sciendo

Wroclaw Review
of Law, Administration & Economics

TAKING DECISIONS ON CUSTOMARY INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE IN THE CASE *JURISDICTIONAL IMMUNITIES OF THE STATE (GERMANY V. ITALY; GREECE INTERVENING)*, 2012

RUDOLF GEIGER*

I. FINDING AND APPLYING RULES OF CUSTOMARY INTERNATIONAL LAW

"Without too much exaggeration one may still assert that in customary international law nearly everything remains controversial. … This is as a result not only of the notorious complexity and intangibility of international custom, but also of the unending doctrinal disputes, in which it seems that often too little attention is paid to current international reality." This statement of Professor Karol Wolfke in his article on "*Some Persistent Controversies Regarding Customary International Law*"[1], written more than twenty years ago, is still very true. This was also still the state of affairs when Professor Wolfke and I were members of the Committee on Formation of Customary Law of the International Law Association at the turn of the century, and it is still confirmed by recent overviews in the work of the International Law Commission[2], and of the literature on this subject[3]. Certainly one of the reasons for unending discussions can be found in the practice of the International Court of Justice (ICJ).[4]

In spite of an ever increasing amount of bilateral and multilateral treaties covering the relationships between States it is also customary international law which still provides rules serving as the basis for judgments

DOI: 10.1515/wrlae-2018-0044
* Professor emeritus, University of Leipzig, rudolf.h.geiger@t-online.de.
[1] K Wolfke 'Some Persistent Controversies Regarding Customary International Law' (1993) XXIV Netherlands Yearbook of International Law 1-16 (1).
[2] See M Wood, Special Rapporteur, 'Second and Third Report on Identification of customary international law' (UN doc A/CN.4/672, A/CN.4/682).
[3] See e.g. A Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 757.
[4] See e.g. S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) European Journal of International Law 417–443; Ch Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making' (2015) 14 The Law and Practice of International Courts and Tribunals 51-79.

and opinions of the International Court of Justice (ICJ). In such cases the Court frequently defines the concept of customary law by citing Article 38 (i) (b) of its Statute and explains the way it should be applied to find a specific norm applicable in the case before it.

In an article published in 2011[5], I have tried to show that the Court`s expressly proclaimed standards for establishing specific rules of customary law are rather frequently quite different from the manner in which the Court really proceeds. In the present article I would like to comment on the Court's judgment of 3 February 2012 on *'Jurisdictional Immunities of the State'*, in which its decision was also based on customary international law.

The issues before the Court originated in acts perpetrated by German armed forces on Italian territory in World War II. Germany fully acknowledged its responsibility for the large-scale killing of civilians and the treatment of members of Italian armed forces being used as forced labourers. Germany did not deny that these acts had violated international humanitarian law. But when Italian courts allowed proceedings and passed judgements against Germany regarding claims arising out of those illegal German acts, Germany brought an action against Italy before the International Court of Justice pleading that (1) by allowing such proceedings Italian courts had neglected their obligation to respect the immunity which Germany enjoyed under international law; (2) that this obligation was also violated by taking measures of constraint against a property (Villa Vigoni) owned by Germany and dedicated to fostering German cultural relations with Italy; and (3) by declaring enforceable in Italy decisions of Greek courts based on violations of international humanitarian law committed in Greece by the German Reich. By a fourth claim Germany pleaded (4) that Italy must ensure that the decisions of its courts and other judicial authorities infringing Germany's immunity cease to have effect.

The Court observed that, as between Germany and Italy, any entitlement to immunity could be derived only from customary international law, rather than from a treaty. Only Germany – not Italy- was one of the eight States parties to the European Convention on State Immunity of 16 May 1972[6]. Neither of the two States was a party to the UN Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004[7] which was not yet in force. Neither Germany nor Italy had signed the Convention.

---

[5] R Geiger, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal', in U Fastenrath *et al* (eds), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (2011) 673-694. My further contributions to the subject were: R Geiger, 'Die zweite Krise der völkerrechtlichen Rechtsquellenlehre' (1970) 30 ÖZöRV 215-234; R Geiger, 'Zur Lehre vom Völkergewohnheitsrecht in der Rechtsprechung des Bundesverfassungsgerichts' (1978) 103 AöR 382-407. A doctoral thesis written under my supervision at the University of Munich was: J Kirchner, *Völkergewohnheitsrecht aus der Sicht der Rechtsanwendung* (1989).

[6] Council of Europe, European Treaty Series (ETS), No 74 (hereinafter the "European Convention").

[7] Hereinafter "UN Convention". The UN Convention had been signed by 28 States and ratified by 13 States. For its entering into force 30 instruments of ratification were necessary.

In this situation, the Court stated that it

> "must determine, in accordance with Article 38(1) (b) of its Statute, the existence of 'international custom, as evidence of a general practice accepted as law' conferring immunity on States and, if so, what is the scope and extent of that immunity. To do so, it must apply the criteria which it has repeatedly laid down for identifying a rule of customary international law." [8]

Referring to the *North Sea Continental Shelf* cases[9], the Court added, that

> "in particular, …the existence of a rule of customary international law requires that there be 'a settled practice' together with opinion juris".

Moreover, as the Court recalled that it had also observed in a further judgment[10],

> '[i]t is of course axiomatic, that the material of customary international law is to be looked for primarily in the actual practice and opinion juris of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed developing them' …".

The Court continued by enumerating the sources for finding *State practice* of particular significance in the present context:

- the judgments of national courts faced with the question of whether a foreign State is immune,
- the legislation of those States which have enacted statutes dealing with immunity,
- the claims to immunity advanced by States before foreign courts , and
- the statements made by States (1) in the work of the International Law Commission and (2) in the context of the adoption of the United Nations Convention.

Turning to *opinio juris* the Court stated that in this context *opinio juris* is reflected when States are claiming or granting immunity or in other cases asserting a right to exercise jurisdiction over foreign States.

---

[8] *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)* (Judgment) [2012] ICJ Rep 99, para 55.

[9] *North Sea Continental Shelf (Federal Republic of Germany v Netherlands/Denmark)*, [1969] ICJ Rep 3, para 77.

[10] *Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Judgment) [1985] ICJ Reports 13, para 27.

II. TESTING STATE PRACTICE AND *OPINIO JURIS* IN THE COURT'S JUDGMENT

1. Jurisdictional immunity of states in customary international law

a) The general rule

Referring to the work of the International Law Commission (ILC), the Court stated that the extensive survey of State practice given by the ILC shows – according to the ILC – that the rule of State immunity had been "adopted as a general rule of customary international law solidly rooted in the current practice of States". The Court agreed with this conclusion. In addition, it referred to a more general principle which comprises the rule of State immunity: this rule derives – as it said – from the principle of the sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order. "This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality. Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it."[11]

Having said this, the Court has in fact only given an introductory note to its reasoning. Nothing of it was contested by the Parties. The Court itself stated that "the Parties are in broad agreement regarding the validity and importance of State immunity as a part of customary international law."[12]

The main difference between the Parties related to the scope and extent of the rule of State immunity in the case of exercising sovereign power (*acta jure imperii*). Whereas Germany insisted that immunity was also applicable to the acts of armed forces in an armed conflict on foreign territory, Italy maintained that Germany was not entitled to immunity in respect of the cases before Italian courts, arguing that there were two limitations of immunity applicable in this case.

Italy pleaded that one reason for denying immunity was that immunity does not extend to torts or delicts occasioning death, personal injury or damage to property committed on the territory of the forum State ("territorial tort principle"). The other reason was that the acts concerned involved the most serious violations of the rules of international law of a peremptory character, for which no alternative means of redress was available.[13]

b) The territorial tort principle as an exception to state immunity

Regarding the 'Territorial Tort Principle' the Court first observed that this rule originated in cases concerning road traffic accidents and other "insurable risks", whereby it was not clear whether this principle also included matters of *acta jure imperi*i. The Court felt that not being called upon

[11] *Jurisdictional Immunities of the State* (n 8) para 57.
[12] ibid, para 58.
[13] ibid, para 61.

to resolve the question of whether the "tort exception" to State immunity was applicable to *acta jure imperii* in general. It stated that the issue before it was confined to the specific case of acts committed on the territory of the forum State by the armed forces of a foreign State in the course of conducting an armed conflict.[14]

This definition of the legal question on which the Court had to take a decision, was followed by the Court's extensive presentation of the *UN Convention* and the *European Convention* cited above[15] (neither being in force between the Parties), which, as the Court put it, could "shed light" on the content of customary international law[16]. In evaluating these Conventions, the Court concluded that these Conventions did not cover the acts of armed forces in the case of armed conflicts.[17]

Thus the question of the applicability of the territorial tort principle in such a case had to be answered by international customary law independently from these Conventions.

Turning to State practice in the form of *national legislation*, the Court found that nine of the ten States[18] referred to by the Parties which had legislated on State immunity have adopted a "territorial tort" provision. Only two of them exclude "foreign armed forces" generally, three of them exclude "foreign visiting forces", and the U.S.A. exclude acts performing a discretionary function "regardless of whether the discretion be abused". In none of the seven States with no general exclusion of the acts of armed forces have the courts ever been called upon in a case involving the armed forces of a foreign State in the context of an armed conflict.

The Court then addressed the State practice concerning the *judgments of national courts*. First it presents eight judgments delivered by national courts in Europe and one in Egypt concerning acts committed by armed forces outside of an armed conflict. As admitted by the Court these judgments do not concern the specific issue of the case, but in the Court's opinion they suggest that a State is entitled to immunity in respect of *acta jure imp*erii committed by its armed forces on the territory of another State.[19]

Finally, the Court dealt with judgments concerning State immunity pertaining to armed forces having acted *in the course of an armed conflict*. All these cases concern events occurring during World War II, all of them regarding acts of German forces. The judgments were delivered by courts of France, Slovenia, Poland, Belgium, Serbia and Brazil. All of these national courts ruled that Germany was entitled to immunity. The only State supporting the Italian position was Greece.

In the light of these findings the ICJ concluded that "State practice in the form of *judicial decisions*" supports the proposition that State immunity

[14] ibid, para 65.
[15] Cf (n 3) 4.
[16] *Jurisdictional Immunities of the State* (n 8), para 66.
[17] ibid, para 69.
[18] ibid, para 70: U.S.A., U.K., South Africa, Canada, Australia, Singapore, Argentina, Israel, Japan.
[19] *Jurisdictional Immunities of the State* (n 8), para 72.

for *acta jure imperii* continues to extend to civil proceedings concerning acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State.[20] The Court also stated that this practice is accompanied by *opinio juris*, as demonstrated by the positions taken by *States* and the jurisprudence of a number of *national courts* which have made clear that they considered that customary international law required immunity.[21] It concluded that the absence of any contrary statements by States such as in connection with the work of the *International Law Commission* was also significant.[22]

Having read the extensive arguments on which the Court founded its opinion that immunity cannot be denied to Germany on the basis of the territorial tort principle, one must involuntarily ask: has this opinion really been developed on the basis of a "'settled' general practice accepted as law", as it has been required by the Court in the beginning of its deliberations?

The Court has repeatedly stated that it had to look for practice concerning acts committed by a foreign State's armed forces in the course of an armed conflict.[23] However, apart from the Parties to the present proceedings (Germany, Italy, Greece) it could mention only the practice of the courts of six States (France, Slovenia, Poland, Belgium, Serbia and Brazil). Relying only on judicial decisions of courts in five European States and in Brazil, all of them concerning only suits against Germany, it sounds rather strange in view of there being almost 200 States in five continents to speak of a settled general practice, no matter whether it is a practice in favour or against the territorial tort principle to be applied in the circumstances of the present case.

In fact, the Court has also elaborated the elements for another line of arguments which may lead to convincing results. Having stated the general rule that in principle States enjoy immunity in foreign courts for acts *jure imperii*, it applied this principle by defining its extent in view of its aims and functions, thereby taking into consideration specific peculiarities "shedding light" on the problem that had to be solved; and in addition, in order to satisfy the Party holding a different view about the legal situation, the Court could show that there was not enough practice and *opinio juris* to justify a contrary decision.

c) The nature of the illegal acts as an exception to state immunity?

Regarding Italy's second argument justifying the denial of immunity because of the particular nature of the acts, that is the *gravity of the violations* of the law, the ICJ pointed out that this argument presented a "logical problem"[24], because immunity from jurisdiction is necessarily preliminary in nature to the substantive issues. Consequently, before a national court can hear the merits of the case it is required to determine whether or not a foreign State is entitled to immunity.

[20] ibid, para 77.
[21] ibid.
[22] ibid, para. 77.
[23] Cf. ibid, para. 73.
[24] ibid, para 82.

Nevertheless the Court in the present case inquired whether a rule of customary international law has become developed in this matter. It stated – after having evaluated *judgments* of national courts and *national legislation* and the work of the *International Law Commission* that there was almost no State practice which might support Italy's proposition.

Turning to Italy's proposition that there was a conflict between according immunity to Germany and *jus cogens rules* forming part of the law of armed conflict, the Court stated that no such conflict exists, because the two sets of rules address different matters. The rules which determine the scope and the extent of jurisdiction do not derogate from those substantive rules which possess *jus cogens* status.

Having argued on the basis of such systemic relations the Court in addition referred to the practice of *national courts* of five States (UK, Canada, Slovenia, New Zealand and France)[25] confirming the position it had reached.

The third strand of the Italian argument was the *"last resort"* argument, meaning that denying Germany immunity before foreign national courts was justified because all other attempts to secure compensation for the victims had failed. In so far the Court points out that whether a State is entitled to immunity before the courts of another State is a question entirely separate from that of whether the international responsibility of that State is engaged and whether it has an obligation to make reparation. Without citing any concrete examples the Court points out that it finds no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation nor in the jurisprudence of the national courts nor in the European Convention or in the UN Convention is there any evidence that entitlement to immunity is subjected to such a precondition.[26] Moreover, even if this exception of immunity existed, its application would be extremely difficult in practice, particularly when it was the subject of extensive intergovernmental discussion.[27]

Without any new comments the Court declared that it felt itself to be not persuaded by Italy's argument relating to a *"combined effect"* of the three strands of its opinion. It concluded that nothing in the examination of State practice lends support to the proposition that the concurrent presence of these elements would justify the refusal of the immunity to which the respondent State would otherwise be entitled. [28]

2. Immunity from enforcement regarding property on foreign territory

In 2007 certain Greek claimants entered in the Land Registry of the Province of Como in Italy a legal charge against Villa Vigoni, a property of the German State located near Lake Como hosting a German cultural centre

[25] ibid, para 96.
[26] ibid, para 101.
[27] ibid, para 102.
[28] ibid, para 106.

intended to promote cultural cooperation and exchanges between Germany and Italy. The claimants relied on a decision of the Florence Court of Appeal which had declared enforceable in Italy the judgment rendered by a Greek court, which had ordered Germany to pay them compensation for the highly illegal acts of German armed forces against Greek civilians in World War II. Germany demanded that the mortgage on Villa Vigoni inscribed at the land registry be cancelled, because such a measure of constraint violated its immunity from enforcement.

First the ICJ observed that the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further that the jurisdictional immunity. Even if a State could not claim immunity from jurisdiction, it does not follow that this State could be the subject of measures of constraint on a foreign territory with a view to enforcing the judgment in question.

Since Germany had cited the rules set out in *Article 19 of the UN Convention*, this Article concerning "State immunity from post-judgment measures of constraint", the Court examined whether – to the extent which could be relevant in this case - this provision reflected customary international law. It stated that there was at least one condition that was part of customary international law relevant in this case: that the property in question must be in use for an activity not pursuing governmental non-commercial purposes. As an "illustration of this well-established practice" the Court referred[29] to *judgments* of the German Constitutional Court (1977), the Swiss Federal Tribunal (1986), the House of Lords (1984) and the Spanish Constitutional Court (1992).

Since it was clear – according to the Court – that in the present case the property at issue was being used for governmental purposes that were entirely non-commercial, and hence for purposes falling within Germany's sovereign functions, the registration of a legal charge on Villa Vigoni constituted a violation by Italy of its obligation based on customary international law to respect the immunity owed to Germany.

3. German immunity in case of Italian courts declaring enforceable a Greek judgment

Germany also complained that its jurisdictional immunity was violated by Italian courts declaring enforceable in Italy judgments against Germany rendered by Greek courts. In proceedings initiated by successors in title of the victims of the Distomo massacre committed by German armed forces in Greece in 1944, Greek courts had ordered Germany to pay compensation. At the request of the Greek claimants, Italian courts declared the Greek judgments to be enforceable in Italy.

From the Court's point of view, the relevant question was whether the Italian courts had themselves respected Germany's immunity from jurisdiction in allowing the application for exequatur, and not whether the Greek court had respected Germany's jurisdictional immunity. In granting or refusing exequatur, the court exercises a jurisdictional power which results in the foreign judgment being given effects corresponding to those of a judgment rendered on the merits in the requested State. In this regard, the

[29] ibid, para 118.

Court refers to *Article 6, para. 2, of the UN Convention,* according to which – if applied to the request for exequatur – this request must be regarded as being directed against the State which was the subject of the foreign judgment. As a consequence, the court seized of an application for exequatur of a foreign judgment has to ask itself, whether, in the event that it had itself been seized of the merits of the dispute, it would have been obliged to accord immunity to the respondent State. For confirming this statement, the Court referred to *judgments* of the Supreme Court of Canada (2010) and the United Kingdom Supreme Court (2011).[30]

"In the light of this reasoning", the Court concluded that the Italian Courts which declared enforceable in Italy the decisions of Greek courts rendered against Germany have violated Germany's jurisdictional immunity, because they would have been obliged to grant immunity to Germany if they had been seized of the merits of a case identical to that which was the subject of the decisions of the Greek courts.[31]

4. The duty to cease internationally wrongful acts

Germany asked the Court to order Italy to ensure that the decisions of the courts and other judicial authorities infringing the immunity of Germany cease to have effect.

The Court's reasoning was very short. It simply referred to "general international law" on the responsibility of States for internationally wrongful acts "as expressed in this respect" by Article 30 (a) and Article 35 of the *International Law Commission's Articles* on the subject[32]. According to these provisions the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, if the act has ended, that State must re-establish, by way of reparation, the former situation, if this is not impossible and does not involve a burden out of proportion to the benefit deriving from restitution instead of compensation. The Court repeated the content of these Articles and – in its concluding evaluation – confirmed Italy's obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect.[33]

III. THE COURT'S "REAL METHOD" TO FIND "INTERNATIONAL CUSTOMARY LAW"

As a closer look at the detailed opinion of the I.C.J in this judgment has shown, the Court did not establish a widespread and settled practice regarding the *range of the jurisdictional immunity* comprising the acts of armed forces in combat on foreign territory, but applied this principle by defining its extent in view of its aims and functions. International conventions

[30] ibid, para 130.
[31] ibid, para 132.
[32] ibid, para 137.
[33] ibid, para 137.

(partly not even in force), acts of national legislatures and courts of only a few States are used as tools "shedding light" on the problem of interpreting the general rule that had to be solved. The same was true regarding the *immunity from enforcement*, where the Court in interpreting the general rule argued in the light of the UN Convention (not in force) and the judgments of four courts of European states. The next problem - German immunity in the case of Italian courts declaring enforceable a Greek judgment – was decided "in the light of" the UN Convention and the judgments of two national courts (Canada, UK). And finally – on the duty to cease internationally wrongful acts – the Court could simply refer to "general international law" and the International Law Commission's *Draft Articles on the Responsibility of States for Internationally Wrongful Act*.

Actually in its judgment on *Jurisdictional Immunities on the State* the Court in establishing customary rules is implicitly following a course which can be discovered in quite a number of its former judgments.[34] At first it turns to very general "first principles" of international law for which there does not seem to be any need for a specific justification because they appear to be basic norms of the contemporary international legal order and therefore it goes without saying that they have legal force. These "first principles" consist of the group of basic norms by which the international system of States has developed as a legal order for co-existing sovereign States, and also of the basic legal values the observance of which is considered necessary for the peaceful cooperation within this system in a time of "globalization".

In contentious cases these first principles may appear to be too wide in their content. It may become necessary to ascertain specific norms within their frame. In this process of interpretation it is the non-binding value assessments prevalent within the community of States that are of special weight. This is the place in the system of law sources where resolutions and declarations of the UN General Assembly and the efforts of States to codify certain sections of international law as well as national legislation and court judgments come into play: they are an expression of prevalent ideas about preferable value assessments in specific fields of the legal order. Thus it is not the – mostly impossible – task of collecting convincing facts for establishing a widespread settled "State practice" and "*opinio juris*" that characterizes the main problem of finding the applicable law, but the question of the guidelines which should serve as an orientation for the interpretation of the general norms and the establishment of specific rules. These guidelines are not legally binding, they do not say what the law *is*, but they can be considered as non-binding proposals for the Court's task of putting general norms into concrete terms, on which the international community could agree with the highest probability.

This method of detecting customary international law rules – that is, looking for legal principles and interpreting these principles to find specifying rules suitable for deciding the case, and making use of the law-making treaties and resolutions of international organizations as guidelines – seems to be the law-finding method which the Court really applies.

[34] Cf R Geiger, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal' (n 5).

Thus, whenever it becomes necessary to ascertain specific norms within the framework of customary international law, it seems to be advisable to proceed in three stages: first, one should find a general rule which can evidently be qualified as belonging to the corpus of international customary law. Secondly, if it is necessary to rely on a norm of more specific content, this norm may be established by arguing from the self-evident wider norm using the well-recognized instruments of teleological interpretation as guidelines. Only as a third step it may become necessary for a court to deal with general practice and *opinio juris* by testing whether the outcome is being refuted by a specific general practice and *opinio juris*. But then it will usually be easy to conclude that there is not enough evidence showing that custom and *opinio* in question are shared by a majority of states.

References

Geiger R, 'Customary International Law in the Jurisprudence of the International Court of Justice: A Critical Appraisal' in U Fastenrath *et al* (eds), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (2011) 673.

Geiger R, 'Die zweite Krise der völkerrechtlichen Rechtsquellenlehre' (1970) 30 ÖZöRV 215.

Geiger R, 'Zur Lehre vom Völkergewohnheitsrecht in der Rechtsprechung des Bundesverfassungsgerichts' (1978) 103 AöR 382.

Kirchner J, *Völkergewohnheitsrecht aus der Sicht der Rechtsanwendung* (1989).

Roberts A, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 757.

Talmon S, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) European Journal of International Law 417.

Tams Ch, 'Meta-Custom and the Court: A Study in Judicial Law-Making' (2015) 14 The Law and Practice of International Courts and Tribunals 51.

Wolfke K 'Some Persistent Controversies Regarding Customary International Law' (1993) XXIV Netherlands Yearbook of International Law 1.