, s 113.

[33] The Convention as amended provides in effect in art 30 that 'Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.'

[34] Hélène Ruiz Fabri, Le réglement des différends au sein de l'OMC, in "Souveraineté étatique et marchés internationaux à la fin du 20 ème siècle": Travaux du CREDIMI, Volume 20, p.304 – Litect – Lexis-Nexis.

International Criminal Court[35] and the European Court of Justice.[36] But of course, in all cases, subordinate organs are courteously invited and naturally inclined to respect the decisions rendered at a higher level.

Moreover, if the legal situation is the same for the courts of a global nature and those of regional character, the practice of these courts is very different. In both cases, precedent is often invoked. In the first, it is rarely abandoned.[37] In the second, evolutions or even outright changes in jurisprudence are more frequent.

The example of the European Court of Human Rights is revealing in this connection. Article 46 of the European Convention on Human Rights presents in a classic manner that 'the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.' In its 1990 *Cossy v United Kingdom* decision, the Court deduced, in a no less classic manner, that it 'is not bound by its previous judgments'. It then added that nonetheless 'it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law'.

However, immediately thereafter, the Court admitted the possibility for it to depart from the precedent in the Grand Chamber, which could 'be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions'.[38] Later, in the *Stafford v United Kingdom* decision, the Court went even further by revealing that 'it is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective... A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.'[39]

On this basis, in the past 10 years the European Court of Human Rights has several times explicitly declared that it was reversing its case-law, with the goal of either creating new rights (for example, for the benefit of prisoners,[40] minorities[41] and transsexuals)[42] or to abandon the rule of judicial economy[43] in order to more fully determine the rights of litigants.

[35] See cases reported by Gilbert Bitti in his study on art 21 of the Statute of the International Criminal Court in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2009).

[36] In a negative sense, see the Opinion of Advocate General Trstenjak in Case C-331/05 P *Internationaler Hilfsfonds v Commission* [2007] ECR I-05475 (18 January 2007) ss 85–87. For a more respectful approach to the judgments of the Court, see Case T-142/03 *Fost Plus v Commission* [2005] ECR II-589 (16 February 2005) s 80.

[37] Thus, in the case of a tax on alcoholic beverages, the Appellate Body of the World Trade Organization (WTO) decided in 1996 that 'the adopted panel reports are an important part of the acquired GATT', to take into account in the decisions intervening in the WTO (4 October 1996 at 1). This decision was confirmed in the *Shrimp* case (12 October 1998 at s 108). Likewise, the International Criminal Tribunal for the former Yugoslavia specified at numerous occasions on appeal that it saw no 'cogent' reason to depart from its precedent (see eg Case IT-96-21-A *The Prosecutor v Delalic et al.* [2001] (20 February 2001) at s 136).

[38] Case No 10843/84 *Cossey v United Kingdom* [1990] (27 September 1990) s 35.

[39] Case No 46295/99 *Stafford v United Kingdom* [200] (28 May 2002) s 67–68.

[40] Ibid s 70.

[41] *Chapman v United Kingdom* [2001] (18 January 2001) 33 EHRR 399.

[42] Case No 17488/90 *Goodwin v United Kingdom* [2002] (11 July 2002) s 74–75.

[43] Case No 30210/96 *Kudla v Poland* [2000] (26 October 2000) s 146.

This judicial policy is not without debate, which is evident both in opinions attached to judgments and in doctrine. The 'activists' of human rights call for a constant reassessment of precedent, while others (who are more prudent) stress the insecurity that would ensue, by maintaining, to use the words of President Wildhaber, that 'the existing case-law and the doctrine of precedent should be observed, except for compelling, serious and objective reasons.'[44]

For its part, the European Court of Justice did not hesitate to change its jurisprudence over time. To do this, it primarily employed the method of distinguishing between precedent invoked and cases examined. However, in certain cases it proceeded to truly and explicitly overrule precedent.[45]

To conclude, we see that all the international jurisdictions distance themselves in principle from the rule of *stare decisis*. We also see that they construct an entire jurisprudence based on their own precedent. But those global jurisdictions, concerned about legal certainty, only do this with prudence, while the European jurisdictions do not hesitate to overrule precedent—at times in disguise, other times in plain sight—in the name of goals that they intend to pursue.

B. *International Arbitration*

Of course, the situation is quite different in international arbitration. In fact, tribunals are normally constituted for each different arbitration, and thus lack the permanence that is characteristic of a jurisdiction. Furthermore, their decisions are of variable quality.[46] What is more, not all of their decisions are rendered public, and hence the tribunals do not have knowledge of all decisions previously rendered. Thus, for arbitrators, precedent plays a much lesser role than for judges. Legal coherence sometimes suffers as a consequence.

However, in certain sectors permanence and transparency are stronger than in others. Thus the portrait is more complex than one might be led to believe at first sight.

[44] Luzius Wildhaber, *Precedent in the European Court of Human Rights*, Studies in Memory of Rolv Ryssdal (Protecting Human Rights: The European Perspective), 1545 (2000).

[45] See eg Case C-10/89, I-3711 *CNL Sucal v Hag* [1990] ECR; Case C-267/91, 268/91, I-6097 *Criminal Proceedings v Keck and Mithouard* [1993] ECR; Case C-127/08, I-6241 *Metock et al v Minister for Justice, Equality and Law Reform* [2008] ECR s 14. On the whole of the question, see Laurent Coutron, 'Style des arrêts de la Cour de justice et normativité de la jurisprudence communautaire' (2009) Revue trimestrielle de droit europeen 45, 643–675.

[46] In this regard, the quality of the arguments and those of the arbiters are determinative (see the judicious observations of Jan Paulsson, 'The Role of Precedent in Investment Arbitration' in Katia Yannaca-Small (ed), *Arbitration under international investment agreements*, 710–11 (2010).

Interstate arbitration is most frequently entrusted to members of international tribunals (particularly from the International Court of Justice) or to academics who are familiar with these institutions. The decisions are always published. Thus, they are more frequently imprinted with jurisprudence from the International Court of Justice and arbitration tribunals on which they rely. They can at times distance themselves from this jurisprudence in an attempt to complete it or add nuances to it.[47] Yet they are essentially faithful to the precedent that they cite abundantly.[48]

At the opposite extreme of the spectrum are the arbitral awards rendered in commercial disputes between private companies. These decisions remain confidential in the vast majority of cases. Arbitrators settle specific contractual disputes in light of the parties' undertakings and the facts of the case. Due to this double reason, they often arbitrate without reference to arbitral jurisprudence.

A first example is, in this regard, topical. It concerns standard international construction contracts published by the International Federation of Consulting Engineers, better known as FIDIC contracts. Based on analyses conducted in 2006 by Gabrielle Kaufmann-Kohler[49] and in 2008 by Christopher Seppäla,[50] it was determined that about 100 decisions were more or less available out of 500 identified decisions. Of this 100, only six referred to previous decisions, and almost always to determine the application of the statute of limitations fixed by Article 67 of the FIDIC. Such data are weak and insignificant.

The data statistics improve only slightly in cases of commercial arbitration undertaken in an institutional framework. Only 12% of the decisions adopted under the auspices of the International Chamber of Commerce (ICC) are published (with a three-year delay). The percentage of decisions published is even weaker for the majority of other arbitration institutions, according to a recent study by Alexis Mourre.[51] Finally, secrecy remains the rule for *ad hoc* arbitration.

Furthermore, the result of the comprehensive study that Gabrielle Kaufmann-Kohler undertook is that only 15% of the decisions published by the ICC, that is about 30 decisions, refers to previous arbitral decisions. These references are most often on issues of jurisdiction or admissibility, or on the

[47] See eg the *Iron Rhine* arbitration (Decision of 24 May 2005 at s 59) in which the tribunal, interpreting the decision of the Court in the *Gabčikovo-Nagymaros* case, specified that '[w]hen the development presents a risk of significant harm to the environment, there must be an obligation to prevent, or at least mitigate this pollution' (see Virginie Barral, *'La sentence du Rhin de fer'* (2006) 110 RGDIP 647).

[48] See eg the arbitral Decision of 11 April 2006 delimiting the maritime border between Barbados and Trinidad and Tobago according to the jurisprudence of the International Court of Justice.

[49] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2006) Freshfields Lecture, (2007) 23 Arb Intl 357.

[50] Christopher Seppäla, 'The development of case law in construction disputes relating to FIDIC contracts' in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in international arbitration* (2008) 67.

[51] Alexis Mourre, 'Precedent and Confidentiality in International Commercial Arbitration: the case for the Publication of Arbitral Awards' in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in international arbitration* (2008) 39.

extent of the powers enjoyed by the arbitrators to adopt interim measures. References to precedent also appear for the determination of applicable law. Here, too, data is sparse.

This situation, however, is completely different in two sectors: sports and internet domain names. In fact, over the past few years, arbitrators of the Court of Arbitration for Sport systematically referred to decisions previously taken by their colleagues.[52] This is also true for the decisions of ICANN (Internet Corporation for Assigned Names and Numbers). In both cases, this is probably due to the concern of assuring equality of treatment between the numerous plaintiffs in disputes that treat similar issues.

There remains a particularly interesting case: that of disputes resolved within the framework of the International Centre for Settlement of Investment Disputes (ICSID). These disputes are submitted to arbitration tribunals composed under the Washington Convention, which created the Centre. They are constituted according to the provisions of this Convention and the Rules adopted for its application. A certain control is exercised over the awards by *ad hoc* committees constituted according to Article 52 of the Convention.

These provisions undoubtedly play a role in favour of a coherent jurisprudence founded on the use of precedent. Inversely, we must observe that the arbitration tribunals established within the framework of ICSID are constituted for each case and apply close to 3200 bilateral investment treaties (BITs) of varying texts. Furthermore, the *ad hoc* committees are, by definition, *ad hoc* and have only limited control over the decisions.

What is the true role precedent plays in ICSID? In this regard, we first recall that Article 53 of the Washington Convention states that 'The award shall be binding on the parties' and that the *stare decisis* rule is no more applied in ICSID than it is in other international jurisdictional instances.[53] The arbitration tribunals are nonetheless inclined to rely on precedent in order to evaluate their pertinence. They do this even today with rather excessive zeal.[54]

In the present state of the development of international investment law, is the result a coherent jurisprudence? The debate is open and, during a conference in Paris in 2007 by the International Arbitration Institute, divergent opinions were expressed in this regard.[55]

In reality, such jurisprudence has developed on certain points, but much is still to be done.

[52] (n 48) 365.

[53] See eg *El Paso Energy International vs Argentine Republic* (Decision on competence) (2006) ICSID case No ARB/03/15 27 April 2006 s 39.

[54] This is generally done without specifying the grounds. At the most, we can note that, in *Saipem v People's Republic of Bangladesh*, the tribunal declared that it 'believes that, subject to compelling grounds, it has the duty to adopt solutions established in a series of consistent cases'. See *Saipem* at s 67.

[55] Conference proceedings published in Emmanuel Gaillard and Yas Banifatemi (eds), *Precedent in International Arbitration* (2008) 97, 137, 149.

Thus, it is presently admitted that State consent to arbitration can be established from the very existence of bilateral investment treaties or of national laws, without there having been a signed *compromis* (which was not obvious in light of applicable texts).[56] It is also recognized that an investor may not have been treated in a 'fair and equitable' manner, even with the absence of bad faith on the part of the State in question.[57]

Furthermore, jurisprudence is advancing as to the exact content of the clause on fair and equitable treatment and of obligations of the State to compensate damages.

However, it remains hesitant on numerous questions, such as the relation between treaty and contract claims,[58] the weight of the umbrella clause,[59] the implications of the legitimate expectations of investors or the application of the most favoured nation clause to dispute settlement provisions.[60]

These divergences are, of course, regrettable. They become difficult to tolerate when identical issues, concerning the same State, are decided differently by different arbitration tribunals, as is presently the case regarding the existence of the state of necessity in Argentina in 2002 and the implications of this situation.[61]

Some have proposed to resolve this problem by transforming in fact or in law the *ad hoc* committees into appellate committees. However, this project has, in turn, created diverse problems.[62] It was abandoned, and we are currently reduced to depending on the wisdom of arbitrators or even their *esprit de corps*.

In conclusion, the arbitration tribunals presently reference precedent more frequently than in the past. But the demand of transparency and coherence is not the same in all domains, or for all actors. This demand is stronger in interstate relations than in commercial relations. Dispute settlement in the field

[56] For jurisdiction based on a domestic law, see *SPP v Egypt* (Decision on jurisdiction), 3 ICSID Rep 142/3, 14 April 1988. For jurisdiction based on a treaty, see *AAPL v Sri Lanka*, ICSID Case No ARB/87/3, Final award, 27 June 1990 (followed by many other decisions).

[57] *Mondev International Ltd. v United States of America*, ICSID Case No ARB/99/2, Award, 11 October 2002; *Tecmed v United Mexican States*, ICSID Case No ARB (AF)/00/2, Award, 29 May 2003 (with many other decisions following).

[58] The distinction goes back to the *ad hoc* committee decision of 3 July 2002, in *Vivendi v Argentine Republic*, ICSID Case No ARB/97/3. Since then, it has been interpreted several times and in different ways.

[59] See eg *Salini v Jordan* (Decision on jurisdiction), ICSID Case No ARB/02/13, 29 November 2004; *SGS v Islamic Republic of Pakistan* (Decision on jurisdiction), ICSID Case No ARB/01/13,, 6 August 2003; *SGS v Republic of the Philippines* (Decision on jurisdiction), ICSID Case No ARB/02/6, 29 Jan. 2004.

[60] On all these points, see presentations of James Crawford and Gabrielle Kaufmann-Kohler during the IAI conference referenced in n 54, above.

[61] See, *CMS Gas Transmission Co. v Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, s 324; *Enron v Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, s 307; *Sempra Energy International v Argentine Republic*, ICSID Case No ARB 02/16, Award, 28 September 2007, s 346; *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/09, Award, 5 September 2008. But in contrast see *LG&E Energy Corp. v Argentine Republic* (Decision on Liability), ICSID Case No ARB/02/1, 3 October 2006, s 339. In two cases, the question of the state of necessity in general international law was not discussed (*BG Group Plc v Argentine Republic*, Award, 24 December 2007; *National Grid Plc v Argentine Republic*, Award, 3 November 2008). For a general overview, see Theodore Christakis, 'Quel remède a l'éclatement de la jurisprudence CIRDI sur les investissements en Argentine? La décision du Comite ad hoc dans l'affaire CMS c. Argentine' 111 (2007) RGDIP 879.

[62] See, generally Karl Sauvant (ed), *Appeals mechanism in international investment disputes* (2008).

of investments, for its part, constitutes an intermediate case in which a certain progress is both possible and necessary.

3. *Each Jurisdiction's Use of External Precedent*

We can hope that such progress will be achieved in the years to come by all tribunals concerning the utilization of their own precedent. In such a case, there would remain the necessity to assure the coherence of the whole of the judgments and decisions rendered by the multiple existing judicial bodies. In fact, the proliferation of these bodies in the past decades poses a serious problem in this regard.

First, it increases the risk of overlapping jurisdictions and contradictory judgments. This was the case for interstate relations in the swordfish dispute between the European Union and Chile, which the former wished to bring before the International Tribunal for the Law of the Sea, and the latter before the World Trade Organization. It was also the case in the arbitration between Ireland and the United Kingdom concerning the Mox Plant where the International Tribunal for the Law of the Sea, an *ad hoc* tribunal and the European Court of Justice were involved.[63] We frequently see this in disputes over investment that could be submitted to either ICSID tribunals or to the dispute settlement bodies provided for in the contracts.

Yet this proliferation not only creates risks of contradictory decisions in specific cases, but also risks of contradictions of jurisprudence. Such inconsistencies can be the fruit of a stated desire to distance precedents that are estranged from the tribunal in question. Thus, in the *Tadic* case, the International Criminal Tribunal for the former Yugoslavia wished to oppose the International Court of Justice with regard to the issue of the law governing the responsibility of a State involved in a civil war within the territory of another State.[64] In certain branches of law, these divergences can also be the consequence of a growing specialization that judges and arbitrators are pursuing. Thus, in the *Loizidou* case, the European Court of Human Rights distanced itself from the jurisprudence of the International Court of Justice on reservations in the name of the specificity of human rights. Finally, the divergences can simply be the fruit of ignorance.

Whatever the origins, such difficulties appear, on the one hand, in particular areas of international law where the application by multiple tribunals is relevant, and on the other hand, in the application of general international law as a whole.

[63] *See* Yann Kerbrat, 'Le différend relatif à l'usine Mox de Sellafield (Irlande/Royaume-Uni): connexité des procédures et droit d'accès a l'information en matière environnementale' (2004) AFDI 607.

[64] International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, (Judgment) Case IT-94-1-A 15 July 1999 s 115. See also *Loizidou v Turkey* (Judgment on Merits) ECHR Rep 1996-VI (18 December 1996) s 56.

A. *The Use of External Precedent in a Particular Sector of International Law*

Numerous examples could be given of cases in which various judges and arbitrators have to apply the same law in a specific sector. In such cases, they of course have no obligation to follow the decisions adopted by other judges or arbitrators. But it seems to me that they must consider those decisions—either to follow or distinguish them—while justifying their choice. This is, however, not always the case.

To begin with, the International Court of Justice has exclusively cited its own judgments and advisory opinions for a long time. In the *Barcelona Traction* case, it even refused to refer to invoked arbitral decisions, noting that they could not 'give rise to generalization going beyond the special circumstances of each case'.[65] The Court then evolved. In 1953, it relied for the first time on the decisions rendered a century earlier on the *Alabama Claims*, which it credited with establishing the principle from which all tribunals have 'competence-competence'.[66] Then, in 1982, it referred to the decision rendered in 1977 on the delimitation of maritime boundaries between France and the United Kingdom in the Irish Sea, and partially employed the method followed by the arbitral tribunal.[67] In the last few years, these references have multiplied (for example, in the delimitation of borders in the Gulf of Fonseca,[68] between Bahrain and Qatar,[69] Malaysia and Indonesia[70] and Cameroon and Nigeria).[71] We may observe that all the decisions thus cited by the Court concern interstate disputes and that it has never made reference to decisions rendered in other sectors, such as commercial arbitration or investment arbitration.

Furthermore, with regard to the issue of the Srebrenica massacres, while the Court in the Bosnia case relied on the findings of facts made in the International Criminal Tribunal for the former Yugoslavia, it 'found itself unable to subscribe to the view expressed by the Tribunal' on the law of state responsability.[72] It always abstained itself from the smallest reference to the

[65] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 40 at s 63.

[66] *Nottebohm Case (Preliminary Objection)* (Judgment) [1953] ICJ Rep 111, 119 (18 November 1953); *Arbitral Award of 31 July 1989* (Judgment) [1991] ICJ Rep 53, 68 at s 46.

[67] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18, 57 at s 66, 79 at s 111.

[68] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras : Nicaragua intervening)* (Judgment) [1992] ICJ Rep 351, 591–92 at s 391.

[69] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Merits)* (Judgment) [2001] ICJ Rep 40, 70–71 at s 100, 117.

[70] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Judgment) [2002] ICJ Rep 625, 682 at s 135.

[71] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria : Equatorial Guinea intervening)* (Judgment) [2002] ICJ Rep 303, 414–15 at s 222.

[72] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) 26 February 2007 (for the facts, see s 297; for the law, see s 402–03).

rationales employed by the regional jurisdictions. In fact, the Court's policy of precedent essentially aims to assure a constructive dialogue with arbitration tribunals dealing with interstate disputes, primarily in border disputes. For their part, these tribunals are very attentive to the jurisprudence of the Court; by this method, coherence is satisfactorily assured in those matters.

In the sector of international criminal law, the first jurisprudence issued was delivered by the Appeals Chamber of the International Criminal Tribunals for the former Yugoslavia and Rwanda. It was later put into question whether criminal tribunals subsequently established must take into account this jurisprudence, or even follow it. This was the case for national tribunals with international components, and the Statute of the Special Court for Sierra Leone even obliged it to proceed in this manner.[73]

The precedents of *ad hoc* tribunals are constantly invoked before the International Criminal Court, but the Court has adopted a prudent attitude. On multiple occasions it utilized these precedents on substantive law, as it did with decisions of the International Court of Justice and the European Court of Human Rights.[74] However, it refused to do so in procedural matters, noting that its statute in this regard was quite different from that of the *ad hoc* tribunals, concerning both the situation of the victims and the roles of the prosecutor and judges. It seems to me that this jurisprudence illustrates rather well the importance, as well as the limits, of external precedent.

Human rights offers a third interesting example at the European level, in terms of the respective competences of the European Court of Human Rights and the European Court of Justice. The former, as we know, assures member States' respect of the European Convention on Human Rights. The latter assures the European Union's respect for the fundamental rights guaranteed by the Convention. The overlap of competence, at times contested and finally called into question by the Lisbon Treaty, has raised certain problems despite the care taken by each Court to consider the jurisprudence of the other. Difficulties have arisen recently, for example, with respect to the rules governing the fight against international terrorism or the status of real property in Northern Cyprus.[75] Here again, precedent was not ignored, yet each jurisdiction pursued its course according to the goals that the treaties assign to them.

In the sector of investment law, arbitration tribunals are also understood to rely on all existing precedent. Thus, in ICSID arbitration, *ad hoc* decisions

[73] Art 20.3 of the Statute of the Special Court for Sierra Leone thus reads: 'The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda'.

[74] See examples in William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010) 396.

[75] Jiri Malenovsky, 'L'enjeu délicat de l'éventuelle adhésion de l'Union européenne à la Convention européenne des droits de l'homme: de graves différences dans l'application du droit international, notamment général, par les juridictions de Luxembourg et Strasbourg' (2009) 113 RGDIP 754.

adopted pursuant to the UNCITRAL Rules, as well as rendered within the framework of Free Trade Agreements, such as NAFTA, are also frequently invoked. We see traces of these in the resulting decisions.

To conclude, it appears that a certain coherence is attained in interstate law due to the utilization of precedent, but that it is not always the case for other sectors. There it would seem that external precedent is sometimes ignored and sometimes used to reinforce a reasoning which was attained through other methods.

B. *The Use of External Precedent in General International Law*

With regard to general international law, we will first note that numerous statutes refer to it in one way or another.[76] Furthermore, we are struck by the noted desire to apply this law all around. Thus, in its first decision, the Appellate Body of the World Trade Organization specified that the General Agreement 'is not to be read in clinical isolation from public international law'.[77] Likewise, the European Court of Justice reiterated that 'European Community must respect international law in the exercise of its powers'.[78] The European Court of Human Rights also recently reiterated that in interpreting the European Convention on Human Rights 'it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties.'[79]

In practice, these affirmations of principle are reflected, by both judges and arbitrators, in numerous references to Articles 31 and 32 of the Vienna Convention on the Law of Treaties and to decisions of the International Court of Justice conferring a customary character to the disposition of these Articles. We also find a large number of judgments and arbitration decisions[80] that rely on precedent from the Permanent Court or of the International Court concerning the responsibility of States (for example, in referring to the *Chorzow Factory* case).[81] On these grounds, the jurisprudence seems coherent, at least in appearance.

However, precedents taken from general international law are sometimes invoked in an entirely different context: to enable certain tribunals to justify

[76] For the International Tribunal on the Law of the Sea, see eg arts 58, 74, 83, 295 and 304 of the Montego Bay Convention; for the Appellate Body of the WTO, see art 3.2 of the Memorandum of Understanding on the rules and procedures governing dispute settlements; for ICSID arbitration, see Article 42(1) of the Washington Convention.

[77] WTO Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline* (29 April 1996) WT/DS2/AB/R.

[78] Case C-286/90 *Poulsen and Diva Navigation* (ECJ 24 November 1992). For more information concerning the use of general international law by the European Court of Human Rights, see Marina Eudes, 'La pratique judiciaire interne de la Cour europeenne des droits de l'homme' (2005) 266 Annex V.

[79] *Demir and Baykara v Turkey* (Judgment) (Case 34503/93) ECHR 12 November 2008.

[80] See Franck Latty, 'Arbitrage transnational et droit international général' (2008) Annuaire francais de droit international 467.

[81] *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits* (Collection of Judgments) PCIJ Rep Series A No 17, 47 (13 September 1928).

solutions that could not easily be founded on the governing texts alone. Two examples in this regard are quite enlightening: provisional measures and *jus cogens*.

For a long time, it has been uncertain whether provisional measures indicated by the International Court of Justice are binding for the concerned States. By interpretation of Article 41 of its Statute, the Court in 2001 answered in the affirmative.[82] This decision provoked a jurisprudential evolution that also affected other jurisdictions that have sometimes employed the decision of the Court, while governing texts were quite different. This was the case, for example, for the European Court of Human Rights, whose statute does not even foresee the possibility of granting provisional measures. Some ICSID tribunals have also proclaimed the binding nature of provisional measures,[83] although Article 47 of the Washington Convention states they are simply a recommendation. These decisions do not rely on the applicable texts, but on external precedent or on principles derived from such precedent.

An analogous evolution can be noted in what concerns the existence in a given sector of peremptory norms of general international law, at times referred to as *jus cogens*. We know that, according to Article 53 of the Vienna Convention on the Law of Treaties, norms accepted and recognized as such by the international community of States as a whole must be considered as peremptory. These are conventional norms (or more frequently customary norms created by the practice and by the *opinio juris* of States), elevated to peremptory norms by way of the conditions fixed by the Vienna Convention.

The international community of States has been remarkably discreet in this regard, and it has been arbitrators and judges who have been called to promote this concept and to define its contents. The first decisions in this regard were taken by the arbitration tribunals in the *Aminoil v Kuwait* case[84] and in the *Guinea-Bissau v Senegal* case,[85] then by the Arbitration Commission for the peace conference in Yugoslavia.[86] Following this, the concept was adopted by the International Criminal Tribunal for the former Yugoslavia,[87] the European Court of Human Rights,[88] the Inter-American Court of Human Rights, the Tribunal of First Instance of the European Community[89] and,

[82] *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, 501 at s 98, 501–06.

[83] *Maffezini v Kingdom of Spain*, Request for Provisional Measures (Procedural Order No 2) 28 October 1999, s 9; *Pey Casado v Chile* (Procedural Order No 14) 25 September 2001, s 17–26; *Tokio Tokeles v Ukraine*, Decision on Jurisdiction (Procedural Order No 1) 1 July 2003, s 4; *Occidental Exploration and Production Company v Republic of Ecuador,* Decision on Provisional Measures, 17 August 2007, s 58.

[84] Decision of 24 March 1982, ILM 976 [JDI] 1982, 89.

[85] Decision of 31 July 1989, 94 RGDIP 1990, 234.

[86] Yugoslavia Arbitration Commission Opinion No 1, 2, RGDIP 1992, 265; Opinion No 10, RGDIP 1993, p 594.

[87] *Prosecutor v Furundzija* ICTY-95-17/1-T (10 December 1998) ss 147, 153; *Prosecutor v Jelisic* IT-95-10-T (14 December 14, 1999) s 60; *Prosecutor v Krstic* IT-98-33-T (2 August 2001) s 541.

[88] *Al-Adsani v United Kingdom* (App no 35763/97) ECHR 21 November 2001, s 61.

[89] Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities,* Judgment of the Court of First Instance (Second Chamber, extended composition) of 21 September 2005, s 283.

lastly, the International Court of Justice.[90] Yet it is interesting to note that from awards to judgments, arbitrators and judges have essentially always relied on the jurisdictional precedents that they enumerate, without even questioning the opinion of the States as to the peremptory nature, or even the customary nature of the applied norms. The recourse to precedent does not hide well the desire to ignore positive law and to promote natural law created by the conscience of judges.

At the end of two feasts during which only tongue had been served, prepared in various manners, Aesop made the following comment to his master Xantus: tongue is both the best and the worst of things. Arriving at the end of this presentation, I am afraid that I must arrive at the same conclusion in terms of precedent.

At the heart of each jurisdiction and each arbitration system, precedent is certainly a guarantee of certainty and equality in treatment of litigants. It is thus indispensable to rely on it in new branches of law where the norm is yet uncertain. Furthermore, it is an instrument that is privileged in dialogues by judges and arbitrators and can, to this effect, contribute to the organization of a decentralized jurisdictional system, such as the one existing in international law. For these two reasons, recourse to precedent is a necessity.

Yet there are good and bad precedents and the best are not always immediately adopted. The cult of the precedent is thus just as dangerous as the rejection of precedent. Distinctions impose themselves and it is often wise to accept only a *jurisprudence constante*.

Furthermore, always relying on precedent incurs the risk of freezing law in each jurisdiction. Evolutions, and more rarely overturning case law, must never be excluded.

Finally, and most importantly, one must not appeal to precedent in order to disregard the relevant texts and more generally the applicable law. It cannot be a governing instrument for judges: it is merely an auxiliary in the determination of the law, and judges and arbitrators ought to constantly remind themselves of the maxim by Justinian: '*Non exemplis, sed legibus iudicandum est*'.[91]

[90] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* Jurisdiction and Admissibility (Judgment) [2006] ICJ Rep, p 6, 31–32, s 64.

[91] Digest of Justinian, C 7.45.13.