

## SOME REMARKS ON STATE IMMUNITY AND PROFESSOR WOLFKE`S CONCEPT OF INTERNATIONAL CUSTOMARY LAW

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### INTRODUCTION

One of the fields of Professor Karol Wolfke's scholarly interests was customary international law. In 1964 he published – *Custom in Present International Law* (second revised edition in 1993<sup>1</sup>). The book is widely known and became one of the fundamental writings on the subject. In my contribution I will deal with some recent examples of identification of customary international law on State immunity by international and domestic courts and confront some of their aspects with Professor Wolfke`s understanding of customary international law.

### I.

The idea that a State may not be proceeded against in the courts of another State since *par in parem non habet imperium* has long been the subject of controversy. Due to legal developments prompted by national legislation, national and international case law and academia, in the present state of international law, State immunity is not absolute, but is generally recognised where the dispute concerns sovereign acts performed *iure imperii*. It may be excluded, by contrast, if the legal proceedings relate to acts performed *iure gestionis* which do not fall within the exercise of public powers. But the exact scope of the exceptions is still disputed. The Council of Europe tried to solve some controversies in the 1970s. On 16 May 1972 the Basel Convention on State Immunity was concluded. The Convention entered into force but it binds only eight States. The regime of State immunity established by the Basel Convention influenced the work of the International Law Commission (ILC) on the jurisdictional immunities of States and their

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<sup>1</sup> K Wolfke, *Custom in Present International Law* (1993).

property which it undertook in 1979. In 1991 the ILC adopted, on the second reading, the Draft Articles on Jurisdictional Immunities of States and Their Property.<sup>2</sup> Draft Articles were further discussed by two Working Groups and the Ad Hoc Committee, and finally the UN General Assembly adopted, by way of resolution 59/38 of 2 December 2004, the United Nations Convention on Jurisdictional Immunities of States and Their Property. The Convention currently has 21 State parties and 28 signatories; 30 ratifications are required for its entry into force.

As early as in 1964, concurring with Professor Schwarzenberger's opinion that to state the law is predominantly a scientific function, Professor Wolfke underlined the role of the academia for the development of international law but noted that "the importance of doctrine is no longer based on certain individual celebrities, but above all upon concordant opinions of writers representing various legal and social systems."<sup>3</sup> In this regard he referred to the special role of the works of the ILC emphasizing that "(s)ince the creation of the International Law Commission, one might even speak of a sort of renaissance of the authority of doctrine, not only as evidence of customary international law, but also as a law-creating factor".<sup>4</sup> That what makes the Commission special is its membership and competence. The Commission composed of (currently 34 members) "most highly qualified experts, mainly professors of universities of various countries, has been entrusted with the task of codification and development of international law. The choice of the members is made on a geographical basis, hence they are almost officially representatives, at least of certain regions and legal systems."<sup>5</sup>

Professor Wolfke was right in his evaluation of the law-creating role of the ILC. Since it was established in 1947, the ILC has elaborated on crucial aspects of international law. Its reports, draft articles and commentaries are often referred to as a highly authoritative source of law. It is not surprising that, in the lack of a binding universal treaty, the ILC Draft Articles on Jurisdictional Immunities of States and Their Property and reflecting them – the UN Convention of 2004 – are often referred to by national and international courts. But before I refer to some examples let me first comment on the ILC competence.

Some time ago, at the meeting of the Legal Advisory Committee to the Polish Minister of Foreign Affairs, we discussed the work carried out by the ILC in respect of immunities of State officials from foreign criminal jurisdiction. The discussion focused on the competence of the ILC in regard to questions which have not yet been regulated in general international law and where the practice of States lacks uniformity or is even almost non-existent. The matter is thus not so much the subject of codification as "the

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<sup>2</sup> Text adopted by the International Law Commission at its forty-third session, in 1991, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/46/10, at para. 28). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 1991, vol. II, Part Two.

<sup>3</sup> K Wolfke, *Custom in Present International Law* (1964) 152.

<sup>4</sup> *ibid.*

<sup>5</sup> *ibid* 152-153.

progressive development of international law” within the meaning of Article 15 of the Statute of the ILC. Some of the members of the Committee were of the opinion that the ILC should deal only with the immunity enjoyed by the Head of State, the Head of Government and the Minister of Foreign Affairs which follows from customary international law, while excluding the other State officials since no treaty or customary norms concerning their immunity from foreign criminal jurisdiction exist. These members of the Legal Advisory Committee were afraid not only that the ILC work may fail but also that the ILC will unnecessarily replace the States in their law-making function. On the other hand the ILC is empowered to develop international law and it is for the States to approve or reject its propositions.

Since the works of the ILC play such an important role, it is necessary for the State to perceive them as an element of the law-making process in international law and take an active part in a discussion on the ILC reports in the VI Committee of the UN General Assembly. This presupposes systematic and comprehensive evaluation of the reports by domestic experts and if necessary making political decisions. The examples below prove that the behaviour of the State during the “legislative process” in international law is not neutral.

The European Court of Human Rights (ECtHR) has, on several occasions, dealt with State immunity<sup>6</sup> while examining whether the right of access to a court, within the meaning of Article 6 para 1 ECHR, was respected. The Strasbourg Court treated the grant of immunity as a procedural bar on the national courts' power to determine the right<sup>7</sup> and examined whether the measure taken by the State party is required by international law in relation to the test of legitimate aim and proportionality.<sup>8</sup> In all these cases the determination by the Court of the customary international law was crucial.

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<sup>6</sup> See e.g. cases concerning: employment at embassies: *Fogarty v the United Kingdom*, no. 37112/97, ECHR 2001-XI, *Cudak v Lithuania*, no. 15869/02, ECHR 2010 and *Sabeh El Leil v France*, no. 34869/05, 29 June 2011); personal injury incurred in the forum State (*McElhinney v Ireland*, no. 31253/96, ECHR 2001-XI); personal injury incurred as a result of torture abroad (*Al-Adsani v the United Kingdom*, no. 35763/97, ECHR 2001-XI); crimes against humanity carried out in wartime (*Kalogeropoulou and Others v Greece and Germany*), no. 59021/00, ECHR 2002-X); service of process (*Wallishauser v Austria*, no. 156/04, 17 July 2012); and complaints of an allegedly private-law nature (*Oleynikov v Russia*, no. 36703/04, 14 March 2013), immunity from execution *Manoilescu and Dobrescu v Romania and Russia*, no. 60861/00, ECHR 2005-VI, immunity for State officials for acts of torture (*Jones and others v the United Kingdom*, no. 34356/06 and 40528/06, (2014) 59 EHRR). Each of these cases concerned the extent to which the former absolute notion of State immunity had given way to a more restrictive form of immunity.

<sup>7</sup> See e.g. *Fogarty v the United Kingdom*, no. 37112/97, ECHR 2001-XI, para 48.

<sup>8</sup> In *Al-Adsani* (cited above (n 6) para 54) the court described the legitimate aim as “the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty”. Similarly in cases cited above (n 6): *Fogarty v United Kingdom* (para 34), *Cudak v Lithuania* (para 60), *Sabeh El Leil v France* (para 52), *Wallishauser v Austria* (para 64), *Oleynikov v Russia* (para 60) and *Jones v United Kingdom* (para 188). The Court admitted that the measures taken by a party to the ECHR which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court (*Al-Adsani v United Kingdom*, para 55-56; *Fogarty v United Kingdom*, para 36; *McElhinney v Ireland and United Kingdom*, para 13; *Cudak v Lithuania*

In the decision of 2010 in Case *Cudak v. Lithuania* the Court had to identify the international customary law in respect to employment disputes in foreign embassy. Instead of examining State practice and *opinio iuris* the Court relied on the provision of the 1991 ILC Draft Articles and the 2004 UN Convention (not being in force and not even signed by Lithuania) which provided for no immunity in some embassy employment disputes (dismissal of the local employee not exercising public authority).<sup>9</sup> It referred to the commentaries appended to the 1991 ILC Draft Articles for support of its finding that the rules formulated in Article 11 concerning the contracts of employment “appeared to be consistent with the emerging trend in the legislative and treaty practice of a growing number of States”.<sup>10</sup> The ECtHR noted that this must also hold true for Article 11 of the 2004 UN Convention. The authority of the conclusions of the ILC probably seemed to the judges to make their own inquiry unnecessary.

The next step was to determine whether this “emerging trend” (a new customary rule) is opposable against Lithuania. The Court referred in this regard to “a well-established principle of international law” that, “even if a State has not ratified a treaty, it may be bound by one of its provisions in so far as that provision reflects customary international law, either “codifying” it or forming a new customary rule”<sup>11</sup>. The judges then added that there were no particular objections by States to the wording of Article 11 of the ILC’s Draft Articles, especially as Lithuania had not objected. Lithuania has not ratified the 2004 UN Convention but it did not vote against its adoption either.

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(57), *Sabeh El Leil v. France* (49); *Wallishausser v Austria* (59); *Oleynikov v Russia* (paras 60-61); *Jones v United Kingdom* (para 189).

<sup>9</sup> Article 11 of the 2004 UN Convention titled “Contracts of employment” reads: “1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State. 2. Paragraph 1 does not apply if: (a) the employee has been recruited to perform particular functions in the exercise of governmental authority; (b) the employee is: (i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961; (ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963; (iii) a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or (iv) any other person enjoying diplomatic immunity; (c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual; (d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State; (e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or (f) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.”

<sup>10</sup> *Cudak v Lithuania* (n 6) para 66, referring to (1991) II-2 ILC Yearbook 44, paragraph 14. It is worth to note that the ECtHR departed from its reasoning in *Fogarty v. United Kingdom* judgment cited above (concerning, however, recruitment; not the dismissal of the employee) granting a wide margin of appreciation to the forum state in view of the state of international law in relation to embassy employment disputes (cf paras 37-38).

<sup>11</sup> *Cudak v Lithuania* (n 6) para 66 referring to the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases [1969] ICJ Rep 41, para 71.

Thus “it is possible to affirm that Article 11 of the 1991 Draft Articles, on which the 2004 UN Convention was based, applies to Lithuania under customary international law.”<sup>12</sup>

The Court confirmed its ruling referring to few decisions of the Lithuanian Supreme Court. The first one of 5 January 1998 concerned unlawful dismissal from the US embassy (*Stukonis v. United States embassy*). Contrary to Article 479 of the Code of Civil Procedure on the absolute immunity of a foreign State, the decision was based on the doctrine of restrictive immunity; however, the Court required the request of a foreign State to apply the State immunity doctrine.<sup>13</sup> The second decision, that of the plenary of the Supreme Court of 21 December 2000 contains binding guidelines for the courts on “Judicial Practice in the Republic of Lithuania in applying Rules of Private International Law”. It gives new understanding to Article 479 of the Code of Civil Procedure as a norm guaranteeing State immunity only for “legal relations governed by public law” (not for relations governed by private law).<sup>14</sup> However, the Supreme Court advised the lower courts to exercise their jurisdiction only if they confirm that the defendant State applies the doctrine of restrictive immunity (therefore on the basis of reciprocity).<sup>15</sup> In the third case, similarly to *Cudak*, the Supreme Court followed these instructions and found that restrictive State immunity doctrine should be applied towards Sweden (*S.N. v. the embassy of the Kingdom of Sweden*)<sup>16</sup>

In the decision of 2011 in *Sabeh El Leil v. France* the Strasbourg Court repeated, however, using more nuanced reasoning, that Article 11 of the 2004 UN Convention which was based upon Article 11 of the ILC's Draft Articles of 1991 reflects customary international law. The State is bound by customary international law if it has not protested in relation to 1991 Draft Articles and later during the preparatory works leading to the adoption of the 2004 UN Convention.<sup>17</sup>

In the same way, the Court noted that France had not opposed the adoption of the 2004 UN Convention, and was in the process of ratifying it. It therefore found it possible to affirm that the provisions of the Convention applied to France under customary international law.<sup>18</sup> Similarly, the Court observed that French courts had moved away from the doctrine of absolute State immunity, especially in embassy employment disputes. The Court then went on to examine, on the basis of the facts, whether the respective applicants could be considered to be covered by any of the exceptions enumerated in paragraph 2 of Article 11 of the ILC's 1991 Draft Articles. Finding that this was not the case, it concluded that in upholding the objection based on State immunity the domestic courts had failed to preserve a

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<sup>12</sup> *Cudak v Lithuania* (n 6) 67.

<sup>13</sup> *ibid*, para 21.

<sup>14</sup> *ibid*, para 68.

<sup>15</sup> *ibid*, paras 19-24.

<sup>16</sup> *ibid* para 23.

<sup>17</sup> *Sabeh El Leil v France* (n 6) para 54.

<sup>18</sup> *ibid*, para 58.

reasonable relationship of proportionality and had impaired the very essence of the applicant's right of access to court.<sup>19</sup>

Similar reasoning was subsequently employed by the Court in *Wallishauser v. Austria*<sup>20</sup> and *Oleynikov v. Russia*<sup>21</sup>. The first case concerned the employment in the US embassy in Austria, but the main issue was the serving of the Court's documents (summons) in the proceedings against the United States. The ECtHR made here a general observation that the 2004 UN Convention codifies customary international law which governs State immunity from jurisdiction.<sup>22</sup> Further the Court noted that Austria had signed and ratified the Convention. The United States has not ratified the Convention, but did not vote against it when it was adopted in the General Assembly of the United Nations.<sup>23</sup>

The Court was much more specific than in previous cases explaining the preparatory process: "The draft text of the Convention was prepared by the United Nations International Law Commission (ILC) which, in 1979, was given the task of codifying and gradually developing international law in matters of jurisdictional immunities of States and their property. It produced a number of drafts which were submitted to States for comment. The Draft Articles that were used as the basis for the text adopted in 2004 dated back to 1991. They were subsequently further revised by the Sixth Committee of the United Nations General Assembly. States were again given an opportunity to comment."<sup>24</sup> They did not make use of this opportunity. That evidently made them bound by the rule enshrined in Article 11 and Article 22 (on the service of process) of the 2004 UN Convention.

As to the rule on the service of process contained in Article 22 of the Convention the Court noted: "The question therefore arises whether the rules embodied in Article 20 of the International Law Commission's 1991 Draft Articles applied to Austria as rules of customary international law. In the Court's view, the question is to be answered in the affirmative (see paragraph 38 above and the reference made in the commentary on Article 20 § 1 of the 1991 Draft Articles to Article 16 §§ 1 to 3 of the 1972 European Convention on State Immunity). Austria did not object to this provision of the 1991 Draft Articles. It did not vote against the adoption of the 2004 Convention and subsequently signed and ratified it. In addition, the Court notes that the United States did not object to the rules contained in Article 20 § (1) (b) (i) and § 2 of the 1991 Draft Articles either. While it has not signed or ratified the 2004 Convention, it did not vote against it."<sup>25</sup>

By the same token, in *Oleynikov v. Russia* concerning the repayment of Mr Oleynikov's loan to the Khabarovsk Office of the Trade Counsellor of the Embassy of the Democratic People's Republic of Korea (DPRK), the ECtHR found the provisions of the 2004 UN Convention on commercial

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<sup>19</sup> *ibid*, para 67.

<sup>20</sup> *Wallishauser v Austria* (n 6) paras 59-60.

<sup>21</sup> *Oleynikov v Russia* (n 6) paras 66-68.

<sup>22</sup> *Wallishauser v Austria* (n 6) para 30.

<sup>23</sup> *ibid*, para 31.

<sup>24</sup> *ibid*, para 32.

<sup>25</sup> *ibid*, para 69.

transactions (Article 10<sup>26</sup> and the definition in Article 2(1)(c))<sup>27</sup> to reflect customary law “binding upon” Russia which signed the 2004 UN Convention but not ratified it. The Court noted that the Convention endorsed the principle of restricted immunity when a State engages in a commercial transaction with a foreign natural person. Moreover, the President of Russia and the Supreme Commercial Court had both acknowledged that restrictive immunity had become a principle of customary law. Finally, the new Code of Commercial Procedure adopted in 2002 provided for restrictive immunity and the 1960 Treaty on Trade and navigation between the USSR and the DPRK provided for a waiver of immunity in respect of foreign trade transactions.<sup>28</sup>

In *Oleynikov v. Russia* the ECtHR found also that the European Convention on State Immunity signed in Basel on 16 May 1972 (specifically its Article 4) binds upon Russia under customary international law.<sup>29</sup> The Court referred for the authority to the Opinion of the Russian President that the Russian Federation may regard the Convention as a codified digest of customary norms of international law.<sup>30</sup>

The reasoning and the findings of the ECtHR in the above mentioned cases were questioned, i.a. by Libya before the United Kingdom Court of Appeal in *Benkharbouche/Janah v Sudan Embassy/Libya*.<sup>31</sup> The arguments presented by the Libyan agent are typical and to some extent justified, which was also noted by this Court:

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<sup>26</sup> Article 10 of the 2004 UN Convention “Commercial transactions” reads: “1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction. 2. Paragraph 1 does not apply: (a) in the case of a commercial transaction between States; or (b) if the parties to the commercial transaction have expressly agreed otherwise. 3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of: (a) suing or being sued; and (b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.”

<sup>27</sup> Article 2(1)(c) of the 2004 UN Convention reads: ““commercial transaction” means: (i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons. 2. In determining whether a contract or transaction is a “commercial transaction” under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

<sup>28</sup> See *Oleynikov v Russia* (n 6) paras 66-68.

<sup>29</sup> *ibid*, para 68.

<sup>30</sup> Opinion cited *ibidem* in para 31: “This approach has been consolidated in the European Convention on State Immunity, 16 May 1972, which, in accordance with generally recognised international practice, the Russian Federation may regard as a codified digest of customary norms of international law.”

<sup>31</sup> The Court of Appeal (Civil Division), judgment of 5 February 2015, *Benkharbouche & Janah v Embassy of the Republic of Sudan, Libya and the Secretary of State for Foreign Affairs*, Case No: A2/2013/3062.

“(1) A treaty cannot create either obligations or rights which are binding on states which are not parties to it without their consent. (Vienna Convention on the Law of Treaties, 1969, Article 34.) None of the states concerned in these proceedings is a party to the UN Convention on Jurisdictional Immunities of States and their Property, 2004 (“the UN Convention”).

(2) The UN Convention requires 30 ratifications, acceptances, approvals or accessions before it will enter into force. To date the Convention has been ratified by only 16 states.

(3) Rules contained in treaties may, however, bind non-parties if they embody existing rules of customary international law or if they subsequently attain that status. It is likely that many of the rules in the UN Convention reflect customary international law. However, as we shall see, that is not necessarily true of all its provisions. In particular, while it is clear that customary international law no longer requires immunity in all proceedings relating to employment contracts, state practice in relation to embassy employment disputes is so diverse that it is far from clear that Article 11 of the UN Convention is a definitive statement of the limits of immunity required by customary international law in such circumstances.

(4) The court’s analysis fails to take account of important differences between the text of the International Law Commission (“ILC”) Draft Articles and that of the UN Convention. They cannot both represent the current state of customary international law.

(5) Neither the failure of a state to object to the adoption of the ILC Draft Articles or to vote against the adoption of the UN Convention by the General Assembly is capable, without more, of binding the state concerned to the content of the instrument in question.”<sup>32</sup>

The way the ECtHR determined the customary international law on State immunity in relation to contracts of employment or to service of process will probably not fully satisfy Professor Wolfke’s requirements. Professor Wolfke would certainly repeat that it is already a truism that treaties frequently constitute a very important factor in the development of international customary law. According to him the treaty constitutes a precedent, an element of practice. As an expression of the will of the parties, the treaty is at the same time “evidence of acquiescence in everything that is part of its content”.<sup>33</sup> But he warns that a treaty “can never of itself lead to the formation of international custom, because in international law the principle *pacta tertiis nec nocent nec prosunt* is still valid. A treaty can, on the other hand, extend its binding force to other subjects of international law, if the conduct of such subjects – that is, practice – justifies the presumption that they accept the provisions of the given treaty as binding on them.”<sup>34</sup> Professor Wolfke calls it “accession by way of custom”. Certainly, he refers here to treaties which, like the Basel Convention, have entered into force. But he also admits that not only treaties themselves but also their drafts or *travaux préparatoires* may influence the custom forming process. However, he

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<sup>32</sup> *Benkharbouche & Janah v Embassy of the Republic of Sudan, Libya and the Secretary of State for Foreign Affairs* (n 31) para 29.

<sup>33</sup> Wolfke (n 3) 77.

<sup>34</sup> *ibid*, 77-78. See also 137-140. For more detailed discussion see, Wolfke (n 1) 68-71.



advises to take into account all relevant circumstances and be cautious in drawing final conclusions. Neither drafts nor negotiations constitute the custom forming practice or any conclusive evidence of acceptance of the practice as law, "for it is more than doubtful that the participating states would agree to be bound in any way by their opinions and statements delivered in the course of negotiations, except possibly in cases when such has been their clear intention."<sup>35</sup> On the other hand, drafts or *travaux préparatoires* are expressions of certain new trends which may influence the evolution of the practice and *opinio iuris*.<sup>36</sup> States may react to such new emerging trends by adjusting their practice or opposing them<sup>37</sup>. Even those states which refuse to sign or ratify the convention may modify their practice, "thus factually accepting as law the newly prescribed practice and in this way contributing to the formation of customary international law even before the final acceptance of the convention."<sup>38</sup>

In light of the consensual conception of the formation of an international custom, shared by Professor Wolfke<sup>39</sup>, the approach taken by the ECtHR can only be justified by a lessening of the requirements of practice and *opinio iuris*, that is by modern concepts of customary international law. The Court declared the norms enshrined in the draft and two treaties, one of which has not even entered into force, as binding upon third States under customary law, admittedly, assuming what Professor Wolfke calls "presumed acquiescence in the rule".<sup>40</sup> But the Court satisfied itself with sparse practice, mostly verbal acts and abstentions from acting. In most cases it took into account only the attitude of the respondent State towards the norms proposed in the above mentioned documents (statements or lack of protest<sup>41</sup>), only being able to point to rare examples of their practice. It is also true that Article 11 of the ILC Draft Articles<sup>42</sup> is not identical with Article 11 of the 2004 UN

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<sup>35</sup> Wolfke (n 1) 71-72.

<sup>36</sup> *ibid*, 72.

<sup>37</sup> See on the concept of persistent objector Wolfke (n 1) 66 et seq.

<sup>38</sup> *ibid*, 66 et seq.

<sup>39</sup> Cf K Wolfke, 'Some persistent controversies regarding customary international law' (1963) 24 *Netherlands Yearbook of International Law* 1-16.

<sup>40</sup> "While in treaty law, in general, the active will of States aims at changing the reality, the essence of customary international law lies in certain factual uniformity in international relations which is ratified only by means of acquiescence.(...) But in the event of a dispute on the question as to whether a certain rule binds a certain State as a legal rule (...) precisely the existence (or absence) of presumed acquiescence in the rule" will be decisive (Wolfke (n 3) 161; cf Wolfke (n 1) 161 ff).

<sup>41</sup> The statement of the ICJ in the judgment of 18 December 1951 in *Fisheries Case (United Kingdom v Norway)* is widely regarded as the leading authority for the persistent objector principle. The Court held in respect to the ten-mile rule of the delimitation of the baselines of the territorial sea applied by certain States that even if this rule "had acquired the authority of a general rule of international law", it would "appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast" [1951] ICJ Rep 131.

<sup>42</sup> Article 11 (2)(2) of the Draft Articles reads: "Paragraph 1 does not apply if: (a) the employee has been recruited to perform functions closely related to the exercise of governmental authority; (b) the subject of the proceeding is the recruitment, renewal of employment or reinstatement of an individual; (c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was

Convention or Article 5 of the Basel Convention.<sup>43</sup> Moreover, the provision enshrined in Article 11 of the 2004 UN Convention is complex and requires clarification by practice [especially Article 11(2)(a) based on the general distinction between sovereign (governmental) and non-sovereign (commercial) acts].<sup>44</sup>

Despite the shortcomings of the ECtHR's identification of customary international law in the above mentioned cases, its decisions have the potential to influence State practice. To prove the existence of customary international law in respect of State immunity, some judges of the ECHR's State parties, will certainly refer to the ECtHR's findings e.g. on the character of the norms enshrined in the 2004 UN Convention and would feel free from making their own assessment of the elements of custom.

An example of the domestic court decision following the ECtHR rulings in this way is a judgment of 2015 of the Court of Arbitration for Sankt Petersburg in case *Inpredserwis v. Consulate General of the Republic of Poland*<sup>45</sup> on execution of payments for the rent of the house for the seat of the Consulate and the obligation to leave the building. We will leave aside the issue of the proper service of summonses (the documents initiating the proceedings were not served through diplomatic channels) and more importantly, the appropriateness of the evaluation of the facts by the Russian Court, and focus on the merits. But it is necessary to mention that it is difficult

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concluded; (d) the employee is a national of the employer State at the time when the proceeding is instituted; or (e) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding." Cf. Article 11 the 2004 UN Convention *cited above ft. 9*. See R O'Keefe, ChJ Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and their Property*, a *Commentary* (2013) 185 et seq.

<sup>43</sup> Article 11 of the Basel Convention "Contracts of employment" reads: "1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State. 2. Paragraph 1 does not apply if: (a) the employee has been recruited to perform particular functions in the exercise of governmental authority; (b) the employee is: (i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961; (ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963; (iii) a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or (iv) any other person enjoying diplomatic immunity; (c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual; (d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State; (e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or (f) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding."

<sup>44</sup> Cf R O'Keefe, ChJ Tams (eds) (n 42) 192 ff.

<sup>45</sup> Judgment of the Court of Arbitration for Sankt Petersburg, case no A56-48129/2014 [3783/2015-44531(1)] announced on 3 February 2015, full text of the judgment of 9 February 2015.

to qualify as a commercial transaction the situation in which the agreement concerning the relevant premises had expired, the negotiations concerning the premises used for diplomatic or consular purposes in each of the interested States have not been conclusive and the relevant building, as the Russian Court noticed, "is occupied without legal basis".

The Russian court accurately recognized that the claims against Consulate equate to action against the State and the norms on State immunity apply. The Arbitration Court noted that according to general rules of Russian law, Poland is entitled to immunity from Russian jurisdiction, but according to Article 15(4) of the Constitution, generally accepted rules and principles of international law and treaties of the Russian Federation are the part of the Russian legal system. That gave the Court the basis to apply customary international law. The Court first referred to the rules on restrictive jurisdictional immunity in respect to commercial transactions enshrined in the Basel Convention of 1972 (Article 4), the ILC Draft Articles of 1991 (Article 2 (1)(c) and Article 10) and the 2004 UN Convention (Article 2(1)(c) and Article 10) and next to the ECtHR decisions in *Oleynikov v. Russia*, *Cudak v. Lithuania*, *Sabeh El Leil v. France* and *Wallishauser v. Austria* for authority that the ILC Draft Articles now reflected in the 2004 UN Convention are applicable as customary international law even if the concerned State has not ratified the Convention, if it has not protested against its content.

The Russian Court observed that Poland has not signed the Convention, but it also has not announced that it will not ratify it. Besides, the document of the Polish Consulate in the Court's files demonstrates that restrictive jurisdictional immunity as a norm of customary international law was accepted by Poland. It was enough for the Court to conclude that, according the ECtHR's stance, the above mentioned acts (including the Basel Convention) as customary law are applicable to Poland and as a consequence the Russian Court has competence to deal with the commercial transaction at hand.

However, the Court of Arbitration made the additional remark which seems inconsistent with the argument of customary law opposable against Poland. It referred to the Polish Court decision of 2007 in the case against the Ambassador of the Russian Federation obliging Russia to leave the building in Warsaw which was once used for Russian diplomatic purposes.<sup>46</sup> According to Russian judges, since the Polish court has not respected Russian State immunity in this case, Poland, on the basis of the principle of sovereign equality, has lost the right to invoke immunity in the present case. Consequently, one would suppose that in the Russian court's view, if the decision of the Polish court had been different, reciprocity would apply.

Contrary to this simplified method of the identification of customary international law is the approach taken by the UK Court of Appeal in *Benkharbouche/Janah v Sudan Embassy/Libya*. Professor Wolfke would certainly be pleased with the detailed discussion of all the relevant evidence of the exceptions to State immunity in employment cases concerning a foreign embassy in this judgment. The UK Court of Appeal carefully studied

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<sup>46</sup> The decision of the District Court in Warsaw of 24 September 2007, no II S 1306/06 concerning the buildings at Szucha Avenue 17/19.

the application of Article 6 ECHR to embassy employment disputes, relevant international conventions, case law of international courts, including the Court of Justice of the European Union decisions (especially C-154/11 *Mahamdia v. Algeria* for authority that international law does not require the granting of absolute immunity from all employment claims by employees of diplomatic missions<sup>47</sup>), the opinion of leading scholars on international law and State practice (including the decisions of domestic courts of various countries) before coming to the conclusion that certain provisions of the United Kingdom's State Immunity Act of 1978 infringe not only Articles 6 and 14 ECHR but also in those parts of a claim which falls within the scope of EU law, Article 47 of the EU Charter on Fundamental Rights.

The UK Court of Appeal was not keen to follow the Strasbourg court indiscriminately. It highlighted that the precise scope of immunity is still uncertain and the distinction between sovereign acts and non-sovereign acts is difficult to apply. Moreover, State practice and the decisions of national courts reveal diversity of approaches and views. In such a situation the ECtHR should be more cautious since "it is not the function of the Strasbourg court to make definitive rulings as to the position in international law."<sup>48</sup> States should be left much more freedom to determine their international law obligations.

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<sup>47</sup> CJEU judgment C-154/11 *Mahamdia v Algeria* concerning claims of a driver from the Algerian embassy in Berlin for unpaid overtime and dismissal. The German second instance court decided to refer two questions to the CJEU for a preliminary ruling concerning interpretation of the Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the effect of the exclusive jurisdiction clause contained in a contract at hand (a clause conferred exclusive jurisdiction on the Algerian courts). To answer the questions the CJEU had to identify relevant customary international law.

<sup>48</sup> *Benkharbouche & Janah v Embassy of the Republic of Sudan, Libya and the Secretary of State for Foreign Affairs* (n 31) para 21: "The precise scope of immunities required by international law is often the subject of great uncertainty and the boundary lines between immunity and non-immunity will often be difficult to draw. The distinction between sovereign acts and non-sovereign acts is easy to state but notoriously difficult to apply in practice. Moreover, as Judge Higgins, Judge Kooijmans and Judge Buergenthal observed in their Separate Opinion in *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 [72], the meaning of the concepts of *acta jure imperii* and *acta jure gestionis* is not carved in stone; it is subject to a continuously changing interpretation which varies with time reflecting the changing priorities of society. In some areas it is unclear to what extent immunities have been eroded. (See, for example, the observations of the Strasbourg court in *McElhinney v Ireland and the United Kingdom* (n 6) [38], a case concerning the conduct of a foreign state within the forum state resulting in personal injury.) Nowhere is this difficulty more apparent than in the field of embassy employment disputes with which we are concerned in the present cases. Here, as we shall see, state practice and the decisions of national courts reveal a variety of different approaches and a diversity of views. Accordingly, while there will be many cases in which the answer to the question whether there exists an obligation in international law to grant immunity will be clear, there will be many others where the issue will not be free from doubt. In the latter category of cases it is not the function of the Strasbourg court to make definitive rulings as to the position in international law. In this regard we would draw attention to the concurring judgment of Judge Pellonpää, joined by Judge Bratza, in *Al-Adsani* where they observed that "when having to touch upon central questions of general international law, this Court should be very cautious before taking upon itself the role of a forerunner" (n 6 at [O-II9]). It is for these reasons that it is necessary to accord to states which are parties to ECHR a margin of appreciation in determining what are their obligations under international law. "

It brings us to the role of the courts in the identification and formation of international customary law. Professor Wolfke deals with both of these aspects. As far as identification is concerned he stresses the evidentiary value of the decisions of international courts based on Article 38 (1)(d) of the Statute of the International Court of Justice (ICJ) which refers to them as subsidiary means for the determination of rules of law. The judgments of international courts, especially the ICJ, are of the decisive importance as evidence of customary rules.<sup>49</sup>

As far as the domestic courts decisions are concerned, Professor Wolfke takes the position that they are also covered under Article 38 (1)(d) ICJ Statute (the provision is general and refers to "judicial decisions") but they are of lesser significance as evidence of customary international law.<sup>50</sup> This is mainly due to the fact that national courts, even if they base their decisions on international law, do that within the limits of national law. Therefore their decisions have to be carefully regarded and properly evaluated. "Apart from the role of decisions of national courts as evidence of ripe customary international law, we may recognize also their contribution as evidence of the elements of international custom. It cannot be denied that such decisions can, where appropriate, serve as at least indirect evidence of the practice and of its acceptance as law."<sup>51</sup>

Professor Wolfke alludes here to the law-making function of domestic courts. He develops this aspect elsewhere: "Formally, the role of courts [both international and domestic/ AW] is confined to ascertaining and applying law which binds only the parties in the case. Any legislative competence *ex officio*, or binding ascertainment of customary rules for States who are not parties to a dispute, is out of the question. Considering, however, that the formation of international custom is spontaneous, what is important, it seems, is not the courts' function according to statutes, but the role they play in fact. And their informal share in the development of international customary law is undoubtedly considerable."<sup>52</sup>

Professor Wolfke realizes that the courts, in order to make the decision, have to gather and evaluate all available material, which is rarely complete and univocal. Thus the decision as to the binding rule "often amounts to choosing the less doubtful alternative"<sup>53</sup> and "is always based, to a greater or lesser degree, on free evaluation. Hence it is a truism to say that a judicial organ ascertaining customs to some extent creates them".<sup>54</sup>

He further adds: "A statement by the court, that a certain rule applies in settling a dispute involves a law-creating factor. (...) A case in which a declaration is made by the court that there is no sufficient evidence for admission of the existence of a custom may for long paralyze the development

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<sup>49</sup> K Wolfke (n 3) 142; K Wolfke (n1) 145 (Professor Wolfke observes that the ICJ has invoked its own decisions almost as being positive law).

<sup>50</sup> K Wolfke (n 1) 147.

<sup>51</sup> K Wolfke (n 1) 148; cf. K Wolfke (n 3) 144-145.

<sup>52</sup> K Wolfke (n 1) 72, K Wolfke (n 3) 71.

<sup>53</sup> K Wolfke (n 1) 72-73; K Wolfke (n 3) 71-72.

<sup>54</sup> K Wolfke (n 1) 73; K Wolfke (n 3) 72.

of such custom. On the other hand, by drawing attention to a certain practice, the court may considerably accelerate its ripening into custom.”<sup>55</sup>

## CONCLUSION

The assessment made by Professor Wolfke of the consensual basis of customary international law and the importance of both State practice and *opinio iuris* in formation of custom is still valid.<sup>56</sup> The judgments of the ECtHR concerning State immunity, cited above, are examples of the lessening of the requirements of consent. A similar trend is visible in the ICJ case-law on customary international law. The ICJ has only rarely relied on actual practice to determine the content of customary rules. It based its conclusions rather on non-binding resolutions of international organisations or on its own decisions.<sup>57</sup> This behaviour is the expression of the so called modern approach to customary international law. Both approaches, traditional (emphasising State practice) and modern (emphasising *opinio iuris*) have been criticised on many occasions.<sup>58</sup> At the moment, however, there is no better test for the identification of custom than that which was once proposed by G. Puchta<sup>59</sup>.

The creation of custom is not instantaneous, it is a process with many participants including international and domestic courts. Nowadays more international courts are taking part in the identification of customary international law and also national courts are more active and more open to take part in a dialogue on its content and scope. The problem is, that to keep a proper balance, the courts should be cautious not to replace the governments (the executive) in their function<sup>60</sup> and the States must be vigilant on this point

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<sup>55</sup> K Wolfke (n 1) 73; K Wolfke (n 3) 72-73.

<sup>56</sup> See especially, K Wolfke (n 1) 169 et seq.

<sup>57</sup> See e.g. A Mark Weisburd, ‘The International Court of Justice and the Concept of State Practice’, (2009) 31(2) University of Pennsylvania Journal of International Law 295 et seq.

<sup>58</sup> Cf. ia A Roberts, ‘Traditional Approaches to Customary International Law: A Reconciliation’ (2001) 95 American Journal of International Law 757 et seq; J. d’Aspremont, ‘The Decay of Modern Customary International Law in Spite of Scholarly Heroism’ (2015) Yearbook of International Law and Jurisprudence 2015, Amsterdam Law School Research Paper No. 2016-18. Available at SSRN: <http://ssrn.com/abstract=2756904>.

<sup>59</sup> See, eg K Wolfke (n 39) 5.

<sup>60</sup> See eg the cautious attitude of the ICJ in *Jurisdictional Immunities of the State (Germany v Italy)* (Judgment of 3 February 2012) [2012] ICJ Rep 97, where the Court concluded that under customary international law as it stood at the time of its judgment, a State was not deprived of immunity by reason of the fact that it was accused of serious violations of international human rights law or the international law of armed conflict (para 91) or the ECtHR in case of *Jones and others v. United Kingdom* on immunity for State officials for acts of torture where the judges have decided not to depart from the ruling in *Al-Adsani v the United Kingdom* (n 6). In the lengthy and comprehensive judgment the ECtHR confirmed the decision of the House of Lords in regard to the applicants that customary international law did not admit of any exception regarding allegations of conduct amounting to torture to the general rule of immunity *ratione materiae* for State officials in the sphere of civil claims where immunity is enjoyed by the State itself. The ECtHR underlined that the findings of the House of Lords were based on extensive references to international law materials and the other national courts, which have examined in detail the findings of the House of Lords in the present case, have considered those findings to be highly persuasive (para 214). Further

and not only guard their law-making powers but also accurately exercise them.

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the Court added: "However, in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States" (para 215).