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Domestic Courts as Agents of Development of the International Law of Jurisdiction

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Abstract
The role of domestic courts in the development of the international law of jurisdiction is less direct and less important than might be supposed. As a manifestation of the practice and *opinio juris* of the forum state, domestic judicial decisions take a back seat to legislation and, like legislation, represent the position of a single state alone. The more influential part that domestic judicial decisions and, indeed, proceedings can play in the evolution of the international rules on jurisdiction is as triggers both for reactive practice on the part of other states and for international litigation. Domestic decisions can also shape international law when looked to by foreign courts as persuasive judicial authority.

Key words
jurisdiction; domestic courts; judicial decisions; judicial proceedings; state practice; international litigation

1. Introduction

The casual observer might expect that domestic courts would play a significant role as agents of development of the international law of jurisdiction, given that the international rules on jurisdiction relate in large measure, indirectly or directly, to the extent of the authority to which a state may lay claim through its courts. The reality, however, is more complex.

For expressions or reflections of a state's belief as to the content of international jurisdictional rules, it is by and large to that state's legislature that one should look. While domestic courts doubtless have occasion to pronounce on the lawful jurisdiction of states, this is infrequent; and where the international rules in question are more than mundane, what the court has to say is not always reliable. As it is, in and of itself, a domestic judicial decision, like domestic legislation, reflects the view, in the final analysis, of a single state alone. In this light, the more significant role that domestic judicial decisions and, indeed, domestic judicial proceedings can play as regards the international law of jurisdiction is as triggers for reactive practice on the part of a greater array of states, practice which either clarifies and consolidates the existing law or catalyses its alteration. In a not dissimilar vein, domestic-court decisions and proceedings can trigger litigation in an international court, the

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judgment of which may serve to settle or further complicate contested points of the international law of jurisdiction. Finally, it may be, particularly in the common-law world, that the decisions of domestic courts are looked to not as mere state practice, like any other, on the part of the forum state but specifically as foreign judicial decisions, and decisions of persuasive authority, as to the existence or content of an international jurisdictional rule. In this last context, domestic judicial decisions have the potential to exert a greater influence than other forms of state practice on the development of the international law of jurisdiction.

The focus of this article will be on the international rules governing states' jurisdiction to prescribe and to adjudicate.

2. Domestic proceedings and decisions as practice by the forum state

The most obvious contributions that proceedings in and decisions[1] by domestic courts are capable of making to the development of international rules on jurisdiction stem from the formal quality of such proceedings and decisions as state practice and, at least potentially, the reflection or expression of a concomitant *opinio juris* on the part of the forum state in relation to any such rules.[2] This practice and *opinio juris* may pertain either to the existence and precise content of customary international rules on jurisdiction or to the correct interpretation of treaty provisions permitting or mandating specific assertions of jurisdiction by states parties.

There are three ways in which, as manifestations of practice and *opinio juris* on the part of the forum state, domestic-court proceedings and decisions may contribute to the development of international jurisdictional rules, by which is meant here international rules on jurisdiction to prescribe and to adjudicate. The first is precisely as manifestations of practice and *opinio juris* on the part of the forum state, which in and of itself may have an impact on the international rule in question. The second is as a trigger for practice and *opinio juris* on the part of other states in reaction to the assertion of jurisdiction by the forum state manifest in the proceedings or decision. The last is as a trigger for litigation before and eventual pronouncement by an international court.

2.1. Domestic decisions as practice of the forum state

The contribution made in and of themselves, in their formal quality as practice and *opinio juris* of the forum state, by proceedings in and decisions by domestic courts – or, in this context, just the latter – to the development of international rules on jurisdiction is in practice limited, although not negligible.

1 The term 'decision' is used throughout this article to refer not just to the court's bare ruling on the point at issue between the parties but also, where relevant, to its judgment in its entirety.

2 It may be worth emphasizing that the decisions of domestic courts are not judicial decisions within the meaning of Art. 38(1)(d) of the Statute of the International Court of Justice. The latter refers solely to decisions by international courts and tribunals.

2.1.1. Cases usually turning on domestic law alone

One reason why the decisions of domestic courts play no great role in and of themselves in the development of international rules on jurisdiction to prescribe and to adjudicate is that, even in cases implicating contested jurisdictional rules of international law, judicial determinations as to the ambit of domestic law and the jurisdiction of domestic courts are generally a straightforward function of the application of governing statute or domestic case law. Where they are not, it is still often the case that the courts prefer to base their rulings solely on domestic legal principles.[3] In short, domestic rulings as to the geographical and personal reach of regulation and to the procedural and substantive competence of the courts are referable mostly to domestic law alone. Few such judicial decisions turn on the permissibility or otherwise under public international law of the forum state's claim to prescriptive and/or adjudicative jurisdiction. Being largely immaterial, then, to domestic cases, the public international rules on jurisdiction to prescribe and to adjudicate go largely unmentioned in domestic judgments, particularly in legal traditions where an austere judicial economy is prized.

This domestic judicial silence, for the most part, on the international rules of jurisdiction to prescribe and to adjudicate is most obvious in criminal cases, given the widespread, perhaps universal, domestic legal requirement for legislation when creating crimes and specifying their ambit and/or vesting the courts with jurisdiction over them or when extending extraterritorially the ambit of, or the courts' jurisdiction over, existing crimes. Since it is uncommon for domestic courts to have the power to invalidate or otherwise disavow an unambiguous statutory competence by reference to international law, the international rules on jurisdiction are usually simply irrelevant in the domestic criminal context. In the civil context too, however, there is generally little cause to mention the rules of public international law on the permissibility of states' assertions of jurisdiction, either because the jurisdiction of the courts in relation to tort/delict, contract, and so on is equally specified in statute or because it is founded on settled judicially created doctrines. For example, the unrestricted jurisdiction *ratione loci* and *ratione personae* over actions in trespass to the person enjoyed by the courts of England and Wales and by the federal and state courts in the US once initiating process has successfully been served on the defendant – what might be referred to as the UK and US's respective assertions of universal civil jurisdiction – has nothing to do with what those courts, let alone what the UK or US governments think public international law permits the UK or the US to regulate by means of its tort law or to adjudicate by reference to the *lex loci delicti commissi*. It is simply a routine application of the common-law conflict-of-laws rule laid down as long ago as 1774 – without, it might be added, the slightest reference to

3 This has especially been the case in courts of the common-law tradition. In England and Wales – one of the three separate jurisdictions within the UK – alone, see *R v. Cox (Peter Stanley)* [1968] 1 WLR 88 (UK 1967); four of the five Law Lords in *R v. Treacy*, 55 ILR 110 (UK 1970); *Secretary of State for Trade v. Markus* [1976] AC 35 (UK 1975); three of the five Law Lords in *Director of Public Prosecutions v. Stonehouse*, 73 ILR 252 (UK 1977); *R v. Smith (Wallace Duncan) (No. 4)* [2004] QB 1418 (UK 2004); *R v. Sheppard* [2010] 1 WLR 2779, 2784–8, paras. 20–33 (UK 2010).

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the law of nations – by England's Court of King's Bench in *Mostyn* v. *Fabrigas*.[4] The same could be said, conversely and *mutatis mutandis*, of the mundane application of any of the settled, self-denying domestic conflict-of-laws rules by which the civil courts of most states hold themselves to lack jurisdiction over specified proceedings. The public international rules on states' jurisdiction have nothing to do with it, and usually do not figure in the courts' judgments.

But there are exceptions. Domestic courts sometimes do pronounce on international jurisdictional rules.

First, it may be that a domestic court, en route to a decision ultimately founded on domestic law alone and usually in response to an argument advanced by one of the parties, will point *obiter* to the enjoyment on the facts by the forum state,[5] or indeed to that state's lack,[6] of prescriptive jurisdiction under international law. Examples from the US federal courts include affirmations that passive personality constitutes a lawful basis under customary international law for criminal jurisdiction to prescribe[7] and statements as to the permissible scope of the protective principle.[8] While such dicta may carry less weight as state practice than a judgment's *ratio decidendi*, they are not worthless, and indeed may have an impact on the development of customary international rules on jurisdiction to prescribe or on the interpretation of jurisdictional treaty provisions. A prime example is the influential view expressed in the *Eichmann* case by the District Court of Jerusalem[9] and later by the Supreme Court of Israel[10] – gratuitously, given the clear statutory basis for the proceedings[11] – as to the universal character of the criminal jurisdiction enjoyed as a matter of international law over the accused by the state of Israel.

Second, the ambit of a legislative proscription may not be clear on its face, and the courts may be called on by the parties to determine it, choosing to do so in the event by reference to the legislating state's jurisdiction under international law.[12] A

4 (1774) 98 ER 1021. See also, even earlier, *Skinner v. East India Company*, 6 St. Tr. 710, 719 (1666).

5 In addition to the cases mentioned in the text, see e.g., *Director of Public Prosecutions v. Doot*, 57 ILR 117, 119 (Lord Wilberforce)(UK 1973); *Rosenstein v. Israel*, ILDC 159 (IL 2005), paras. 22–26 and 36; *XYZ v. Commonwealth of Australia*, ILDC 528 (AU 2006), para. 13 (Gleeson CJ) and para. 130 (Kirby J). A more unusual example – unusual in that the House of Lords eventually held that the English courts did not enjoy jurisdiction even though 'it [was] by no means certain that any rule of international law would be violated' – is *British South Africa Company v. Companhia de Moçambique* [1893] AC 602, 624–5 (Lord Herschell LC) (UK 1893).

6 See, e.g. *S v. Mharapara*, 84 ILR 1, 9–11 (Zimbabwe 1985); *Columa v. Magistrates of the Intermediate Court*, ILDC 1258 (MU 1998), para. 9.

7 See, e.g. *United States v. Benitez*, 741 F. 2d 1312, 1316 (11th Cir. 1984)(US); *United States v. Rezaq*, ILDC 1391 (US 1998), para. 36.

8 See, e.g. *Benitez*, *supra* note 7, 1316; *United States v. Bravo*, ILDC 1061 (US 2007), para. 17.

9 See *Attorney-General for Israel v. Eichmann*, 36 ILR 5, 26, para. 12 (Israel 1961).

10 See *Attorney-General for Israel v. Eichmann*, 36 ILR 5, 298–304, para. 12 (Israel 1962).

11 The accused's conduct was manifestly covered by Israel's Nazi and Nazi Collaborators (Punishment) Law 1950.

12 In an analogous vein, it may in rare instances be that the ambit of a common-law crime is uncertain or, less rarely, that a court is called on to determine an unsettled non-statutory point of conflict of laws. In such cases, some judges have in the past at least mentioned the public international rules on jurisdiction, even if their decisions have been based on domestic principles. See *Doot*, *supra* note 5, 119 (Lord Wilberforce); *Companhia de Moçambique* (*supra*, note 5), 624 (Lord Herschell LC); *Mharapara* (*supra*, note 6), 9–11; *Treacy*, *supra*, note 3, 127–8 and 130 (Lord Diplock).

leading example[13] is the US's antitrust legislation, in the form of the Sherman Act 1890[14] as supplemented by the Clayton Act 1914,[15] the indeterminate geographical reach of the penal[16] and effectively penal[17] provisions of which set the scene for the statement in 1945 by the US Court of Appeals for the Second Circuit in the *Alcoa* case that, as a matter of 'settled [international] law', 'any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends'[18] – on which basis the Court held the Act to apply to extraterritorial acts of foreign corporations and individuals which were intended to produce and did produce effects within the US.[19] Almost 60 years later, in the context of a challenge to the meaning of the word 'effect' in Section 3(1) of South Africa's Competition Act 1998, the South African Competition Appeal Court held that the rule of international law which 'permits states to exercise their jurisdiction to promulgate rules, whether it be legislation or administrative decrees, prohibiting conduct elsewhere having an "effect" within the state'[20] applied in respect of '"direct and foreseeable" substantial consequences within the regulating country'.[21] Four years after this, the uncertain territorial scope of Austria's Cartel Act 1988[22] gave occasion for the Austrian Supreme Court to rule that the application of domestic antitrust law to foreign undertakings operating abroad comported with international law only if the latters' activities had an 'immediate and direct' effect on competition within the domestic market.[23] Nor is it only in the antitrust context that the call for statutory construction has provided an opportunity for domestic courts to pronounce on international jurisdictional rules. For instance, a challenge to the meaning of the phrase 'afterwards found in the United States' in the provision of the US's Antihijacking Act 1974[24] under which the lower court claimed jurisdiction over the accused, who had been forcibly brought within US territory, offered a chance for the US Court of Appeals for the District of Columbia Circuit to hold in *Yunis (No. 3)* that the words 'present in the territory' in Article 4(2) of the Convention on the Suppression of the Unlawful Seizure of Aircraft,[25] which mandates the assertion of universal jurisdiction over hijackers, do not require that such presence be voluntary.[26]

13 See also e.g. *United States v. Reumayr*, ILDC 1050 (US 2008), para. 28; *United States v. Neil*, ILDC 1247 (US 2002), paras. 12 and 14; *R (Al-Skeini) v. Secretary of State for Defence*, 133 ILR 499, 716, para. 46 (Lord Rodger), ILDC 702 (UK 2007); *R (Smith) v. Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1, 93, para. 53 (Lord Phillips PSC) (UK 2010); *Scilingo Manzorro v. Spain*, ILDC 1430 (ES 2007), para. 7.

14 15 USC Sections 1–7.

15 15 USC Sections 12–27 and 29 USC Sections 52–53.

16 See 15 USC Sections 1, 2, 13a and 24, especially Sections 1 and 2.

17 See 15 USC Section 15.

18 *United States v. Aluminum Co. of America*, 148 F. 2d 416, 443 (2nd Cir.1945)(US).

19 For the practical consequences of the decision, see *infra* section 2.b.

20 *American Soda Ash Corporation and CHC Global (Pty) Ltd v. Competition Commission of South Africa*, ILDC 493 (ZA 2002), para. 17.

21 Ibid., para. 18.

22 Repealed by Federal Law Gazette I No. 61/2005.

23 *Re Erste Bank*, ILDC 1593 (AT 2006), para. 27.

24 Formerly 49 USC App. Section 1472(n), now 49 USC Section 46502(b)(2)(C).

25 1970 Hague Convention on the Suppression of the Unlawful Seizure of Aircraft, The Hague, 860 UNTS 105.

26 See *United States v. Yunis (No. 3)*, 88 ILR 176, 182, ILDC 1476 (US 2001). See also, albeit conflating Arts. 4(2) and 7 of the Convention, *Rezaq* (*supra*, note 7), para. 31.

Third, it may be that the scope of a domestic court's statutory competence is open to question and that the court is invited by one or other of the parties to decide the issue by reference, at least in part, to the forum state's jurisdiction under international law. By way of example, it was in the context of a challenge to the restrictions placed by two lower courts on the statutory grant to the Spanish courts of what was at that time a territorially and personally unlimited jurisdiction over genocide[27] that the Spanish Constitutional Court held in the *Guatemalan Generals* case that 'the concept of universal jurisdiction in contemporary international law is not predicated on links to the individual interests of states'[28] or on the suspect's presence in the territory of the forum state.[29]

Fourth, the governing legislative provision may be formulated so as to give a proscription an extraterritorial ambit or to grant the courts an extraterritorial competence over it where a treaty to which the forum state is party or customary international law so requires, in which case the court may be called on to decide whether the international legal condition is met in the instant proceedings. An example of such a provision is Section 6(9) of the German Criminal Code, which gives German criminal law an unrestricted territorial and personal ambit in relation to 'offences which on the basis of an international agreement binding on the Federal Republic of Germany must be prosecuted even though committed abroad'.[30] In upholding as punishable pursuant to Section 6(9)[31] of the Criminal Code and Articles 146 and 147 of the Fourth Geneva Convention[32] the killing by a Bosnian Serb of six Bosnian Muslim civilians during the war in Bosnia–Herzegovina,[33] the German Federal Supreme Court inferred in *Kusljić* that the grave-breaches provisions of the Geneva Conventions mandate the exercise of universal jurisdiction by the high contracting parties.[34] Similarly, Spain's Supreme Court held in *Jiménez Sánchez* v. *Gibson* that Article 23(4)(h) of that country's Organic Law on the Judiciary (Ley Orgánica del Poder Judicial), vesting competence in the Spanish courts over any crime other than those previously specified 'which, in accordance with international treaties and conventions, in particular conventions on international humanitarian law . . ., are required to be prosecuted in Spain', had the effect of granting the courts universal jurisdiction, in accordance with the Geneva Conventions, over

27 See Organic Law 6/1985, of 1 July 1985, on the Judiciary (Ley Orgánica del Poder Judicial), Art. 23(4)(a). Art. 23(4) has since been amended so as to condition the exercise of the court's jurisdiction on the suspect's presence in Spain, on the existence of Spanish victims, or on some other link with Spain.

28 *Menchú v. Two Guatemalan Government Officials*, ILDC 137 (ES 2005), para. 9, author's translation.

29 Ibid., para. 7.

30 Translation from http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGBengl_000P6. See also e.g. Criminal Code (Denmark), §8; Criminal Code (PRC), Art. 9; Criminal Code (Switzerland), Art. 6(1).

31 The substantive provision to which §6(9) gave its ambit was the provision on murder in the German Criminal Code. Murder as a grave breach of the Geneva Conventions is now punishable, on the basis of universal jurisdiction, pursuant to §§ 1 and 8(1) of Germany's Code of Crimes against International Law of 6 June 2002.

32 1949 Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 75 UNTS 287 ('Fourth Geneva Convention').

33 See *Bosnia–Herzegovina Genocide Case* (*Kusljić*), 131 ILR 274, 278, para. 4 (Germany 2001).

34 See also, delivered the same day, *Sokolović*, ILDC 564 (DE 2001), para. 4.

grave breaches of the Conventions and of Additional Protocol I.[35] Another example of the sort of provision in question is Article 12 *bis* of the Belgian Code of Criminal Procedure, which, in the words of the Belgian Court of Cassation, grants the Belgian courts competence over 'those crimes provided for in every treaty ratified by Belgium which contains an obligatory rule extending jurisdiction as a derogation from the principle of the territoriality of criminal law'.[36] Article 12 *bis* provided the context in which – purely *obiter*, and perhaps confusing the scope of a high contracting party's undertaking to search for suspects with the scope of its undertaking to 'bring such persons, regardless of their nationality, before its own courts'[37] – the Court of Cassation held, in *Re Sharon and Yaron*, that the grave-breaches provisions of the Geneva Conventions contained no such 'obligatory rule extending jurisdiction'.[38]

Fifth, it may be that the question of the forum state's jurisdiction under international law goes not to the adjudicative competence of the court but to some other domestic legal issue on which the court is perfectly free to rule. The ultimate question, for instance, in the Canadian Supreme Court case of *Hape* – which turned on whether the Canadian Charter of Rights and Freedoms applied extraterritorially, a question decided by extensive reference to the customary international rules on jurisdiction – was whether certain evidence collected abroad by Canadian police ought to have been excluded at trial by virtue of the Charter's prohibition on arbitrary search and seizure.[39]

Sixth, it may be that what is at issue is the conformity with international law of a jurisdiction claimed not by the forum state but by some other state. For instance, in proceedings for the judicial grant of assistance to proceedings in another state, whether by way of the production of evidence, extradition, or the recognition of a judgment, it may be that the governing law of the forum state provides the court with a measure of discretion whether or not to accede to a request and that this discretion is capable of being exercised by reference, at least in part, to the conformity of the foreign proceedings or judgment with the international rules on jurisdiction.[40] By way of example, a request from a US court for the production of evidence provided the occasion for Viscount Dilhorne's forthright assessment in the

35 See *Jiménez Sánchez v. Gibson*, ILDC 993 (ES 2006), para. 7. The Court cited specifically Arts. 146 and 147 of the Fourth Geneva Convention (*supra*, note 32), along with Art. 79 of 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), Geneva, 1125 UNTS 3. That the grave-breaches regime of the Geneva Conventions obliges the assertion of universal jurisdiction by the high contracting parties was affirmed, again in discussion of Art. 23(4)(h) of the Organic Law on the Judiciary, in *Scilingo* (*supra*, note 13), para. 7.

36 *Re Sharon and Yaron*, 127 ILR 110, 122–3, ILDC 5 (BE 2003).

37 1949 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 75 UNTS 31, Art. 49; 1949 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 75 UNTS 85, Art. 50; 1949 Convention Relative to the Treatment of Prisoners of War, Geneva, 75 UNTS 135, Art. 129; Fourth Geneva Convention, *supra* note 32, art. 146.

38 *Re Sharon and Yaron*, *supra* note 36, 123.

39 See *R v. Hape*, 143 ILR 140, ILDC 758 (CA 2007).

40 Such a discretion might be expected in legislation implementing the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, The Hague, 847 UNTS 231, Art. 12(b) of which permits a contracting state to refuse a letter of request if it 'considers that its sovereignty . . . would be prejudiced thereby'.

House of Lords case of *Rio Tinto Zinc Corporation* v. *Westinghouse Electric Corporation* that the US's assertion, on the basis of a permissive version of the 'effects' doctrine, of an expansive extraterritorial penal jurisdiction over foreign corporations and individuals in the field of antitrust law was 'not in accordance with international law'.[41] Not dissimilarly, a request from Israel for the extradition of a suspected accomplice to the 'Final Solution' saw the US Court of Appeals for the Sixth Circuit affirm the availability under international law of universal jurisdiction over genocide, crimes against humanity, and war crimes.[42]

Finally, the unquestioning giving of effect to a proscription's apparent ambit and the unquestioning exercise of an apparent judicial competence are not universal domestic patterns to begin with, at least at the highest appellate levels. The constitution or some other organic law of the forum state may authorize that state's constitutional or equivalent court to read down and perhaps even to declare invalid the prima facie scope of a proscription or judicial competence, and it may be that the court is called on by one of the parties, and has the express or implied authority, to exercise its mandate by reference to international law. So it was that, in declaring inadmissible a constitutional complaint relating to the lower courts' implementation of the prima facie unlimited territorial and personal ambit of the crime of genocide then embodied in Section 6(1) of the German Criminal Code,[43] a chamber of Germany's Constitutional Court held in *Jorgić* that Article VI of the Genocide Convention[44] did not prohibit states parties from exercising over the crime of genocide the universal jurisdiction recognized by customary international law.[45] In Australia, a High Court challenge to whether Section 9 of the War Crimes Act 1945, as amended by the War Crimes Amendment Act 1988, was a valid exercise of the power to legislate in respect of external affairs conferred on the federal parliament by Section 51(xxix) of the Australian constitution paved the way for Brennan and Toohey JJ's respective affirmations in *Polyukhovich* of the existence under customary international law of universal jurisdiction over war crimes,[46] the latter affirming the same with respect to crimes against humanity.[47] Not dissimilarly, an attempt to have Section 7(4.1) of the Canadian Criminal Code declared *ultra vires* the Canadian parliament saw Cullen J of the Supreme Court of British Columbia rule in *Klassen* on whether criminal jurisdiction on the basis of the nationality of the accused is recognized under international law.[48] Lastly, in the Netherlands, where Article 94 of the Constitution permits a court not to apply legislative prescriptions that conflict with multilateral treaty obligations binding on the Netherlands, a challenge to the compatibility of the unlimited territorial and personal ambit of the crime of piracy

41 *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] AC 547, 631 (UK 1977).
42 See *Demjanjuk v. Petrovsky*, 79 ILR 534, 543–6 (US 1985).
43 See now Germany's Code of Crimes against International Law, Sections 1 and 6. Section 6(1) of the Criminal Code has been repealed.
44 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 78 UNTS 277.
45 See *Jorgić*, 135 ILR 152, 166, para. 6(aa) (Germany 2000). See also ibid., para. 6(bb).
46 See *Polyukhovich v. Commonwealth of Australia*, 91 ILR 1, 39–41 (Brennan J, dissenting) and 119–20 (Toohey J) (Australia 1991).
47 See ibid., 119–20.
48 See *R v. Klassen*, ILDC 941 (CA 2008), especially paras 86, 94 and 101.

pursuant to Articles 4 and 381 of the Dutch Criminal Code resulted in the statement by the District Court of Rotterdam in the *Cygnus* case that Article 105 of UNCLOS[49] did not exclude the exercise of universal prescriptive jurisdiction over suspected pirates by a state other than the detaining state.[50]

But all these qualifications notwithstanding, domestic judicial statements as to the international rules on states' jurisdiction to prescribe and to adjudicate remain exceptional. Far more often than not it is to the legislature that one should look for evidence of the forum state's belief as to the existence and content of international jurisdictional rules.

2.1.2. International rules at issue usually well established

A further reason why domestic-court decisions, as practice and *opinio juris* of the forum state, play only a limited part in and of themselves in the development of international rules on jurisdiction to prescribe and to adjudicate is that, even where domestic courts have occasion to inquire into the existence and content of international jurisdictional rules, the rules at issue are often axiomatic, so that any judicial statement on point is a commonplace and as such of little international legal interest. Examples include the recent uncontroversial conclusions by the Australian,[51] Canadian,[52] and US[53] courts that international law permits a state to criminalize the extraterritorial acts of its nationals, as well as those by the UK[54] courts stating the same, *mutatis mutandis*, in relation to civil legislation; and the rulings by the Mauritian[55] and Italian[56] courts that prescriptive flag-state jurisdiction over ships on the high seas is, as a general rule, exclusive.

This said, various examples given above illustrate how more controversial heads of prescriptive jurisdiction under international law can form the subject of domestic judicial pronouncements.

2.1.3. Courts often wide of the mark

A third and more embarrassing explanation for the modest contribution *in se* by domestic-court decisions, in their quality as practice and *opinio juris* of the forum state, to international rules on jurisdiction is that, when it comes to international law, domestic courts not infrequently get it wrong, especially when assisted less than ably by the parties' counsel. This tends to happen more in dicta, often on points not in dispute between the parties (where one side may not even have made submissions as to the content of the international law of jurisdiction), than in the *ratio decidendi*. Examples in this context include the statements that offences related

49 1982 United Nations Convention on the Law of the Sea, Montego Bay, 1833 UNTS 3.
50 See *The 'Cygnus' Case (Somali Pirates)*, 145 ILR 491, 494 (Netherlands 2010).
51 See *XYZ*, *supra* note 5, paras. 13 (Gleeson CJ) and 130 (Kirby J).
52 See *Hape*, *supra* note 39, para. 60; *Klassen*, *supra* note 48, especially paras. 86, 94 and 101.
53 See *United States v. Clark*, ILDC 897 (US 2006), para. 21 and cases cited therein; *United States v. Plummer*, ILDC 315 (US 2000), para. 21 and cases cited therein.
54 See *Al-Skeini*, *supra* note 13, 716, para. 46 (Lord Rodger); *Smith*, *supra* note 13, 156, para. 238 (Lord Collins JSC).
55 See *Columa*, *supra* note 6, para. 9.
56 See *Kircaoglu and Sanara*, ILDC 1635 (IT 2010), para. 4.1.

to drug-trafficking[57] and to the sexual exploitation of children,[58] along with the crimes of hijacking and hostage-taking,[59] are subject to universal jurisdiction under customary international law and, conversely, that the grave-breaches provisions of the Geneva Conventions do not oblige states parties to assert extraterritorial prescriptive jurisdiction over such breaches;[60] the view expressed at least twice, in the context of criminal proceedings founded squarely on the nationality of the accused, that extraterritorial prescriptive jurisdiction on the basis of the accused's permanent residency in the forum state is a manifestation of nationality jurisdiction as recognized by international law;[61] the reaffirmation as late as 2010, and by reference to Article 19 of the Geneva Convention on the High Seas[62] and Article 97 of UNCLOS, of the long-discredited theory that a ship represents the 'floating territory' of the flag state;[63] the claim that the protective principle and passive personality constitute exceptions to the flag state's 'normally . . . exclusive' prescriptive jurisdiction over ships on the high seas;[64] the assertion that the 'territorial principle' permits 'extraterritorial jurisdiction' over offences having effects within the forum state;[65] the suggestion that, where two states enjoy concurrent criminal jurisdiction to prescribe, one on the basis of territoriality and the other on the basis of nationality, the former 'may have a legitimate claim of interference with its territorial sovereignty', since the latter's link to the impugned conduct 'is less real and substantial';[66] and the much-quoted solecism that 'each sovereign State should refrain from punishing persons for their conduct within the territory of another sovereign State, where that conduct has had no harmful consequences within the territory of the State which imposes the punishment'.[67] Whether less frequently or not, however, international legal solecisms have certainly also been known to underpin a domestic court's *ratio*. The wrong-headed reasoning in *Hape*, in which the Supreme Court of Canada characterized as an impermissible exercise of enforcement jurisdiction the extraterritorial application of Canadian law to Canadian state officials,[68] is a spectacular example.

This is not to say, of course, that every domestic judge is an international legal ignoramus. Many members of most domestic judiciaries have handled and continue

57 See *Doot*, *supra* note 5, 817 (Lord Wilberforce).
58 See *Klassen*, *supra* note 48, paras. 93–94 and 101.
59 See *United States v. Yunis (No. 2)*, 82 ILR 343, 348–9 (US 1988). The point was left undecided in *Yunis (No. 3)*, *supra* note 26, 181.
60 See *Re Sharon and Yaron*, *supra* note 36, 123.
61 See *XYZ*, *supra* note 5, para. 4 (Gleeson CJ); *Klassen* (*supra*, note 48), paras. 89–90, 94, 96 and 100.
62 1958 Convention on the High Seas, Geneva, 450 UNTS 11.
63 *Kircaoglu and Sanara*, *supra* note 56, para. 4.1, citing also the court's previous decision in Cass. 30.10.1969, *Matrino*. Quite apart from the elementary conflation of exclusive jurisdiction and territoriality, why the court referred in a case involving the smuggling of migrants to Art. 97 (on collisions and other incidents of navigation on the high seas) of UNCLOS, rather than to Art. 92 (exclusivity of flag-state jurisdiction on high seas), is anyone's guess.
64 See *United States v. Marino-Garcia*, ILDC 687 (US 1982), para. 8, including quote, and para. 9.
65 *Neil*, *supra* note 13, para. 11.
66 *Hape*, *supra* note 39, para. 63 (LeBel J), quoted verbatim in *Klassen*, *supra* note 48, para. 64.
67 *Treacy*, *supra* note 3, 130 (Lord Diplock). Although his Lordship founds his dictum on what he calls 'the international rules of comity' (ibid., 127; see also, similarly, ibid., 130, 'the rules of international comity'), it is tolerably clear from the surrounding passages that he is referring in this context – as is not always and perhaps not usually the case with references to comity – to the customary international rules on jurisdiction.
68 See *Hape*, *supra* note 39, especially 174–5, 182 and 185–6, paras. 84–85, 87, 105 and 115 (LeBel J).

to handle public international law with facility. But it can no more realistically be expected that all domestic judges, most of whose study and professional experience of public international law is somewhere between limited and non-existent, will be infallible with regard to international rules on jurisdiction than that all public international lawyers should have a deep and nuanced knowledge of their national law of intestacy. Perhaps even more to the point, the quality of a court's decision is largely dependent on the quality of the arguments and supporting material put before it, and it is not infrequently the case, especially in the vast majority of domestic jurisdictions where points of public international law are rarely pleaded, that counsel do the court no favours in this regard. All told, then, it simply stands to reason that the pronouncements of domestic courts on the international law of jurisdiction should regularly need to be read *cum grano salis*.

2.1.4. Each decision the practice of a single state alone

Finally, and most tellingly, in its quality as state practice and *opinio juris*, a decision of a domestic court represents, when all is said and done, the practice and *opinio juris* of only one state. In other words, even in the fortuitous combined event that a domestic court has occasion to pronounce on international rules of jurisdiction, that the rule in question is more than mundane, and that the court gets it right, all we gain from the pronouncement as such is evidence of the view of the forum state alone as to the content of the relevant international jurisdictional rule; and it is extremely rare for the courts of more than a few states to have occasion to pronounce, and to pronounce accurately, on the content of the same controversial international jurisdictional rule. It is true that, when it comes to their formal contribution to the development of rules of customary international law and to the ascertainment of the correct interpretation of multilateral treaty provisions, the decisions of the courts of 'specially affected' states will carry more weight.[69] But even so, they cannot dictate the content of the law. It is only through the identification of the practice and concomitant *opinio juris* of a sufficient number of sufficiently representative states that an accurate picture of the international rule at issue can be gleaned. Conveniently, however, decisions by domestic courts, and indeed all stages of domestic judicial proceedings, present an opportunity for precisely this exercise in identification, as shall now be seen.

2.2. Domestic proceedings and decisions as triggers for practice by other states

It is trite law that the reaction of one state to practice by another itself constitutes state practice, which, if accompanied by the requisite subjective belief, can inform the existence and content of customary international rules and the interpretation of provisions of a treaty. In this light, the more significant contribution that domestic-court decisions, in their formal quality as practice and *opinio juris* on the part of the forum state, are capable of making to the development of international rules on jurisdiction, whether customary or conventional, is as triggers for the manifestation

69 See *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment*, ICJ Rep. 1969, 3, 42–3, paras. 73–74.

by other states, via their respective executives or legislatures, of practice and *opinio juris* in relation to such rules.[70] Indeed, the mere initiation of proceedings can invite protest, long before any potential decision on the merits. It may be too, at least in civil proceedings in certain courts, that foreign states are permitted to register their opposition to the forum state's assertion of jurisdiction through the filing of *amicus curiae* briefs or intervention in the case.

Given the uncontroversiality of extraterritorial prescriptive jurisdiction on the basis of nationality, the exercise by a state, via its courts, of an allegedly exorbitant prescriptive jurisdiction will necessarily involve a foreign accused or defendant. As a result, there will always be a foreign state, and perhaps more than one, with an immediate vested interest in court proceedings founded on such a jurisdiction and with a potential claim in diplomatic protection. In addition, a far wider circle of states may have less immediate but equally real interests at stake in such proceedings.

It is true that the passage of legislation asserting a putatively exorbitant prescriptive jurisdiction can also provide, and earlier, an occasion for reaction by other states. Protest may well follow, and indeed precede,[71] the passage into law of a bill with internationally notorious jurisdictional implications, and may be sustained even in the absence of proceedings on the basis of the resultant law. But judicial proceedings are often the more visible expression of the prescribing state's claim to jurisdiction and, as such, can be more likely to bring that claim to other states' attention. In addition, judicial proceedings signal that the prescribing state intends to exercise a jurisdiction which might otherwise be merely on the books. It may be too that the exorbitant jurisdiction is coined judicially in the case in question, rather than being apparent on the face of the legislation.

As triggers for relevant practice and *opinio juris* on the part of other states,[72] domestic-court proceedings and decisions can play an important role, either clarificatory or catalytic, as regards international rules on jurisdiction. Two examples illustrate the point.

2.2.1. US antitrust law and the 'effects' doctrine

The long and bitter history of the US's assertion pursuant to its antitrust laws of both formally and effectively penal prescriptive jurisdiction over the extraterritorial conduct of non-US corporations and individuals provides a useful example of the role played by domestic-court proceedings and decisions as triggers for practice by other states.

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70 When it comes to reaction in the form of protest, it may be that states protest even when the domestic judicial decision is founded strictly on domestic law, both because what they are protesting is less the judicial decision than the underlying legislation of which it is an instantiation and because of the *Alabama Claims* principle, *viz* the basic tenet of the law of state responsibility according to which a state may not invoke the insufficiency of its domestic law as a justification for its breach of international law.

71 See e.g. the European Union démarches of 15 March 1995 and 5 March 1996, 35 ILM 397 (1996), prior to the passage on 12 March 1996 of the Cuban Liberty and Democratic Solidarity (Libertad) Act 1996 ('Helms-Burton Act'). See also the EC démarches in UKMIL (1992) 63 *BYIL* 725, 728 and 729 in relation to previous, similar bills.

72 It may be too that judicial proceedings provide an opportunity for the executive of the forum state to intervene in order to put forward its views on the relevant international jurisdictional rules. Consider e.g. *Rio Tinto*, *supra* note 47, 589 and 594.

The Sherman and Clayton Acts themselves – passed in 1890 and 1914 respectively to suppress various restrictive trade practices by means of penal sanctions (in proceedings brought by the US authorities) and punitive treble damages (in proceedings brought by private parties) – excited no international reaction until 1945, when, on the basis of a bald version of the 'effects' doctrine, the former, and as a result the latter, were given extraterritorial reach over foreign corporations in the *Alcoa* case,[73] which involved as defendants one Canadian and five European companies. The consequence of the decision was to expose to de jure and de facto punishment under US law the organization of cartels, done in its entirety abroad and lawful where done, by foreign corporations and individuals not engaged in commercial activity in the US as long as part of the intended effect, no matter how indirect or insubstantial, was experienced in the US market – in practice, as long as part of the intended effect was an increase in world prices 'which US consumers might have to pay'.[74] The judgment of the US Court of Appeals for the Second Circuit[75] precipitated protest from the defendant companies' states of nationality, as well as from the UK.

Adverse reaction became more assertive in the early 1960s, when a US court gave orders in antitrust proceedings for discovery against a range of foreign shipping interests in respect of commercial conduct outside the US.[76] Further protest followed,[77] serially, the institution in 1979 of a US grand jury investigation, pursuant to the same laws, into the setting of rates outside the US by various non-US shipping companies without the approval of the US Federal Maritime Commission, the grand jury's subsequent handing down of criminal indictments against the companies and several individuals, the imposition of US$ 6 million fines after pleas of no contest, and the subsequent filing of over 30 private claims for treble damages.

Matters came to a head with the *Westinghouse* case in the late 1970s and early 1980s, when private antitrust proceedings seeking treble damages were brought in the US against 12 foreign corporations in relation to their wholly extraterritorial commercial conduct. The initiation of the proceedings and the later intervention in the case by the US Department of Justice both triggered sharp reactions from Australia, Canada, South Africa, the UK, and the EEC, while the first four of these

73 See *United States v. Aluminum Co. of America* (*supra*, note 18).

74 A. V. Lowe, *International Law* (2007), 173.

75 The US Supreme Court was unable to hear the case, as too many of the justices were obliged to recuse themselves.

76 What was resented in this and similar cases was as much the arrogation by the US, through its courts, of an exorbitant jurisdiction to enforce as the exorbitant jurisdiction to prescribe on which the proceedings rested. The immediate upshot was the UK's Shipping Contracts and Commercial Documents Act 1964, Section 2(1)(b) of which provided for government-mandated non-compliance with orders from foreign courts for the production of commercial documents or information where the request 'would constitute an infringement of the jurisdiction which, under international law, belongs to the United Kingdom'. Analogous legislation was eventually passed in Australia, Canada, Denmark, France, the Netherlands and Switzerland. The Shipping Contracts and Commercial Documents Act was in time replaced by Section 2(2)(a) of the Protection of Trading Interests Act 1980 ('if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom').

77 See e.g. UKMIL (1979) 50 *BYIL* 352. The prosecutions in question were *United States v. Atlantic Container Line*, Crim. No. 79-00271 (DDC, filed 1 June 1979) and *United States v. Bates*, Crim. No. 79-00272 (DDC, filed 1 June 1979).

submitted *amicus curiae* briefs, both at first instance and on appeal, in which they opposed what they viewed as the exorbitant penal jurisdiction claimed by the US.[78] The default judgment given against nine non-appearing defendants[79] and its upholding by the US Court of Appeals for the Seventh Circuit[80] provoked the passage in several states of legislation to prohibit the enforcement of any such judgments.[81]

Finally, the suit brought under the Sherman Act[82] against London reinsurers in *California* v. *Merrett Underwriting Agency Management Limited*, the final appeal in respect of which was joined to *Hartford Fire Insurance Co.* v. *California*,[83] gave the governments of Canada and the UK the chance to submit *amicus* briefs to the US Supreme Court,[84] in which they opposed by reference to international law the extent of the extraterritorial reach of US antitrust legislation.[85]

In sum, a series of proceedings in the courts of a single state triggered a welter of consistent diplomatic and legislative practice on the part of many more states manifesting an unambiguous and uniform *opinio juris* opposed to the view of the international rule on jurisdiction posited or reflected in the proceedings, revealing thereby that this view did not accord with customary international law.[86]

2.2.2. The exercise of universal jurisdiction over African officials

The vociferous reaction of African states to certain exercises of competence by the criminal courts of France[87] and Spain[88] over Rwandans suspected of offences in Rwanda against Rwandans – what the Assembly of the African Union (AU) has

78 For excerpts from the UK's *amicus* brief, as well as from its *amicus* brief at first instance to the US District Court for the Northern District of Illinois (Eastern Division), see UKMIL (1979) 50 *BYIL* 352–7.

79 The default judgment was made final in *In re Uranium Antitrust Litigation; Westinghouse Electric Corporation v. Rio Algom Ltd and Others*, 473 F. Supp. 382 (ND Ill. 1979)(US).

80 See *In re Uranium Antitrust Litigation; Westinghouse Electric Corporation v. Rio Algom Ltd and Others*, 617 F. 2d 1248 (7th Cir. 1980)(US).

81 See Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 (Australia), subsequently replaced by the Foreign Proceedings (Excess of Jurisdiction) Act 1984 (Australia); Protection of Trading Interests Act 1980 (UK), *supra* note 76; Foreign Extraterritorial Measures Act 1985 (Canada).

82 Note that, although the passage of the Foreign Trade Antitrust Improvements Act (15 USC Section 6a, inserted by way of Pub. L. 97–290, title IV, Section 402, 8 October 1982, 96 Stat. 1246) had the effect of rendering inapplicable to conduct involving foreign trade or commerce, other than import trade or commerce, the penal provisions of Sections 1 and 2 of the Sherman Act unless such conduct has a 'direct, substantial and reasonably foreseeable effect' on domestic or import trade or commerce, it left untouched the provision for treble damages in private antitrust actions, *viz* 15 USC Section 15.

83 100 ILR 566 (US 1993).

84 In the event, in a statement not forming part of the ratio, the Supreme Court held, ibid., 585 (emphasis added), that 'the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some *substantial* effect in the United States'.

85 See UKMIL (1992) 63 *BYIL* 734–738.

86 This is not to say that all effects-based assertions of prescriptive penal jurisdiction over the extraterritorial conduct of foreigners are internationally unlawful. The effects doctrine appears to have attained international acceptance where the penalized conduct has, and was intended to have, a direct and substantial harmful effect in the territory of the prescribing state.

87 It is worth noting that, while the French law (*infra* note 90) under which the investigation was opened by Judge Jean-Louis Bruguière provides for universal jurisdiction, emphasis was placed on the fact that the crew members killed on board the aircraft allegedly brought down by the suspects were French – a fact which, as a matter of international law, conferred on France prescriptive and adjudicative jurisdiction under the passive personality principle.

88 See *Vallmajo i Sala v. Kabarebe*, Formal Indictment, ILDC 1198 (ES 2008).

called 'the abuse of universal jurisdiction'[89] – is another, albeit more complicated case in point.

The relevant French and Spanish legislation[90] asserting universal jurisdiction over certain international crimes had long been in force, and it was only when it formed the basis for the opening of criminal investigations in respect of certain Rwandans that it gave rise to protest and other condemnation, first from Rwanda itself and later, at Rwanda's initiative, from the 50-plus member states of the AU Assembly.[91] But the precise *opinio juris* attaching to African states' reactions to the specific domestic cases at issue – and, as a result, the effect such reactions have had and may yet have on the relevant international rules on jurisdiction – can accurately be gleaned only when these reactions are considered alongside the same states' reactions to like cases and other relevant reactive conduct by those states; and the fact is that neither Rwanda nor the AU has ever protested when the criminal courts of several European states have given effect to universal jurisdiction to try, for their roles in the 1994 genocide, Rwandans in no way linked to the current government (and, indeed, who are in effect its enemies). Moreover, and highly significantly, the AU Assembly has made clear throughout the controversy the collective belief of its member states that, as a matter of positive customary international law, states are permitted to exercise universal prescriptive jurisdiction over the customary international crimes of genocide, crimes against humanity, war crimes, and torture.[92]

What all of this tells us, contrary to first impressions, is that the diplomatic storm is not, in fact, over the existence or otherwise under customary international law of universal jurisdiction over these crimes but, rather, over the exercise of such jurisdiction in the particular circumstances of the cases the subject of protest – in other words, over foreign state officials, especially when they are not present in the territory of the forum state. That is, fuller study of the reactions by African states to relevant proceedings in European courts reveals that the apparent controversy over universal jurisdiction in respect of customary international crimes is really a controversy, first, over the availability to foreign state officials, as a procedural bar to prosecution for such crimes on the basis of universal (or indeed any other extraterritorial head of prescriptive) jurisdiction, of the jurisdictional immunities recognized by international law; and, second, and to a lesser extent, over

89 See AU Assembly Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, AU Doc. Decision Assembly/AU/Dec. 199(XI), 1 July 2008; AU Assembly Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, AU Doc. Decision Assembly/AU/Dec. 213(XII), 3 February 2009; AU Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, AU Doc. Decision Assembly/AU/Dec. 243(XIII) Rev.1, 3 July 2009 and all subsequent, identically entitled resolutions.

90 See Law No. 96-432 of 22 May 1996 (France) and Organic Law on the Judiciary, *supra* note 27, Art. 23(4).

91 Tanzania, on behalf of the AU, eventually took the issue to the UN General Assembly, opening up the international jurisdictional questions implicated by the French and Spanish proceedings to the views of all UN member states.

92 See e.g. AU Assembly Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, *supra* note 89, para. 3; 'The Scope and Application of the Principle of Universal Jurisdiction. Report of the Secretary-General', UN Doc. A/66/93, 20 June 2011, para. 158.

the initiation *in absentia* of proceedings for such crimes on the basis of universal jurisdiction.

In short, the opening of criminal investigations in two states on the basis of universal jurisdiction has flushed out relevant practice and *opinio juris* on the part of a large group of interested states from a geographical region different from that where the investigations have been opened – fertile ground for the ascertainment of a rule of customary international law in relation to universal jurisdiction; but what discerning analysis of the practice of this group of states tells us, contrary to appearances, is that universal jurisdiction as such is unobjectionable to this bloc.[93] In serving as triggers for African state practice on point and, with it, for the clarification of pertinent African *opinio juris*, the impugned domestic court proceedings have in fact helped to consolidate a customary international rule in favour, in principle, of states' universal prescriptive jurisdiction over customary international crimes.

2.3. Domestic proceedings and decisions as triggers for international decisions

The final role that domestic-court proceedings and decisions can play, in their formal quality as practice and *opinio juris* on the part of the forum state, in the development of international rules on jurisdiction is as triggers for international litigation leading to pronouncements by international courts which serve to clarify – or, as often as not, further to obscure – such rules.[94] It is worth remembering that it was the prosecution and conviction of Lieutenant Demons before the Criminal Court of Istanbul that gave rise to the *Lotus* case,[95] the befuddling *locus classicus* of the international law of jurisdiction; and that almost 75 years later it was the judicial issue and circulation of a warrant for the arrest of Yerodia Ndombasi that set in train *Arrest Warrant of 11 April 2000*,[96] in which, in their separate opinions and declarations, various judges of the ICJ muddied the universal jurisdictional waters.[97] More positively, it was the decision of the German Constitutional Court in *Jorgić* that led to *Jorgić* v. *Germany*, in which the European Court of Human Rights held that the German court's conclusion that the Genocide Convention did not exclude the exercise of extraterritorial jurisdiction, including universal jurisdiction, by the contracting parties 'must be considered as reasonable (and indeed convincing)'.[98]

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93 Indeed, according to the Report of the AU–EU Technical Ad Hoc Expert Group on the Principal of Universal Jurisdiction, Council of the EU Doc. 8671/09, 16 April 2009, Annex, para. 33, 'African states welcome the principle of universal jurisdiction'.

94 As with protest, it may be that a state brings a claim in relation to domestic proceedings or a domestic judgment founded on domestic law alone, for the reasons outlined in note 70 above.

95 *The SS Lotus (France v. Turkey)*, 1927, PCIJ Rep. Ser. A N° 10.

96 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Rep 2002, 3.

97 It may also be recalled that it was, inter alia, the initiation of an investigation, on the basis of universal jurisdiction, by the Tribunal de grande instance of Meaux into crimes against humanity and torture allegedly committed in the Republic of the Congo by Congolese against Congolese that sparked the Congo's application to the ICJ in the eventually discontinued *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, General List No. 129. See *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Application Instituting Proceedings, 2–9, http://www.icj-cij.org/docket/files/129/7067.pdf.

98 *Jorgić v. Germany*, no. 74613/01, 12 July 2007, para. 68, ECHR 2007-III.

3. Domestic decisions as persuasive judicial authority

For the purposes of the sources of international law, domestic judicial decisions are formally valued ultimately no differently, all other things being equal, than legislation or conduct by the executive. They are state practice capable of reflecting an *opinio juris* relevant to the existence and precise content of a customary international rule or to the interpretation of a treaty provision. But for the purposes of domestic law, a judicial decision is a judicial decision, and, particularly in the common-law tradition, a domestic court faced with a legal question either new to or not settled in the domestic jurisdiction in question will often look for guidance – or, in the language of the common law, for 'persuasive authority '– to decisions on the same point by courts of other, cognate jurisdictions. This is true as much of decisions on points of international law, including the international law governing national claims to jurisdiction, as of decisions on points of garden-variety domestic law. Used in this way, a domestic judicial ruling or dictum on a question of international law, including the international law of jurisdiction, assumes a formal juridical quality different from, and an influence disproportionate to, its international legal quality as a manifestation of state practice and *opinio juris* on the part of a single state. Indeed, used this way, a domestic judicial ruling or dictum becomes in practice something akin to a 'subsidiary means for the determination of rules of [international] law',[99] as is formally the case with international judicial decisions.

An example of the foregoing tendency is the court's reference to US and Australian case law in *Klassen*, where Cullen J of the Supreme Court of British Columbia buttressed his view as to the international lawfulness of Canada's legislative claim to jurisdiction by pointing out that '[t]he assertion of extraterritorial prescriptive jurisdiction based on the nationality or permanent residence of the alleged offender has been recognized by courts in other jurisdictions'.[100] Similarly, in *Polyukhovich* in the High Court of Australia, Brennan J supported his observation that 'there appears to be general agreement that war crimes and crimes against humanity are now within the category subject to universal jurisdiction'[101] by citing 'numerous cases of prosecution of war criminals after World War II, for both violations of the international laws of war and crimes against humanity, [where] reliance was placed, *inter alia*, on the universality principle'[102] – by which his Honour meant specifically four US cases, a British case and *Eichmann*.[103] Neither Cullen J in *Klassen* nor Brennan J in *Polyukhovich* contributed meaningfully, if indeed at all, to the customary international rules on jurisdiction. But their reliance on foreign case law as persuasive authority on the international law of jurisdiction, rather than as merely the numerically insignificant practice of two and three states respectively, points to

99 Statute of the International Court of Justice, Art. 38(1)(d).
100 *Klassen*, *supra* note 48, para. 89, referring ibid., paras. 89–91, to *Clark*, *supra* note 53 and *XYZ*, *supra* note 5.
101 *Polyukhovich*, *supra* note 46, 119.
102 Ibid., 120.
103 Ibid., citing *Re Einsenträger*, 14 LRTWC 8 (US 1947); *The Hadamar Trial (Re Klein)*, 1 LRTWC 46 (US 1945); *In re Tesch (Zyklon B Case)*, 13 Ann. Dig. 250 (UK 1946); *Re List (Hostages Trial)*, 15 Ann. Dig. 632 (US 1948); *Eichmann* (*supra*, notes 9 and 10); *Demjanjuk* (*supra*, note 42).

at least the potential for domestic judicial decisions to exert a special influence on the development of such international rules.

4. Conclusion

The role of domestic courts as agents of development of the international law of jurisdiction is by no means negligible. But it is more unwitting and more mediated than might be imagined. In the end, it is largely in how other states react to domestic judicial proceedings and decisions, whether by way of protest or litigation in international courts, and in how other domestic courts deploy such decisions that their influence lies.