

D. Identification of customary international law

In reply to the Commission's request in Chapter III D of the Report concerning the identification of customary international law to provide information on the practice relating to the formation of customary international law and the types of evidence for establishing such law in a given situation as set out in

- (a) official statements before legislatures, courts and international organizations; and
- (b) decisions of national, regional and subregional courts,

as well as information about digests and surveys on State practice, Austria would like to provide the following information:

1. Official Statements

- In its reaction to the report of the Charter Committee submitted to the 31st Session of the General Assembly in 1976 Austria stated as follows: "Une résolution de l'Assemblée quel que soit son titre a donc un rôle important à jouer dans la formation du droit international coutumier. C'est probablement à la résolution qu'on devra se référer pour connaître avec le maximum de précision le contenu de la règle"³
- The Explanatory Memorandum submitted by the Austrian Federal Government to the Austrian National Assembly in 1982 declared that the right of international organizations to decide on its headquarters' seat was based on a generally recognized rule of international law.⁴
- With regard to the question as to whether a rule of *bilateral* customary international law had arisen the Legal Office of the Austrian Foreign Ministry came to the conclusion that such a rule had not emerged in the given case due to the lack of practice. It further opined that normally practice even without *opinio iuris* existed prior to the creation of customary international law⁵
- In its statements in the Sixth Committee, Austria referred to the formation of customary international law several times. According to its view expressed in 2012, an obligation to extradite or prosecute does not exist under customary international law and can only be derived from treaty law or domestic law (see attachment, Statement 2011, Cluster III,).
- In 1975, Austria declared that, according to customary international law, a bilateral treaty could be suspended on the grounds that it has been breached. Accordingly, Austria promulgated a declaration in the Federal Law Gazette that, on the grounds of generally recognized principles of international law, Article 2 of this treaty was no longer applicable (cf. Austrian Federal Law Gazette No. 298/1975)

³ Gerhard Hafner, Austrian Practice of international law 1976/77, *Osterreichische Zeitschrift für öffentliches Recht und Völkerrecht*, vol 28 (1977), p 342

⁴ Gerhard Hafner, Austrian Practice of international law 1981/82, *Osterreichische Zeitschrift für öffentliches Recht und Völkerrecht*, vol 33 (1982), p 358

⁵ Gerhard Hafner, Austrian Practice of international law 1983/84, *Osterreichische Zeitschrift für öffentliches Recht und Völkerrecht*, vol 35 (1985), p 373

- In answering a questionnaire of the Council of Europe regarding the question of state immunity in 2014, Austria declared that the immunity of state-owned cultural objects from measures of constraint as provided for in Articles 19 and 21 of the UN Convention reflected the current state of customary international law. As the UN Convention is not in force yet and in order to increase the acceptance of this rule as being part of customary international law, Austria, together with the Czech Republic, developed the idea of drafting a non-binding declaration to be signed by States supporting the immunity of state-owned cultural property from measures of constraint. The declaration, which was presented to the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI) in September 2013, emphasizes that jurisdictional immunities of States and their property are part of customary international law.
- In the context of the discussion whether the rules laid down in the Vienna Convention on the Law of Treaties (VCLT) applied to bilateral investment treaties after a succession of States Austria held the view that the requirement to notify the claim that a treaty was to be considered terminated, as expressed in Article 65 VCLT, was without doubt a rule of customary international law.⁶
- In its written statement to the International Court of Justice (ICJ) in the proceedings concerning the advisory opinion regarding *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* Austria stated *inter alia*⁷

“26. Similarly, such a declaration alone cannot establish a state since other elements are required for this purpose such as: (a) a permanent population, (b) a defined territory; (c) government, and (d) capacity to enter into relations with other states. State practice has applied the principle of effectiveness to the constitutive elements of the state. Accordingly, doctrine and practice unequivocally illustrate that a declaration alone does not suffice to establish the status of an “independent and sovereign state”. Since the Declaration is unable to create statehood it cannot be measured against rules of general international law relating to the creation of a new State or change of territory.”
- In its reply to a question in Chapter III of the 2011 ILC-Report on its 63rd session relating to the criteria for the identification of persons covered by immunity *ratione personae*, Austria held in its statement in the Sixth Committee that existing customary international law did not extend this particular immunity to other officials in addition to heads of state, heads of government and foreign ministers (see attachment, Statement 2011, Cluster 3)
- In 2014, in its reply to a questionnaire of the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI) on immunity of state-owned cultural property on loan, Austria declared that in its view the provisions on service of process in the 2004 UN Convention on Jurisdictional Immunities of States and Their Property were to be seen as a codification of customary international law. It held that in the absence of international agreements or rules deriving from such agreements, customary international law as reflected in the 2004 UN Convention applied. Accordingly, service of documents was deemed to have been effected by their receipt by the Austrian foreign ministry.

2. Judicial Practice

⁶ Tichy et al, ZOR 67 (2012) 166-167

⁷ Austrian Review of International and European Law (ARIEL) 14 (2009), pp 536-541

The Austrian judicial practice regarding customary international law is analysed in an article by Peter Bachmayer & August Reinisch, *The Identification of Customary International Law by Austrian Courts* (forthcoming in ARIEL 17 (2012), see attachment 1)

3. Digests of international Law

Since 1975, an Austrian digest of international law has been published annually. It is divided in two parts, the first relating to judgments, the second to diplomatic and legislative practice. This compilation, initially in German, only with an English summary, since several years in English, has been structured in accordance with the proposal by the Council of Europe.

Moreover, since 2012, the members of the Legal Office of the Federal Ministry Europe, Integration and Foreign Affairs have been publishing concise reports of the recent Austrian practice in the field of international law on an annual basis⁸

See also Austria's statements in the Sixth Committee (see attachments)

- *Statement 2012, Cluster I*
- *Statement 2013, Part III*
- *Statement 2014, Cluster III*

66th Session
of the General Assembly
Sixth Committee

Agenda Item 81
Report of the International Law Commission
on the Work of its 63rd Session

**Cluster 3: Immunity of State officials (Chapter VII),
The obligation to extradite or prosecute (Chapter X), Treaties over time
(Chapter XI), the Most-Favoured-Nation clause (Chapter XII) and
Other Decisions (Chapter XIII)**

Statement by
Catherine Quidenus
Legal Adviser, Permanent Mission of Austria

New York, 1 November 2011

Mr. Chairman,

Austria would like to thank Special Rapporteur Kolodkin for his second report on substantive issues and his third report on procedural questions on **Immunity of state officials from foreign criminal jurisdiction**. We would again like to stress the importance Austria attaches to this question, as states are increasingly confronted with cases involving issues of possible criminal immunity. International law in force does not offer complete responses to all the questions connected with this issue. For this reason, states might come to different answers, generating more confusion than guidance. Therefore it is essential that the Commission deals with this topic as a matter of high priority

Permit me to address the three questions on which the Special Rapporteur would like to obtain more guidance from states first:

The first question relates to the approach States would wish the Commission to take on this topic. Should it concentrate on setting out existing rules of international law or rather embark on an exercise of progressive development? Austria is of the view that the Commission should, as a first step, concentrate on the identification of the existing rules. This exercise would not only be very useful, it would also show situations where international law in force is unable to keep pace with present developments. Nowadays, in the field of international relations, more emphasis is put on combatting impunity and on the accountability of states and their organs. These developments militate in favor of restricted immunity, and the question arises as to what extent existing international law is reflecting these developments. Once the Commission has identified the existing law and its discrepancies with such developments, it could, as a second step, try to propose rules *de lege ferenda* aiming at bringing international law in conformity with these developments.

The second question is certainly of central importance. Which holders of high offices of state enjoy absolute immunity *ratione personae* already under existing international law or should enjoy such immunity *de lege ferenda*? In Austria's view, the International Court of Justice gave a convincing answer to this question in the Arrest Warrant Case of 2002. It stated that heads of state, heads of government and foreign ministers enjoy absolute immunity. At the moment, there is no indication that other persons of high rank likewise enjoy such immunity *ratione personae* under customary international law. This does not exclude, however, immunities accorded under conventions and agreements, such as the Vienna Convention on diplomatic relations, the Convention on special missions or headquarters agreements. These treaties establish absolute immunity for persons other than the three high officials referred to above and apply as *leges speciales*

The third question asks what crimes are, or should be, excluded from immunity *ratione personae* or *ratione materiae*. We believe that the starting point for the examination of this issue must be that state officials generally enjoy immunity in the exercise of their functions and that any restriction thereof constitutes an exception. A different point of view would disregard the evolution of the concept of immunity of state officials, which started from absolute immunity and developed towards functional immunity. The distinction between these two kinds of immunity has to be kept in mind.

Different answers may have to be found for the question of exclusion of either form of immunity in the case of international crimes. Generally, there is undoubtedly a tendency to deny immunity as far as international crimes are concerned. One has also to recognize that certain international crimes by definition are committed by state organs in their official capacity, for example war crimes or the crime of torture, where - according to the UN Convention against Torture - a public official or another person acting in an official capacity must be involved. A state official who enjoys functional immunity cannot invoke this immunity if he or she has committed such acts. Otherwise, the relevant rules would be devoid of any application. Therefore, persons enjoying functional immunity, in principle, cannot invoke their immunity in the case of the commission of international crimes.

Nevertheless, these exceptions from the immunity cannot be applied if immunity is based on a special treaty regime, such as the Convention on special missions, or on a comparable rule of customary law, e.g. in the case of an explicit invitation for an official visit. In addition, no such restriction of immunity would be applied to heads of state or government or ministers of foreign affairs. The International Court of Justice has stated clearly that it “has been unable to deduce from [...] practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity”. This conclusion must *a fortiori* also be applicable to heads of state or government.

In this context, the solution offered by the Institut de Droit International in its resolution adopted in Vancouver in 2001 seems worth considering. The Institut acknowledges the existence of such immunity, but recommends that states should waive the immunity when “the Head of State is suspected of having committed crimes of a particularly serious nature, or when the exercise of his or her functions is not likely to be impeded by the measures that the authorities of the forum may be called upon to take”. This rule applies also to heads of government and, in the light of the reasoning of the International Court of Justice, to foreign ministers.

International crimes certainly include all crimes under the jurisdiction of the International Criminal Court, such as war crimes, genocide and crimes against humanity. When the 2005 World Summit discussed the responsibility of states to protect their populations, it referred to genocide, war crimes, ethnic cleansing and crimes against humanity, other states should cooperate to this end. This responsibility to protect could be understood as including also the duty to prosecute such crimes, which would further restrict functional immunity.

Mr. Chairman,

Turning now to the work of the Commission regarding the **obligation to extradite or prosecute**, Austria thanks the Special Rapporteur Mr. Galicki for the presentation of his fourth report. It discusses emerging tendencies in international law regarding certain crimes that have already acquired the status of international crimes. As far as Austrian practice is concerned, we have submitted a report on our national legislation and jurisprudence regarding the obligation to extradite or prosecute. In this report we reiterated that, in our view, an obligation to extradite or prosecute does not exist under customary international law and can only be derived from treaty law or domestic law. Austria adheres to the principle of legality, according to which Austrian authorities are under a legal obligation to prosecute a crime. In view of Austria's extended criminal jurisdiction, this obligation has wide reaching effect. Austria does not distinguish between different kinds of crimes so that so-called international crimes do not have a different status than any other crime under domestic law.

For these reasons, Austria has some difficulties with the present draft article 4 on international custom. Despite the emerging connection of certain international crimes with *jus cogens*, Austria is not convinced of the reference to *jus cogens* in this context, which is still a very unclear concept in international law. Instead, Austria would like to emphasize again the usefulness of the structure given to this topic by the Working Group in 2009, which raised some issues and questions that are of particular interest to states.

Mr. Chairman,

Let me now refer to the very interesting topic **treaties over time**. Austria is very grateful to the Chairman of the Study Group, Professor Nolte, who, in his second report, meticulously examined the international judicial practice in this field. Austria has transmitted an extensive report on Austria's practice regarding the interpretation by subsequent practice or agreement. In particular, reference can be made to the Gruber de

Gasperi Agreement between Austria and Italy of 1946 on South Tyrol, which was later interpreted by a Calendar and Package of Operation, both constituting agreements that did not obtain the status of formal treaties.

Austria concurs with most of the preliminary conclusions elaborated by the Chairman of the Study Group. A major conclusion is the need to distinguish between different types of treaties according to their substance and, consequently, their object and purpose. Human rights treaties are frequently interpreted by a different method compared to other treaties. It might also be worthwhile to examine up to which extent treaties containing synallagmatic obligations are interpreted differently from treaties containing *erga omnes* obligations. However, we would not consider the evolutionary approach as a special kind of interpretation by subsequent practice. In this case, it is not the practice of the state parties regarding the relevant treaty that is relevant for the interpretation, but the general development and evolution of the political environment.

Mr. Chairman,

Finally, Austria welcomes the work of the study group co-chaired by Professor McRae and Ambassador Perera regarding the complex topic of the **Most Favoured Nation clause** (MFN clause). Austria shares the view that the final result of this work does not necessarily need to be draft articles. It could also have the form of a substantial report providing the general background, analyzing the case law, drawing attention to the trends in practice and, where appropriate, make recommendations, including proposed model clauses.

Regarding the question of the Commission in Chapter III of its Report, Austria would like to emphasize that Most Favoured Nation clauses are not limited to the fields of trade and investment law, but are frequently used in other areas as well: For instance, they are included in various international agreements on navigational matters (*cf Exchange of notes between Austria and Greece of 1931*) or with respect to the treatment of aliens (*cf Art 1 of the Treaty of Friendship between Austria and the USA of 1931*). A specific case is the State Treaty of St Germain concluded after World War I, which in Art 228 accords a MFN treatment to the nationals of the allied and associated powers. Other examples include bilateral treaties regarding the status of members of the diplomatic or consular staff, which are granted treatment under the MFN clause (*cf Art 37 para 6 of the Consular Treaty between Austria and Bulgaria of 1976*). MFN clauses are furthermore systematically included in headquarters agreements of international organizations concluded by Austria (*cf e.g Section 55 lit a of the Agreement on the HQ of UNIDO of 1995, Section 49 lit c of the Agreement in the HQ of IAEA of 1957, or Art 21 of the Agreement on the HQ of the Energy Community of 2007*)

Thank you, Mr. Chairman.

Permanent Mission of Austria
to the United Nations in New York

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67th Session
of the General Assembly
Sixth Committee

Agenda Item 79
Report of the International Law Commission
on the Work of its 64th Session

**Cluster I: Chapter III (customary international law); Chapter IV (expulsion of
aliens); Chapter V (protection of persons in the event of disasters); Chapter XII
(other decisions)**

Statement by
Ambassador Helmut Tichy
Legal Adviser
Austrian Ministry for European and International Affairs

New York, 29 October 2012

Mr Chairman,

I would like to begin by addressing the questions raised in Chapter III of the report of the ILC concerning **customary international law**. The Commission requested states to provide information on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law as set out inter alia in decisions of national courts

Austria will directly communicate to the Special Rapporteur relevant cases in which Austrian courts addressed these issues. However, I would like to refer here to one well known case in which the Austrian Supreme Court dealt extensively with the formation of customary international law and evidence concerning its establishment

In the case of *Dralle v Czechoslovakia*, 17 *ILR* 155 (1950), the Austrian Supreme Court, in order to establish whether a restricted immunity of states formed part of customary international law, focussed as a first step on the examination of the practice of the courts of different states. It further scrutinized relevant documents of the Imperial Economic Conference of the British Empire of 1923, the World Economic Conference of 1927 and the Harvard Law School of 1932, all supporting the principle of restrictive immunity. Although, as the court stated, there was no uniform view of legal scholars on this issue, it reached the conclusion that it can no longer be said that, under customary international law, so-called *acta iure gestionis* were exempt from municipal jurisdiction.

The questions raised in Chapter III relating to the **immunity of state officials from foreign criminal jurisdiction** will be addressed in our statement concerning Cluster III.

Mr. Chairman,

Regarding the topic “**expulsion of aliens**”, Austria expresses its respect to the Special Rapporteur, Maurice Kamto, for the final elaboration of the complete set of draft articles after first reading. Since states are now invited to submit their comments on these draft articles by 1 January 2014, Austria restricts itself at this moment to a few comments.

Generally speaking, we are satisfied to see that some of our concerns have been taken care of in the present text. As far as individual draft articles are concerned, we would like to comment on those which were adopted at the recent session of the Commission

Draft Article 26 para 3 on consular assistance to aliens subject to expulsion, which reflects Article 36 of the Vienna Convention on Consular Relations, has to be read in the light of the latter provision as interpreted by the International Court of Justice. Unfortunately, the important clarification by the Court that Article 36 para. 1 (b) of the Vienna Convention obliges the detaining state to inform the competent consular post upon request by the detainee

and to inform the detainee of his or her right in that respect, is only reflected in para 10 of the commentary but not in the draft article itself

As to draft Article 27 on the suspensive effect of an appeal against an expulsion decision, we think that this provision can only be seen as a principle from which exceptions are possible albeit only in certain specific situations, in particular in the area of public order or safety. Accordingly, as we stated already last year, under Austrian law, in principle all such appeals have suspensive effect if they relate to an alien lawfully present in Austria. However, it is possible to deny the suspensive effect to such aliens if their immediate departure is required for reasons of public order or safety. Nevertheless, even in such cases, suspensive effect has to be granted if that is necessary to respect the non-refoulement principle.

Draft Articles 31 on responsibility and 32 on diplomatic protection seem redundant as, on the one hand, there can be no doubt that any breach of an international obligation entails international responsibility and, on the other hand, that any state can exercise the right of diplomatic protection in favour of its nationals. These obligations and rights derive from other regimes of international law and need not be repeated in this context.

Mr Chairman,

Permit me now to turn to the topic of the **“protection of persons in the event of disasters”**. Austria congratulates the Special Rapporteur, Eduardo Valencia-Ospina, for his work and would like to offer its comments on draft Articles 13 to 15 and draft Article A as provisionally adopted by the Drafting Committee.

Draft Article 13 on the conditions under which assistance may be provided should reflect the rules on cooperation as already outlined in draft Article 5. In our view, an affected state is not free to “impose conditions” unilaterally, rather such conditions should be the result of consultations between the affected state and the assisting actors, taking into account the general principles governing such assistance and the capacities of the assisting actors.

Draft Article 14 regarding the facilitation of external assistance requires the affected state to take the necessary legislative measures. However, practice shows that more issues have to be addressed by the legislation than only those mentioned in the draft article, such as confidentiality, liability issues, the reimbursement of costs, privileges and immunities, control and competent authorities. The Articles 6 – 10 of the Convention of 1986 on Assistance in the Case of a Nuclear Accident or Radiological Emergency are very illustrative in this regard. Similarly, Point VII (2) of the resolution of the Institut de Droit International of 2003 on Humanitarian Assistance refers to the obligation to prepare the required legislation regarding overflight and landing rights, telecommunication facilities and necessary immunities, exemption from any requisition, import, export and transit restrictions as well as customs duties for relief goods and services, the prompt granting of visas or other authorizations free of charge. In line with these provisions, draft Article 14 requires further elaboration.

Draft Article 15 regarding the termination of external assistance leaves it open when the duty of consultation regarding the termination arises. It is very often difficult to state already at the beginning of such assistance when it can be terminated, nevertheless it would certainly be helpful to provide for consultations as soon as possible, subject, however, to such adjustments as may be necessary.

Concerning draft Article A on the duty to cooperate we believe that this provision, in its present phrasing, goes very far, as it implies an international obligation. As we have already stated last year, Austria takes the view that such a general obligation does not exist and should not be established, as it would contradict the basic principle in the field of international disaster relief, the principle of voluntariness.

Thank you, Mr. Chairman.

Permanent Mission of Austria
to the United Nations in New York

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**68th Session of the
United Nations General Assembly**

6th Committee

Agenda Item 81:

**Report of the International Law Commission
on the Work of its 63rd and 65th Session**

Part III (Chapters VI, VII, VIII, IX, X and XI)

Statement by

Professor August Reinisch

Delegation of Austria

New York, 4 November 2013

(Disasters)

Mr. Chairman,

Permit me to address first the topic of the “protection of persons in the event of disasters” Austria congratulates the Special Rapporteur, Eduardo Valencia-Ospina, for his work and would like to offer its comments on the draft articles provisionally adopted by the Drafting Committee during the 65th session of the Commission

As to draft article 5 bis, Austria is not convinced of the need to retain this article. As the commentary itself states, article 5 bis does not contain any normative substance, only a demonstrative enumeration of possible forms of cooperation. *Although we appreciate the presentation of the various measures taken by states, such an inventory would better remain in the commentary and need not be reflected in a normative provision. The forms of cooperation can hardly be defined in a general way, as they would depend on the particular type of disaster and the specific circumstances of the situation.*

Draft article 12 establishes a right to offer assistance. In our view, the stipulation of such a right is necessary. As a consequence, the affected state is precluded from considering such an offer either as an unfriendly act or as an intervention into its internal affairs. *This consequence was explicitly confirmed by the Institut de Droit International. The commentary rightly recognizes, in line with draft articles 10 and 11, that an offer of assistance does neither entail a duty to accept the offer nor a duty to provide assistance. In this understanding, draft article 5, which provides for a duty of cooperation, needs to be better brought in line with draft articles 10 to 12.*

We welcome the differentiation between states and intergovernmental organizations on the one hand and NGOs on the other, now contained in draft article 12. Austria has already advocated such a differentiation in its statement two years ago. The second sentence of this draft provision takes the important role of NGOs in the field of disaster response into account, but is not to be understood as endowing NGOs with international legal personality. With this understanding we support the present drafting of article 12.

As to draft article 13, Austria reiterates that the conditions under which assistance may be provided should not be the result of the unilateral decision of the affected state. We believe that they should be the result of consultations between the affected state and the assisting actors, taking into account the general principles governing assistance and the capacities of the assisting actors.

As to draft articles 14 and 15 Austria retains its comments made last year on these provisions and their need of further elaboration. In particular, the right to terminate assistance, subject to consultations, should be spelled out explicitly.

Draft article 16 on the duty to reduce the risk of disasters seems to exceed the original mandate under this item confined to the “protection of persons in the event of disasters”. Such a duty would certainly go very far, also in view of the broad definition of disasters in draft

article 3 which includes all kinds of natural and man-made disasters. There is a risk that such a broad duty could interfere with existing legal regimes regarding the prevention of certain kinds of disasters, in particular man-made disasters including such caused by terrorist attacks

Accordingly, if the Commission envisages addressing the issue of prevention also in the present context, it should concentrate on the prevention and reduction of the effects of disasters

When it addressed the issue of prevention in the context of the topic "Prevention of Transboundary Harm from Hazardous Activities", the Commission did not impose a duty on states to prevent harmful activities, but to prevent any harm resulting from those activities Article 5 of the relevant draft articles reads "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof" Similarly, as the commentary itself points out, the Hyogo Declaration issued at the 2005 World Conference on Disaster Reduction refers to the duty of reduction of the risk of harm caused by a hazard, as distinguished from the prevention of disasters themselves

Draft article 5 ter likewise refers to the duty to reduce the risk of disasters Given the broad definition of disasters, this would oblige states to cooperate in reducing the risk of terrorist acts or civil strife below the level of non-international armed conflict We are of the opinion that the cooperation in these areas is, to a large extent, already covered by other regimes

(Customary law)

Mr. Chairman,

Allow me to turn to Chapter VII on customary international law. As indicated previously, Austria welcomes the plan of the Commission to contribute to the clarification of the formation and evidence of customary international law. We support the Commission's recent decision to emphasize the methodology of finding evidence for custom by changing the name of the topic to "Identification of customary international law"

The delegation of Austria commends the Special Rapporteur on this topic, Sir Michael Wood, for the comprehensive work he has performed in his first report Austria equally appreciates the thorough study of the Secretariat contained in its memorandum, identifying elements in the previous work of the Commission that could be particularly relevant to the formation and evidence of customary international law

As to the scope of this topic, Austria supports the Special Rapporteur's recommendation not to deal with jus cogens at this stage for pragmatic reasons Customary international law rules may have jus cogens character, but we are of the view that this highly complex work should not be complicated further

As to the case-law that could potentially help to identify customary international law, Austria concurs with the Special Rapporteur's finding that the relevant practice of international,

regional and domestic courts and tribunals should also be scrutinized by the Commission. With regard to the “reliability” of domestic courts to identify custom, Austria appreciates the Special Rapporteur’s “cautious” approach. However, domestic court practice itself may constitute relevant state practice and express opinio juris and thereby contribute to the formation of customary international law regardless of the accuracy of its “identification” of existing custom in specific cases. The development of jurisdictional immunities serves as a clear example of domestic courts, not only “identifying”, but actually “forming” customary international law. In any event, the practice and legal opinion of state organs competent for international relations should be duly reflected

Austria reiterates its view that this project is not suited to lead to a convention or similar form of codification. It is pleased with the present approach of the Special Rapporteur to provide guidance in the form of “conclusions” with commentary.

(Provisional application)

Mr Chairman,

As already stated last year, my delegation welcomes the inclusion of the topic “Provisional application of treaties” into the work program of the Commission and commends the Special Rapporteur for his first report. This report and the discussion held in the Commission already highlight the main issues requiring clarification. The particular importance of this topic has been demonstrated by some recent decisions on provisional application, relating to the Arms Trade Treaty and the Chemical Weapons Convention.

As to the form envisaged of this work, my delegation shares the approach of elaborating guidelines or model clauses that could help states wishing to resort to the provisional application of a treaty.

We also share the view that the provisional application of treaties by international organizations must be included in this topic, since the 1986 Vienna Convention on the law of treaties of international organizations also refers to this possibility.

As to the problems to be addressed, we can only reiterate what we pointed out last year. My delegation concurs with the view that the expression “provisional application” is to be preferred to the expression “provisional entry into force”. As to the legal effects of “provisional application” the work of the Commission will have to explain whether provisional application encompasses the entire treaty or whether certain clauses cannot be applied provisionally. However, once a treaty is being applied provisionally, the obligations resulting therefrom are obligations the breach of which would lead to state responsibility.

It also must be clarified in which way provisional application can be initiated and terminated, in particular whether unilateral declarations are sufficient for this purpose. While article 25 of

the Vienna Convention on the Law of Treaties leaves no doubt as to the possibility of unilateral termination, there is no uniform view concerning unilateral activation.

In a more general view, the Commission will have to examine how far the rules contained in the Vienna Convention, such as regarding reservations or invalidity, termination or suspension as well as the relation to other treaties, also apply to provisionally applied treaties.

My delegation shares the view that interim agreements are substantially different from provisional application since they are treaties that are subject to the usual entry into force procedures and to which the Vienna Convention applies without restrictions

As the discussion about article 45 of the Energy Charter Treaty illustrates, the relationship between provisional application and national law is not yet sufficiently explored. The Austrian delegation does not share the view of the Special Rapporteur that “domestic law does not provide a barrier to provisional application” On the contrary, provisional application raises a number of problems in relation to domestic law, in particular if the constitution of a state is silent on this possibility Moreover, as a matter of principle, not only in the context of constitutional law, but also of international law, the Commission must give serious consideration to the need to ensure that democratic legitimacy is preserved, even in the case of provisional application. It is for this reason that Austria applies treaties provisionally only after their approval by the Austrian parliament *As to our practice in this regard we can refer to our statement of last year*

(Protection of the environment in relation to armed conflicts)

It is with great interest that Austria took note of the topic “Protection of the environment in relation to armed conflicts” which was placed on the agenda of the Commission this year. We also welcome Ms Marie Jacobsson as Special Rapporteur for this topic

The Special Rapporteur proposed to proceed from a broad understanding of this topic and encompass not only the phase during the armed conflict, but also the phases prior and subsequent to it Austria commends this approach We also support the inclusion of non-international armed conflicts Nevertheless, the question still remains whether riots and internal disturbances should also be included.

As to the different emphasis put on the three phases, it must be recognized that the second phase, namely that during the conflict, is already subject to certain conventional regimes, *such as the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1978 (ENMOD Convention) or certain rules of the 1977 Additional Protocol I to the 1949 Geneva Conventions such as articles 35 and 55*

Accordingly, it would be necessary to coordinate the work of the Commission on this topic with the ICRC to avoid the duplication of work or different results. In view of the existing legal regimes and the work of the ICRC, we welcome the decision to start with Phase I, the pre-conflict period that has not yet been addressed When doing so, the effects on phase II and

III will have to be taken into account. We also understand that with regard to Phase I the question of the protection of the environment as such will only be addressed as far as the possibility of a military conflict requires special measures of protection.

My delegation also shares the view that the effects of weapons should not be addressed, since such a work would require major technical advice and would be subject to further technical development

(The obligation to extradite or prosecute)

Austria took note of the work of the Working Group regarding the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)“ under the guidance of Mr. Kriangsak Kittichaisaree.

In our view it is certainly worthwhile to include into the discussion the Judgment of 20 July 2012 of the International Court of Justice in Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) where the court dealt with this issue in extenso At several occasions Austria has already stated that there is no duty to extradite or prosecute under present customary international law and that such obligations only result from specific treaty provisions Accordingly, the scope of the duty to extradite or prosecute and the method and form of its implementation vary considerably and it will be difficult to establish a common regime.

Nevertheless, it might be possible to sort out some common features. Here, the result of the Working Group established in 2009, which constituted a valuable supplement to the work of the Special Rapporteur, could be of assistance to the present Working Group

(Most-favoured-nation clause)

Mr. Chairman,

Austria regards the work undertaken by the Commission concerning the “most-favoured-nation clause” as a valuable contribution to clarifying a specific problem of international economic law which has led to conflicting interpretations, in particular, in the field of international investment law.

Austria reiterates its view that the extremely contentious interpretation of the scope of MFN clauses by investment tribunals makes it highly questionable whether the work of the Commission could lead to draft articles We therefore appreciate the current Study Group’s assertion that this is not intended. Nevertheless, there is certainly room for an analytical discussion of the controversies regarding MFN clauses.

On this note, Austria welcomes the Commission's plan to pursue further studies in the field of MFN clauses and their practical applications with a view to safeguarding against the further fragmentation of international law in general and to counter the risk of incoherence and lack of predictability which currently seems to prevail in the field of investment arbitration.

The Austrian delegation also welcomes the Study Group's intention to broaden its scope of investigation and to address not only other fields of economic law where MFN treatment plays a role, but to look at problems of MFN treatment in headquarters agreements which is of central importance to international organizations and their host states

Thank you, Mr Chairman.

Check against delivery

69th Session

of the General Assembly

Sixth Committee

Agenda Item 78

Report of the International Law Commission

on the Work of its 66th Session

**Cluster III: Identification of customary international law (Chapter X),
Protection of the environment in relation to armed conflicts (Chapter
XI), Provisional application of treaties (Chapter XII), The Most-Favoured
Nation clause (Chapter XIII)**

Statement by

Professor August Reinisch

New York, 3 November 2014

Mr. Chairman,

Allow me to start with the topic **"Identification of customary international law"** As already indicated, Austria strongly supports the Commission's aim to clarify aspects relating to this source of public international law by formulating "conclusions" with commentaries. We specifically commend the Special Rapporteur Sir Michael Wood for the work undertaken in his second report focusing on the two constituent elements of custom, "general practice" and "accepted as law".

However, with regard to some specific points in the Commission's report, my delegation has doubts concerning the desirability of defining "customary international law" and "international organisations" as proposed in the draft conclusions As the first term, "customary international law", is defined in Article 38 of the ICJ Statute, and as this definition is generally accepted also outside the ambit of the ICJ, it does not seem useful to introduce a new definition The wording proposed in draft conclusion 2 subparagraph (a), which was controversially debated by the Commission, may lead to confusion about the general concept

Concerning the definition of "international organisation", the Austrian delegation would not like to question the fact that international organisations may also play a role in the creation of customary international law. However, we are not convinced that this definition is necessary in the text of the draft conclusions It would be preferable to clarify the meaning of this term in the commentary on the relevant draft conclusions, such as draft conclusion 7 on "forms of practice" There, it could be stated that the term "international organisation" does not comprise non-governmental organizations and that international organisations as subjects of international law can be created by states or other international organisations For this reason, we are not convinced that the term "intergovernmental organisation" would be appropriate.

As regards the basic approach to the identification of rules of customary international law the Austrian delegation strongly supports the Special Rapporteur's insistence on the so-called "two-element approach".

Concerning the scope of potential actors in the process of the creation of customary international law, a limitation to the practice of states, or to states as only potential creators of customary international law would be misguided. The Austrian delegation thinks that this potential norm creating role should be kept open for other subjects of international law In that regard we would prefer that the Special Rapporteur's approach could be expanded

The Austrian delegation further welcomes the illustrative list of "Forms of practice" (draft conclusion 7) as well as "Evidence of acceptance as law" (draft conclusion 11 subparagraph (4)) and it particularly concurs with the approach of the Commission to acknowledge that certain manifestations of acts and inactions may actually demonstrate both. We agree with the reference in the Commission's report that the inclusion of "inaction" as a form of practice, as well as the concept of "specially affected states", needs to be further explored and clarified

Mr. Chairman,

With regard to the topic **"Protection of the environment in relation to armed conflicts"**, which was placed on the agenda of the Commission last year, we commend the Special Rapporteur, Ms Marie Jacobsson, for the preliminary report on this topic

According to the distinction of the different phases within this legal regime, the Special Rapporteur concentrated in her report on phase I, the phase prior to an armed conflict. The

report demonstrates that the entirety of international law on the protection of the environment would apply in this phase. In our view, it is not necessary to discuss under this topic the whole range of environmental law, which is under permanent development and review. Instead, the main emphasis should be placed on the relationship between environmental law and international humanitarian law.

As to the use of terms, in particular two terms, which are fundamental for this topic, require further discussion: the terms "environment" and "armed conflict". As to the former, the different international legal instruments existing so far use very different definitions. Nevertheless, the definition adopted by the International Law Commission in the Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities seems to be an appropriate starting point. A definition that also relates to the cultural heritage would certainly be too broad for the present topic.

As to the term "armed conflict", my delegation is in favour of applying the definition used in international humanitarian law also in this context. This definition encompasses international and non-international armed conflicts, but does not reach beyond the lower threshold of the latter, i.e. to situations of internal disturbances and tensions, riots, isolated and sporadic acts of violence or other acts of a similar nature.

Already in our statement of last year we referred to the need to coordinate the Commission's work on this topic with the work of the ICRC. Although specific weapons regimes are not included within the ILC topic, they are nevertheless related to it. In this respect, my delegation would like to draw attention to the upcoming Vienna Conference on the Humanitarian Consequences of Nuclear Weapons, to be held on 8 and 9 December 2014.

Mr. Chairman,

With regard to the topic "**Provisional application of treaties**", the Austrian delegation commends the Special Rapporteur, Mr. Gómez-Robledo, for his second report, which underscores the importance of this topic, as evidenced by some recent decisions on provisional application relating to the Arms Trade Treaty and the Chemical Weapons Convention. Already in our statements in the preceding years, Austria stressed the particular importance of the topic of the provisional application of treaties, identified the particular issues requiring further elaboration and explained its general position regarding this matter.

In his present report, the Special Rapporteur dealt with the issue of the source of provisional application and identified four ways in which Article 25 of the Vienna Convention on the Law of Treaties might be manifested. However, one may question whether Article 25 of the Vienna Convention can be interpreted as permitting a state to unilaterally declare the provisional application of a treaty if the treaty itself is silent on this matter. Since the provisional application is deemed to establish treaty relations between the state parties, it could be argued that a unilateral provisional application would oblige the state parties to accept treaty relations with a state without their consent. This consent is usually expressed by the ratification and accession clauses of a treaty or the special clause on its provisional application.

A provisional application of a treaty by unilateral declaration without a special clause in the treaty could only take place if it can be established that the state parties agreed to this procedure in some other manner according to Article 25 paragraph 1 subparagraph b of the Vienna Convention on the Law of Treaties.

However, this conclusion does not rule out the possibility that a state commits itself to respect the provisions of a treaty by means of a unilateral declaration without obtaining the agreement of the state parties. Whereas the provisional application results in the establishment of treaty rights and obligations with the other state parties, the application resulting from a unilateral declaration can only lead to obligations incumbent upon the declaring state. This is also reflected in the "Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations", adopted by the International Law Commission in 2006, according to which a unilateral declaration entails obligations for the declaring state and cannot generate obligations incumbent on the other state parties without their consent.

As to the effects of provisional application, Austria shares the view of the Special Rapporteur that a breach of the applicable provisions of a treaty provisionally applied entails state responsibility that can be invoked by the other state parties.

Mr. Chairman,

Austria continues to regard the work envisaged by the Commission concerning "**The Most-Favoured-Nation clause**" as a valuable contribution to clarifying specific problems of international economic law. As the Commission itself suggested, this should be undertaken by a systematic study of the main issues and not by an attempt to formulate draft articles. The highly contentious interpretations of MFN clauses, in particular, in the field of international investment law, wisely commend such a careful approach.

The Austrian delegation looks forward to studying the final draft report of the Study Group which will address a wealth of highly topical MFN problems. My delegation would have welcomed if the individual reports mentioned in paragraph 254 of the Commission's Report had been made available as well.

Thank you Mr. Chairman.

The Identification of Customary International Law by Austrian Courts

*August Reimisch / Peter Bachmayer**

I. Introduction

Customary international law, that venerable bedrock of inter-state law, has received additional attention recently. After the ILA,¹ the ILC included the topic “Formation and evidence of customary international law” in its programme of work,² and subsequently decided to focus on the question of the “Identification of customary international law”.³ The following contribution aims at analysing how domestic courts in Austria have addressed this issue of identifying custom.

Article 38 of the Statute of the International Court of Justice refers to customary international law as “evidence of a general practice accepted as law” and lists it as one of the main sources of international law. Custom is formed by two essential elements. (1) a consistent practice of states as indicated by a state’s external behavior towards other states as well as by internal acts like domestic legislation, government memoranda or judicial decisions if they relate to the international field; and (2) the belief that such a practice has a legally binding effect upon the state (*opinio iuris*).

Thus, in order for a rule under customary international law to be formed, states engaging in a certain practice – either by taking action themselves or by responding to it – must have acted upon the notion that said practice was ‘rendered obligatory by the existence of a rule of law requiring it.’⁴ The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character, of the acts in itself is not enough to lead to the emergence of custom. There are many international acts, e.g., in the field of protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.⁵

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¹ ILA Resolution 16/2000, Formation of General Customary International Law, adopted on 29 July 2000 by the International Law Association, reprinted in International Law Association, Report of the Sixty-ninth Conference (London 2000) 39.

² ILC Report 2012, A/67/10, pp. 108-115, at 108.

³ ILC Report 2013, A/68/10, pp. 93-100, at 100.

⁴ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment of 27 June, 1986, *ICJ Rep. 1986*, p. 3, at 108-9, para. 207, *North Sea Continental Shelf Cases* (Germany v. Denmark and Germany v. The Netherlands), Judgment of 20 February, 1969, *ICJ Rep. 1969*, p. 3, at 44, para. 77.

⁵ *Ibid.*

Even in a time of “treatification”,⁶ customary international law remains relevant in many situations and domestic courts will have to resort to customary rules when called upon to resolve issues governed by international law in areas where there is no treaty law or treaties are not applicable.

For domestic courts, customary international law remains particularly relevant in various immunity cases. But it is also important when assessing other questions such as the scope of jurisdiction of national courts, state succession problems, expropriation claims, cross-border environmental claims, etc. In a number of situations, domestic courts have to resort to custom which requires them to identify the normative content of such rules of international law. This presupposes, of course, a domestic legal system which, in principle, allows recourse to international law. Strict dualist approaches may preempt such a possibility. However, most variations of monist influenced domestic legal systems will allow at least resort to customary international without the transformative intervention of the domestic legislator, and even in dualist countries requiring the legislative incorporation of treaties into domestic law custom is often regarded as directly applicable law.

This is also the case in Austria where custom as part of the “generally recognized rules of international law”⁷ is capable of direct application and invocation before domestic courts. In practice, however, resort to customary international law may also cause some uneasiness for Austrian courts since the domestic legal system is heavily reliant on written statutory law and because some positivist traditions of Austrian doctrine may have reservations against any unwritten law. On the national level, customary law is virtually inexistent,⁸ and courts have internalized the notion that they are merely interpreting statutory law. When it comes to international law, however, the main incorporation rule of the Austrian Constitution, mentioned above, is rather explicit in declaring unwritten international law, comprising both custom and general principles, to be part of the Austrian legal order.⁹ A corresponding

⁶ The term ‘treatification’ refers to the increased proliferation of treaties governing matters of international law. Treatification is often considered a superior form of regulation especially over customary international law due to its usually higher level of clarity, stronger notion of legitimacy and less ambiguities in interpretation, cf. *Alvarez*, Symposium 14th Annual Herbert Rubin and Justice Rose Rubin International Law Symposium: A Special Tribute to Andreas Lowenfeld. A Bit On Custom, 42 N.Y.U. J. Int’l L. & Pol. 2009, 17 (71); *Salacuse*, Eighteenth Annual Philip D. Reed Memorial Issue Article: Is There A Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution, 31 Fordham Int’l L. J. 2007, 138 (n 35).

⁷ Article 9(1) Bundes-Verfassungsgesetz, Austrian Federal Law Gazette I No. 1/1930, amended by Austrian Federal Law Gazette I No. 1013/1994 (an official English version of the Austrian Constitution can be found at http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.pdf) (“The generally recognized rules of international law are regarded as integral parts of federal law”)

⁸ § 10 of the Austrian Civil Code, for example, provides that custom can only be considered legally relevant if and to the extent that it is referred to by written statutory law. It is, however, historically unclear whether said provision referred solely to factual custom or whether it also included customary law, see *Bydlinski in Rummel*³, *Kommentar zum ABGB (2000-2007)* § 10 Rz 2. Today, customary law exists in the area of Austrian civil law, though only for a very limited range of legal matters, particularly in the area of inheritance law and family law. Just like under customary international law, it needs a general and consistent practice that is accompanied by the conviction that said practice stems from a legal obligation (*‘opinio iuris’*). See OGH I Ob 49/99h, 22 October 1999, SZ 1999 No. 161, p. 297-308, at 305. Illustrative examples of rules under Austrian civil law that were established or shaped by customary law are the right to cross somebody’s fields, to pick mushrooms or to pick flowers. See *Koztol/Welser*, *Bürgerliches Recht* Vol. I¹³ (2006) 40.

⁹ The Austrian Constitution in its Article 9 speaks of ‘generally recognized rules of international law’, a term that is understood to include both customary international law as well as the general principles of international law. See *Simma in Neuhold/Hummer/Schreuer*, *Osterreichisches Handbuch des Völkerrechts* Vol. I⁴ (2004) 43. The

incorporation norm exists for the more special field of immunity¹⁰ which is, of course, of particular practical relevance since immunity cases are among the most frequently addressed public international law topics for domestic courts.

II. Customary International Law in and through National Court Decisions

The fact that customary international law forms part of domestic law and is therefore applicable in Austrian courts is only the starting point.¹¹ The main task for the judiciary therefore is the ascertainment/identification of what exactly a rule of customary international law provides in order to apply it. It is this question concerning the identification of customary international law which has generally received renewed interest on the level of international law scholarship¹² which will be the focus of this study trying to analyze the approach of Austrian courts in identifying rules of customary international law. By providing such an overview this study is also intended to contribute to the ILC's current quest to seek guidance for the formation and evidence of customary law not only in the jurisprudence of international courts and tribunals, but also in the case law of national courts¹³

In the *Continental Shelf Case*, the ICJ noted that “it is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States”¹⁴ Thus, when courts engage in the analysis of identifying a rule of customary international law their approach should – ideally – focus on showing both the existence of a consistent state practice as well as evidence for the belief that such a practice has a legally binding effect.

term has been equally used by the ICJ and was given the same meaning, cf *Interpretation of the Agreement of 25 March 1991 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, *ICJ Rep 1980*, p 73, at 89-90, para 37 See also Report of the Study Group of the International Law Commission on fragmentation of international law, A/CN.4/L.682, para 493(3) (“‘General international law’ clearly refers to general customary law as well as ‘general principles of law recognized by civilized nations’ under article 38 (1) (c) of the Statute of the International Court of Justice But it might also refer to principles of international law proper and to analogies from domestic laws, especially principles of the legal process (*audiatur et altera pars*, *in dubio mitius*, *estoppel* and so on”)

¹⁰ Article IX para 2 of the Introductory Law to the Law on Jurisdiction (Einführungsgesetz zur Jurisdiktionsnorm, EJGN) provides that Austrian domestic jurisdiction extends to persons who by virtue of international law enjoy immunity if – and only to the extent that – they voluntarily subject themselves to the jurisdiction of Austrian courts or if the legal dispute concerns their real estate located in Austria or their *in rem* rights associated with local real estate that belongs to another person Para 3 adds that in case of doubt as to whether a person enjoys immunity before Austrian courts, the court seized of the dispute has to request a declaration on this question from the Federal Ministry of Justice

¹¹ See OGH 5 Ob 152/04w (*Effects of State Succession on Real Property Abroad / The Soviet Embassy Building in Vienna*), 09 11 2004, RPfSlgG 2004 No 2908, p. 18-29, at 27f

¹² See ILA Resolution 16/2000, Formation of General Customary International Law, adopted on 29 July 2000 by the International Law Association, reprinted in International Law Association, Report of the Sixty-ninth Conference (London 2000) 39, See also the recent work of the ILC on Formation and evidence of customary international law, Note by *Sir Michael Wood*, Special Rapporteur, 30 May 2012, UN-Doc A/CN.4/653

¹³ Formation and evidence of customary international law, Note by *Sir Michael Wood*, Special Rapporteur, 30 May 2012, UN-Doc A/CN.4/653, 4, ILC Report 2013, A/68/10, pp 93-100, at 98 (“There was broad support for a careful examination of the practice of States [] Several members suggested that the Commission research the decisions of national courts, statements of national officials, as well as State conduct”)

¹⁴ *Continental Shelf Case* (Libya v Malta), Judgment of 3 June, 1985, *ICJ Rep 1985*, p 13, at 29-30, para 27

The first element, state practice, can manifest itself in various ways. Most notably, such practice is expressed through administrative acts, legislation, decisions of courts and activities on the international stage such as treaty-making.¹⁵ Additionally, the legal officers of a state's governmental bodies,¹⁶ diplomats and high ranking political figures, when acting on behalf of a state, are considered to express not their private views but to present the views of the state they are representing. Thus, whenever they appear in the international context, they are confirming and sometimes themselves contributing to the practice of their respective state.¹⁷ Accordingly, evidence of state practice can be gathered from a variety of sources: It can be drawn from diplomatic correspondence, policy statements, press releases, official manuals on legal issues, comments by governments on legal documents drafted in international *fora* or court judgments.¹⁸

Opinio iuris, on the other hand, is slightly more difficult to ascertain. Being subjective and psychological in nature, the conviction of a state that its acts are mandated by international law will manifest itself primarily in statements accompanying certain acts or the voting behavior in international organizations, e.g. by voting for or against a resolution of the UN General Assembly. However, if such publicly expressed views are missing or scarce, the task of establishing an *opinio iuris* can seem a rather theoretical (and largely hypothetical) experience. The notion that the belief of a state was usually more difficult to ascertain than its objectively verifiable conduct has led some commentators to argue that in many (if not most) instances a showing of state practice by itself was sufficient to establish a rule under customary international law.¹⁹ In a similar manner, it has been suggested that a certain presumption of *opinio iuris* would stem from an existing practice. However, while sometimes inferring the existence of such an *opinio iuris* from a consistent general practice of states in a given field, thereby elevating the first element of custom to a certain gateway for the second,²⁰ the ICJ has refuted the idea of such a presumption and taken a more rigorous stance towards the *opinio iuris* requirement by demanding actual indications of a belief that the practice in question is legally binding.²¹

¹⁵ *Shaw*, International Law (6th ed, 2008) 82, *Oppenheim*, *Oppenheim's International Law Vol. 1* (9th ed, 2008) 26; *Arrest Warrant Case* (Democratic Republic of the Congo v Belgium), Judgment of 14 February, 2002, *ICJ Rep 2002*, p 3, at 23-24, para 56

¹⁶ *Mendelson*, *The Formation of Customary International Law*, 272 *Hague Academy of International Law, Collected Courses 1998*, 198

¹⁷ ILC Report 'Ways and means for making the evidence of customary international law more readily available' (1950), *Yearbook of the ILC 1950 Vol II*, pp 367-74, at 371-2; *Interhandel Case* (Switzerland v United States of America), Preliminary Objections, Judgment of 21 March, 1959, *ICJ Rep 1959*, p 6, at 27

¹⁸ *Brownlie*, *Principles of Public International Law* (8th ed, 2012) 24.

¹⁹ *Mendelson*, *The Formation of Customary International Law*, 272 *Hague Academy of International Law, Collected Courses 1998*, 246

²⁰ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America), Judgment of 27 June, 1986, *ICJ Rep 1986*, p 3, at 108-9, para 207; *Case Concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v United States of America), Judgment of 12 October, 1984, *ICJ Rep 1984*, p 246, at 293-94, para 91, *Pulp Mills on the River Uruguay* (Argentina v Uruguay), Judgment of 20 April, 2010, *ICJ Rep 2010*, p 14, at 83, para 204, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Rep 1996*, p 226, at 254-5, para 67

²¹ *Case Concerning Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of the Congo), Preliminary Objections, Judgment 24 May, 2007, *ICJ Rep 2007*, p 582, at 615, para 90

Of particular relevance in the context of establishing state practice and *opinio iuris* are national court decisions. Not only are they more readily available and more easily accessible than acts and decisions of administrative bodies (especially those on a lower level) or the views expressed by high ranking government officials in bilateral or multilateral treaty negotiations, but when dealing with matters of international law, they usually contain both a statement of facts and a description of the approach taken by the state that indicates whether it acted out of a legal obligation or not.²² Thus, in an often very precise manner both elements of custom are reflected. In addition to their primary function of being evidence of state practice²³ and indicating *opinio iuris*²⁴ these decisions – even if not legally binding – in their persuasive authority constitute precedents on issues of international law just like those issued by international courts and tribunals. In this context, national court decisions can serve as ‘subsidiary means for the determination of rules of law’ as enshrined in Article 38 (1)(d) of the Statute of the International Court of Justice.²⁵ Especially in the field of state immunity the ICJ only recently has thus acknowledged that the judicial practice of domestic courts is “most pertinent”.²⁶

Moreover, in recent history judicial decisions have featured more prominently in the context of customary international law not only by reflecting state practice but by (actively) contributing to the formation of such practice through what has become known as transnational judicial dialogue between national courts.²⁷ In short, the term refers to the interactive process of courts from different countries citing and making reference to the decisions of each other, thereby harmonizing international law, creating a more consistent practice and thus forming custom.²⁸ By relying on the persuasive authority and by integrating the legal reasoning of foreign courts which have been deciding similar issues of international law, such transnational judicial dialogue can serve as prime evidence of an existing state

²² *Moremen*, National Court Decisions as State Practice – A Judicial Dialogue? 32 N C J Int'l L. & Com. Reg. 2006, 259 (274)

²³ ICTY, Prosecutor v. Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-I-A, ICTY Appeals Chamber 2 October 1995, para 99, ILC Report ‘Ways and means for making the evidence of customary international law more readily available’ (1950), Yearbook of the ILC 1950 Vol. II, pp 367-74, at 370, para 54, *Moremen*, National Court Decisions as State Practice – A Judicial Dialogue? 32 N C J Int'l L. & Com. Reg. 259 (261)

²⁴ *Moremen*, National Court Decisions as State Practice – A Judicial Dialogue? 32 N C J Int'l L. & Com. Reg. 2006, 259 (261) (274)

²⁵ *Mendelson*, The Formation of Customary International Law, 272 Hague Academy of International Law, Collected Courses 1998, 200

²⁶ *Jurisdictional Immunities of the State* (Germany v. Italy – Greece Intervening), Judgment of 3 February 2012, p. 31, para. 73 (“for the purposes of the present case the most pertinent State practice is to be found in those national judicial decisions”)

²⁷ While the names by which the process of transnational interaction of courts sometimes vary, the terms ‘international judicial dialogue’ and ‘transnational judicial dialogue’ are found most consistently in literature, cf. *Krotoszynski*, I’d like to Teach the World to Sing (In Perfect Harmony) International Judicial Dialogue and the Muses – Reflections on the Perils and the Promise of International Judicial Dialogue, 104 Mich. L. Rev. 2006, 1321 (1323), see also *Reimisch*, The International Relations of National Courts: A Discourse on International Law Norms on Jurisdictional and Enforcement Immunity, in *Reimisch* (eds), The Law of International Relations – *Liber Amicorum* Hanspeter Neuhold (2007) 289-309

²⁸ *Waters*, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 Geo. L. J. 2005, 487

practice in a respective field; at the same time, it can itself add to establishing such practice and thus be a key factor in the emergence of customary international law.²⁹

What sounds straightforward in theory, however, often encounters practical problems. Some of them might seem mundane. Certain judges might lack the necessary expertise in international law necessary to properly ascertain the required elements of customary international law.³⁰ After all, international legal disputes are far less likely to arise in a domestic court case than the everyday neighbor dispute. Along similar lines, judges might simply not have the necessary language skills to comprehend foreign sources in their entirety. Other problems again are logistically or institutionally driven: First, even in times of online resources, information on foreign developments and in particular foreign court decisions might not be as readily available as one might expect.³¹ Even if they are, courts are usually constrained by notoriously limited resources, both time- and personnel-wise. Consequently, extensive research or lengthy surveys of state practice occur only in the most exceptional of cases.³² If attorneys representing their parties do not provide the necessary information, courts, rather than engaging in a time-consuming analysis of foreign materials, will thus rely on what scholarly writings or previous court decisions have identified as a rule of custom.³³

Also on a more ‘legal’ level difficulties may arise. When analyzing foreign court decisions, it is doubtful whether judges can correctly evaluate the value and meaning of a decision coming from a different jurisdiction. Not only is the rank of a court within a state’s judicial system of relevance for the relative weight of its decision; but more importantly, it must be kept in mind that a judgment is usually the result of interactions of people involved in the proceedings rather than a mere manual enshrined in a text document. Only if a judge engaging in a transnational judicial dialogue can manage to fully understand the context of the decision in question, he or she will be able to properly assess its evidential character for a state’s practice or *opinio iuris*.³⁴ In addition, given the fact that acts of different state organs altogether contribute to a state’s practice, focusing solely on the judicial branch might overlook potential inconsistencies and contradictions of positions that other branches have taken. After all, a judge whose constitutionally guaranteed independence allows him to have his personal views influence a decision as long as it stays within the boundaries of the law might take a different stand on issues of international law than *e.g.* members of the government or the state’s high ranking legal officers in international organizations. In such

²⁹ *Moremen*, National Court Decisions as State Practice – A Judicial Dialogue? 32 N C J. Int’l L. & Com. Reg. 2006, 259 (263).

³⁰ See ILC Report 2013, A/68/10, pp. 93-100, at 98 (“With regard to the jurisprudence of national courts, several members agreed that such cases should be approached cautiously, and should be carefully scrutinized for consistency. It was suggested that the manner in which national courts apply customary international law is a function of internal law, and domestic judges may not be well versed in public international law”).

³¹ *Trimble*, A Revisionist View of Customary International Law, 33 UCLA L. Rev. 1986, 665 (714).

³² One of those would be the Austrian landmark case of *Hoffmann v. Dralle* where the Austrian Supreme Court engaged in a survey on state practice in numerous countries from all over the world, see below Chapter II.

³³ *Brownlie*, Principles of Public International Law, 56

³⁴ *Krotoszynski*, I’d like to Teach the World to Sing (In Perfect Harmony). International Judicial Dialogue and the Muses - Reflections on the Perils and the Promise of International Judicial Dialogue, 104 Mich. L. Rev. 2006, 1321 (1335)

cases, it remains questionable how reliable such a court decision really is as evidence of a state's practice.³⁵

III. Overview of the Analysis of Customary International Law in Austrian Jurisprudence

On several occasions the Austrian judiciary had to resort to customary international law. The following study is not intended to provide an exhaustive overview of Austrian court cases relying on customary international law. Rather, its focus lies on identifying decisions where custom was not only invoked, but where courts gave some indication how they arrived at the conclusion that a particular rule formed part of customary international law. Thus, the attention is directed toward the methods of identifying customary law. Do domestic courts use the internationally recognized standards of identifying state practice and *opinio iuris* in order to ascertain custom? If so, how deeply do they engage in a survey of relevant state practice; by which means do they determine the existence of *opinio iuris*? What is the role of precedent, both domestic and foreign (including other national jurisprudence as well as the case law of international courts)? To what extent do national courts rely on scholarly works in order to identify custom?

As regards the methodologically proper approach of identifying customary international law, the following survey of Austrian cases demonstrates a rather bleak picture. Apparently, the eagerness of the Austrian judiciary to broadly engage in a determination of state practice and *opinio iuris* is limited. Only few cases can be identified in which courts have truly reviewed the formative elements of customary law. In the majority of cases, Austrian courts appear satisfied with noting that a particular rule was identified as having customary international law quality in textbooks or other works of scholars of international law or that Austrian and foreign (primarily German) jurisprudence had held so. Thus, they mostly rely on subsidiary sources of international law instead of ascertaining the existence of primary ones.

1) Extensive Analysis (Courts evaluating State Practice and *Opinio Iuris*)

The analysis of Austrian jurisprudence since 1945 has shown that in fact only one case extensively addresses the problems of identifying the content of customary rules. It is the well-known *Hoffmann v Dralle* or *Dralle v Czechoslovakia* case,³⁶ a leading 1950 Austrian Supreme Court case confirming the restrictive state immunity doctrine. Its exemplary discussion of the customary international law basis rightfully gave it a place in various prominent textbooks even beyond the German speaking world.³⁷

³⁵ Mendelson, The Formation of Customary International Law, 272 Hague Academy of International Law, Collected Courses 1998, 200, Moremen, National Court Decisions as State Practice – A Judicial Dialogue? 32 N C J Int'l L & Com Reg 2006, 259 (290)

³⁶ OGH 1 Ob 171/50 (*Dralle v Republic of Czechoslovakia*), 10 May 1950, SZ 1950 No 23/143, p 304-332, 17 ILR 155

³⁷ See, e.g., Henkin, et al., International Law – Cases and Materials (2nd ed, 1987) 901-5, Shaw, International Law (6th ed, 2008) 704f, Oppenheim's International Law Vol 1 (9th ed, 2008) 359, Brownlie, Principles of

The case arose from a complex trade mark dispute between Mr. Hoffmann, the Austrian representative of the German cosmetics manufacturer “Georg Dralle” and the state-owned company “Jiri Dralle”, the Czech branch of the German firm which had been nationalized by Czechoslovakia after World War II. While the substance of the dispute related to the potential extraterritorial effect of the Czechoslovak nationalization decree (which was eventually denied) the preliminary question for the courts was whether a foreign state could be sued before Austrian courts with regard to a dispute involving the use of trademarks. The claimant had sought an injunction against the Czechoslovak state-owned company to restrain it from claiming the exclusive right to use the Dralle trademark in Austria. The Austrian Supreme Court came to the conclusion that since the respondent’s claim to immunity from jurisdiction concerned the commercial activities of a foreign sovereign state rather than its political activities, the respondent was subject to the jurisdiction of the Austrian courts.³⁸ While this result is not surprising under a restrictive immunity standard,³⁹ the remarkable part of the decision is the thorough and in-depth analysis which led the Court to conclude that the doctrine of absolute state immunity was no longer generally accepted and that there was thus no customary international law obligation to accord immunity to Czechoslovakia.

After an initial examination of the pertinent Austrian case-law on state immunity where in ten of its previous decisions immunity had been partly denied where a respondent state had acted like a private undertaking, the Supreme Court concluded that “it cannot be said that there is any uniformity of case law in so far as concerns the extent to which foreign states are subject to Austrian jurisdiction.”⁴⁰

It then turned to an analysis of foreign jurisprudence, recognizing that the issue whether foreign states were immune regarding their commercial activities was a question of international law and that such a potential rule of customary international law could be ascertained best by analysing the judicial practice of states. In the court’s words:

“In view of the fact that we are here concerned with a question of international law we have to examine the practice of the courts of civilised countries and to find out whether from that practice we can deduce a uniform view, this is the only method of ascertaining whether there still exists a principle of international law to the effect that foreign states, even in so far as concerns claims belonging to the realm of private law, cannot be sued in the courts of a foreign state.”⁴¹

What follows is a truly impressive overview of mostly European, but also non-European jurisprudence developing the distinction between sovereign and commercial activities, *acta iure imperii* and *acta iure gestionis*, in order to limit state immunity to acts manifesting an exercise of sovereign powers. The court extensively cites from Italian, Belgian and Swiss

Public International Law (7th ed, 2008) 508; *Neuhold/Hummer/Schreuer*, *Osterreichisches Handbuch des Volkerrechts* Vol I⁴ (2004) 44

³⁸ 17 ILR 155

³⁹ See *Lauterpacht*, ‘The Problem of Jurisdictional Immunities of Foreign States’, 28 BYIL (1951) 220, *Schreuer*, *State Immunity: Some Recent Developments* (1988); *Pingel-Lenuzza*, *Les Immunités des Etats en Droit International* (1997)

⁴⁰ 17 ILR 155, 157

⁴¹ 17 ILR 155, 157f

cases and then continues to cite Egyptian, German, English, American, Czech, Polish, Portuguese, French, Romanian, Brazilian, and Russian case-law in order to conclude that

*“[...] it can no longer be said that jurisprudence generally recognizes the principle of exemption of foreign states in so far as concerns claims of a private character, because the majority of courts of different civilised countries deny the immunity of a foreign state, and more particularly because exceptions are made even in those countries which today still adhere to the traditional principle that no state is entitled to exercise jurisdiction over another state ”*⁴²

Subsequently, the Court turned to a number of other documents which dealt with the question of state immunity, ranging from treaty clauses like Article 233 Peace Treaty of Saint-Germain,⁴³ to various resolutions, like the Resolution of the Imperial Economic Conference of the British Empire in 1923 and a similar recommendation in the Report of the World Economic Conference held at Geneva in 1927, to the work of academic associations and institutions like ILA and IDI resolutions and a draft of the Harvard Law School of 1932, all supporting the principle of restrictive immunity

In the view of the Austrian Supreme Court, these “various proposals of international associations” equally showed that “the classic doctrine of unlimited immunity no longer correspond[ed] to the view expressed in legal practice.”⁴⁴

Finally, the court analysed scholarly writings⁴⁵ as a relevant subsidiary source of international law in order to ascertain whether the doctrine of absolute immunity still formed part of customary international law. However, anticipating the result the Court stated. “Neither does the literature on the subject present a uniform picture. The Supreme Court must now consider legal doctrine briefly because the *communis opinio doctorum* is also regarded as a source of international law.”⁴⁶ A broad analysis of Austrian and foreign textbooks led the Court to conclude that “there clearly [was] no *communis opinio doctorum* ”⁴⁷

On this basis the Court concluded that “*it can no longer be said that by international law so-called acta gestiois are exempt from municipal jurisdiction This subjection of the acta gestiois to the jurisdiction of states has its basis in the development of the commercial activity of states The classic doctrine of immunity arose at a time when all the commercial activities of states in foreign countries were connected with their political activities, either by the purchase of commodities for their diplomatic representatives abroad, or by the purchase of war material for war purposes, etc Therefore there was no justification for any distinction*

⁴² 17 ILR 155, 161

⁴³ Treaty of Saint-Germain-en-Laye (Treaty of Peace between the Allied and Associated Powers and Austria), 10 September 1919, 226 CTS 8, Article 233 (“If the Austrian Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty ”)

⁴⁴ 17 ILR 155, 163

⁴⁵ As a humorous side note, it may be pointed out that the Court made reference to, *inter alia*, a *George Granville Chullimore* It of course meant *George Grenville Phillimore*, one of the honorary general secretaries of the International Law Association in the early 20th century and joint editor with *Sir Alexander Wood Renton* of *Burge’s Commentaries on Colonial and Foreign Laws*

⁴⁶ 17 ILR 155, 163

⁴⁷ 17 ILR 155, 163

*between private transactions and acts of sovereignty. Today the position is entirely different, states engage in commercial activities and, as the present case shows, enter into competition with their own nationals and with foreigners. Accordingly, the classic doctrine of immunity has lost its meaning and, *ratione cessante*, can no longer be recognized as a rule of international law. For these reasons the Supreme Court reaches the conclusion that in the present case the question of jurisdiction must be answered in the affirmative.”⁴⁸*

On the merits, the Court held that the Czech nationalization measures would not be accorded extraterritorial effect. Thus, the rights of the German company and its Austrian representative were still in existence and could be enforced via the injunction sought by the claimant.

As regards the evidence relied upon for the central question of state immunity, the Austrian Supreme Court obviously engaged in a very diligent analysis of both Austrian and foreign case-law. With regard to immunity issues such a case-law analysis is of course highly appropriate since it is the court decisions themselves which are both a manifestation of relevant state practice (it is national courts according or denying immunity) and of *opinio iuris* (by deciding in favour or against immunity national courts as organs of a state express an attributable conviction whether they think that their result is required or permitted by international law). Thus, it seems correct to look at the actual court practice in order to establish a rule of customary international law on state immunity.

The fact that any such case-law analysis might ultimately be incomplete for the purpose of establishing conclusively a sufficiently consistent and general practice seems to have motivated the court to look for an answer in a rather indirect way. One should note that the *Dralle* court did not establish that there was a rule of customary international law according to which states no longer enjoyed immunity for commercial/*iure gestionis* activities. Rather, the court used the case-law survey to conclude that the principle of state immunity also for claims of a private character can no longer be upheld since the majority of national courts denied immunity in such cases.⁴⁹ In other words, it was the demise of the absolute state immunity doctrine which led the court to believe that it was entitled to deny immunity for the private law activities of a foreign state which engaged in a commercial activity and tried to dissuade a competitor from using certain trademarks.

2) Light Analysis (Mentioning or at least Indicating State Practice and/or *Opinio Iuris* without thorough Examination)

The far greater number of Austrian court decisions dealing with one or more aspects of customary international law engage in a much lighter analysis as regards the ascertainment of the content of such customary international law rules.

An example where the Austrian Constitutional Court relied on foreign precedent in order to establish a customary international law rule according to which international organizations

⁴⁸ 17 ILR 155, 163

⁴⁹ See *supra* note 42

generally enjoyed immunity before domestic courts can be found in the so-called *Arbitration Panel for In Rem Restitution Case*.⁵⁰ The case concerned the legal attempt to challenge a decision of the arbitration panel as an administrative ‘decision’ of an Austrian authority. While the underlying dispute concerned rather complex factual issues of post-World War II property restitution, the core issue was whether decisions of the Arbitration Panel for *In Rem Restitution*, a hybrid international arbitral tribunal which had been established in 2001 by Austrian legislation pursuant to an international agreement between Austria and the United States,⁵¹ were subject to judicial review by the Austrian Constitutional Court.

The case concerned the restitution of real estate located in Austria that had been involuntarily sold by its Jewish owners after the National Socialist Regime was established following the ‘Anschluss’ in 1938. In 1961, a settlement for restitution of the property was reached between the original owner’s descendants and Austria.

After 2001, another group of descendants claimed that they were the rightful heirs and that the initial 1961 settlement constituted an ‘extreme injustice’. This latter qualification would allow the Arbitration Panel for *In Rem Restitution* to recommend (even after 2001) the restitution of publicly-owned real property. The panel, however, in a decision of 3 May 2004⁵² found that the initial settlement did not constitute such ‘extreme injustice’ and thus rejected the claim. In fact, the Austrian ‘General Settlement Fund Law’,⁵³ enacted pursuant to the bilateral 2001 Washington Agreement between Austria and the United States,⁵⁴ established a three-member Arbitration Panel, consisting of one member to be nominated by Austria, one by the US and a third presiding member to be determined by agreement of the party-appointed arbitrators,⁵⁵ that was empowered to recommend the restitution of real property even in cases where there had already been a previous decision or settlement pursuant to the original restitution legislation after World War II in the exceptional case where such original disposition constituted an ‘extreme injustice’.⁵⁶

⁵⁰ VfGH B 783/04 (*Arbitration Panel for In Rem Restitution Case*), 14 December 2004, VfSlg 2004 No 17415, p 1129-44, for an English summary and analysis of the case see Anonymous v Austria, Individual constitutional complaint decision, B 783/04, ILDC 140 (AT 2004) 14 December 2004.

⁵¹ See *infra* text at note 53.

⁵² Schiedsinstanz für Naturalrestitution (*Arbitration Panel for In Rem Restitution*), Decision-No 4/2004, 3 May 2004, in *Aicher/Kussbach/Reimsch*, Decisions of the Arbitration Panel for *In Rem Restitution* Vol 1 (2008) 112.

⁵³ Federal Law on the Establishment of a General Settlement Fund for Victims of National Socialism and on Restitution Measures (General Settlement Fund Law), Austrian Federal Law Gazette I No 12/2001.

⁵⁴ Agreement between the Austrian Federal Government and the Government of the United States Regulating Questions of Compensation and Restitution for Victims of National Socialism (Washington Agreement), Austrian Federal Law Gazette III No 121/2001.

⁵⁵ Washington Agreement, Annex A 3 d (“The Panel legislation will provide that the United States, with prior consultation with the Conference on Jewish Material Claims, the Austrian Jewish Community, and attorneys for the victims, and Austria will each appoint one member, these two members will appoint a Chairperson. All members of the three-person panel should be familiar with the relevant regulations both under Austrian and international law (in particular, the European Convention on the Protection of Fundamental Freedoms and Human Rights) [. . .]”).

⁵⁶ Section 28(1) General Settlement Fund Law (“For the purposes of *in rem* restitution, the notion of “publicly-owned property” shall cover exclusively real estate (land) and buildings (superstructures) which 1 between March 12, 1938 and May 9, 1945, were taken from the previous owners whether without authorization or on the basis of laws or other orders, on political grounds, on grounds of origin, religion, nationality, sexual orientation, or of physical or mental handicap, or of accusations of so-called asociality, in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era, and 2 were

It was this decision which the constitutional complaint sought to challenge. The Austrian Constitutional Court held that the decisions of the *In Rem* Restitution Panel did not constitute ‘decisions’ of an Austrian administrative authority and could thus not be challenged. The Court noted in particular the fact that the panel could only “recommend” the restitution of real property.⁵⁷ It thus held that the panel was an intergovernmental arbitration body which did not “decide on a claim in such a way as to have legal effect. Its acts are not decisions of an administrative authority in the sense of Article 144 B-VG [Austrian Constitution]. Rather, the arbitration body’s recommendations are a preliminary stage in the consideration of a restitution claim by the appropriate Federal Minister as representative of the owner of the assets concerned, from whom restitution in kind is demanded, namely of the Federal Republic.”⁵⁸

More interesting for present purposes is, however, a long excerpt from the submission of the Federal Chancellor’s Office Constitutional Law Service (‘Bundeskanzleramt-Verfassungsdienst’) which treated the Arbitration Panel as an international organization. The Austrian Constitutional Court extensively quoted from this submission which generally remarked that

“If the arbitration panel is to be qualified as an inter-state institution of an arbitral character, then customary international law is relevant according to which international institutions generally enjoy immunity from proceedings before the domestic courts (cf Belgian Conseil d’Etat, 17 November 1982, Dalfino vs Governing Council of European Schools and European School of Brussels I, Queen’s Bench Division, 20 December 1996, Lenzing AGs European Patent, regarding a decision by the European Patent Office) This general principle of international law equally applies to inter-state institutions (cf Dutch Supreme Court, 20 December 1985, A S v Iran-United States Claims Tribunal) There is therefore no need in the present case to consider further what legal nature the recommendations or “rejections” by the arbitration body ultimately possess, since the generally recognized principles of international law must apply to the arbitration body as an inter-state institution pursuant to Art. 9 (1) B-VG. The Austrian state bodies must observe and apply the transformed rules of international law in accordance with their jurisdiction (cf Rill, op cit, para 13) and consequently respect the immunity of the arbitration body against Austrian authorities and courts.”⁵⁹

never the subject of a claim that was previously decided by an Austrian court or administrative body, or settled by agreement, and for which the claimant or a relative has never otherwise received compensation or other consideration, except in exceptional circumstances where the Arbitration Panel unanimously determines that such a decision or settlement constituted an extreme injustice, and which 3 on January 17, 2001 were exclusively and directly owned by the Federation [Bund], or any legal person under public or private law wholly-owned, directly or indirectly, by the Federation”)

⁵⁷ Washington Agreement, Annex A 3 i and j (“The Panel legislation will provide that the Panel will make recommendations to the competent Austrian Federal Minister for *in rem* restitution [] The Austrian Parliament will pass a resolution indicating its expectation that the recommendations will be expected to be approved by the competent Austrian Minister(s). The Austrian Federal Government will support such a resolution.”).

⁵⁸ See *supra* note 50, at 1143

⁵⁹ See *supra* note 50, at 1138

On this basis, the Federal Chancellor's Office concluded that the exemption of the *In Rem* Restitution Panel from Austrian judicial review was justified and it even referred to the well-known *Waite and Kennedy* case⁶⁰ according to which Contracting Parties of the ECHR⁶¹ must ensure a balance between the organizational interest in an effective and independent functioning secured by immunity and the right of access to court as guaranteed by Article 6 ECHR, thus there has to be at least an adequate alternative mechanism of dispute settlement concerning claims against international organizations⁶²

Interesting is the Constitutional Court-approved method of the Constitutional Law Service to identify an alleged rule of customary international law concerning the immunity of international organizations and other inter-state institutions by reference to (foreign) domestic court judgments. Here the analysis resembles the one used by the Austrian Supreme Court in the *Dralle* case.⁶³ The cited cases⁶⁴ have indeed expressed the view that international organizations enjoyed immunity from suit as a result of customary international law which is remarkable since – contrary to state immunity – the immunity of international organizations is largely based on specific treaty provisions.⁶⁵ Though the analysis is far “lighter” – the cases are merely referred to without any in depth analysis – the approach is ultimately the same. These “precedents” express not only a certain *opinio iuris*, they also directly embody relevant state practice whereby domestic courts exempt international organizations from their jurisdiction.

Another body of cases that motivated Austrian courts to engage in a more detailed analysis of customary international law revolved around the identification and/or application of treaties which the courts found to be either an indication or even a codification of custom. The following paragraphs will serve as an overview of how differently various courts have approached this relation between custom and treaties.

⁶⁰ *Waite and Kennedy v Germany*, European Court of Human Rights, Application No 26083/94, European Court of Human Rights, Judgment of February 18, 1999

⁶¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (ES N 5), 213 UNTS 222, entry into force 3 September 1953

⁶² See VfGH B 783/04 (*Arbitration Panel for In Rem Restitution Case*), *supra* note 50, at 1138 (“If the precedents of the European Court of Human Rights are also taken into consideration, the judgement of 18 February 1999 (GK), *Waite and Kennedy vs Germany*, Appl 26083/94, lines 63 et seq, must be borne in mind, as it states that internal structure of international organisations with superior rights and immunities (in the case in question this had been expressly implemented) is an indispensable instrument of ensuring the orderly functionality of such organisations, free from the unilateral influence of individual governments. This well-established practice would be compatible with the Human Rights Convention insofar as other appropriate means were available to the individual to protect his rights as guaranteed by the Convention.”)

⁶³ See *supra* note 36

⁶⁴ *Dalfino v Governing Council of European Schools and European School of Brussels*, Conseil d'Etat, 17 November 1982, RACE (1982), 1544, 108 ILR 638-642, *Lenzing AG's European Patent*, Queen's Bench Division (Crown Office List), 20 December 1996, [1997] RPC 245, *The Times* 17 January 1997, 141 SJ LB 37, CO/3358/96, *A S v Iran-United States Claims Tribunal*, Local Court (Kantongerecht) of The Hague, 8 June 1983, *De Praktijkgids* (1983) No 2022 (English summary in 15 NYIL 1984, 429, 94 ILR 323), District Court (Rechtbank) of The Hague, 9 July 1984, *De Praktijkgids* (1984) No 2006 (English summary in 16 NYIL 1985, 471, 94 ILR 326), Supreme Court (Hooge Raad) of the Netherlands, 20 December 1985, 483 NJ 1691 (1985), 18 NYIL 1987, 357, 94 ILR 327

⁶⁵ See only *Reimisch*, Privileges and Immunities' in *Klabbers/Wallendahl* (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar, 2011) 135

i) The role of Treaty Provisions for Customary International Law

Treaty provisions may be regarded as a codification of existing customary international law,⁶⁶ and at the same time their existence may be the expression of the contracting parties' belief that they intend to deviate from customary law. What has been termed the *Baxter paradox*⁶⁷ is a recurrent phenomenon in international law. It is often very difficult to determine whether a treaty provision confirms and evidences existing custom or proves that custom would be otherwise.⁶⁸

The 1971 case concerning the immunity of domestic servants of diplomats⁶⁹ is illustrative in this regard. In a paternity and alimony suit against a domestic servant of a member of the Greek diplomatic mission in Vienna, the Supreme Court had to decide whether such persons enjoyed immunity from suit as a matter of customary international law. This was required since – as a result of Austrian legislation in 1919⁷⁰ – only persons entitled under international law would continue to enjoy immunity. The legislation specifically aimed at the removal of further privileges and immunities granted by the imperial Austria to friendly princes as a matter of *courtoisie*, but its broad formulation had the effect that all other persons equally lost such privileges and immunities not extended on the basis of an obligation. The Supreme Court thus felt that it had to scrutinize whether domestic servants were entitled to immunity from suit. The Court concluded that “since there was no international legal basis found in ‘positive’ treaty law, the question remained whether the privilege in question reflects customary international law as it existed in 1919. Only those norms that are recognized as law by the general practice of states can be considered customary international law (*Verdross, Völkerrecht* [5] 139).”⁷¹

The Court then began its analysis of state practice,⁷² noting that previous state practice had granted the “*suite privée*” of the diplomat full immunity just as it had to the entourage of the head of state. The “*suite privée*” included not only the family but also those servants which did not belong to the official staff of the mission but were only personally obligated to the diplomat, such as domestic servants. While recognizing that “domestic servants still enjoyed privileges in certain countries” the Court found, however, that “there [was] no universal

⁶⁶ See also ‘Evidence of customary international law. Elements in the previous work of the International Law Commission that could be particularly relevant to the topic’, Memorandum by the Secretariat, A/CN.4/659, 14 March 2013, Observation 25 (“Recognizing that a treaty may codify existing rules of customary international law, the Commission has often referred to treaties as possible evidence of the existence of a customary rule.”)

⁶⁷ Named after *Richard R. Baxter* (1921-1980), Professor at Harvard Law School and Judge at the International Court of Justice from 1978 to 1980.

⁶⁸ *Baxter*, *Treaties and Custom*, 129 *Recueil des Cours* 1970, 27, at 64 (“The number of participants in the process of creating customary law may become so small that the evidence of their practice will be minimal or altogether lacking. Hence the paradox that as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty.”)

⁶⁹ OGH 6 Ob 94/71 (*Diplomatic Immunity of Domestic Servants Case*), 28 April 1971, SZ 1971 No. 44/56, p. 202-5.

⁷⁰ § 1 (1) Gesetz vom 3. 4. 1919 über die Abschaffung der nicht im Völkerrecht begründeten Exterritorialität, StGBI 1919/210.

⁷¹ See *supra* note 69, at 204.

⁷² Relying on *Holtzendorff*, *Handbuch des Völkerrechts* (1887) 661.

opinio iuris on this matter (cf *Verdross* 333, *Dahra* [sic]⁷³, *Völkerrecht* I 342, *Strupp – Schlochauer*, *Wörterbuch des Völkerrechts* 672)⁷⁴

Subsequently, the Supreme Court turned to treaty law to confirm its finding that domestic servants of diplomats did not enjoy immunity from suit as a matter of customary law and noted

*“Also the provision of Article 37 para 4 of the Vienna Convention on Diplomatic Relations is clearly based on the assumption that there is no consistent opinio iuris regarding the privileges of domestic servants. It is for that very reason that the exceptional case where a receiving state would also grant broader immunity to these people was regulated in the Convention”*⁷⁵

In fact, Article 37(4) of the Vienna Convention on Diplomatic Relations⁷⁶ provides that “private servants” enjoy only certain fiscal advantages and “may enjoy privileges and immunities only to the extent admitted by the receiving State.” Thus, the option under treaty law was taken as an indication of the absence of a customary law rule

With regard to the primary evidence of the existence of an alleged rule of customary international law to the effect that also domestic servants of diplomats enjoyed immunity from suit the Court merely relied on scholarly works without engaging in any in-depth analysis of Austrian or foreign jurisprudence on the matter.

ii) Treaties as Codification of Custom

a) Effects of State Succession - Distribution of the Funds of the SFRY

In a set of legal proceedings concerning control over funds deposited by the former Yugoslav central bank in commercial bank accounts in Austria, the Austrian Supreme Court relied not only on legal doctrine, but equally on ILC codification treaties as evidence of customary international law

In interim relief proceedings,⁷⁷ Croatia and Macedonia sought an injunction from the Austrian courts to enjoin the Federal Republic of Yugoslavia (FRY), which claimed to

⁷³ The court was obviously referring to *Dahm*, *Völkerrecht*

⁷⁴ See *supra* note 69, at 204

⁷⁵ *Ibid*

⁷⁶ Article 37 (4) of the Vienna Convention on Diplomatic Relations, 18 April 1961, UNTS 500 (1964) 95 (“Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.”)

⁷⁷ OGH 4 Ob 2304/96v (*Effects of State Succession/State Property – Republic of Croatia et al v Girocredit Bank A G der Sparkassen*), 17 December 1996, SZ 1996 No 69/281, p 886-894. See also *Reimsch/Buhler*, Austria Supreme Court decision in *Republic of Croatia et al v Girocredit Bank A G der Sparkassen* Introductory note, 36 ILM 1520 (1997), *Buhler*, *Casenet*. Two Recent Austrian Supreme Court Decisions on

continue the legal personality of the former Yugoslavia, the Socialist Federal Republic of Yugoslavia (SFRY), to withdraw or otherwise decide over such bank accounts. The Supreme Court upheld the lower courts' decision to grant such an injunction because it found that the SFRY had been dissolved by "dismembratio",⁷⁸ that the FRY was only "one of the successor states" to the SFRY, and that these successor states were only jointly entitled to dispose of such funds.

It came to this conclusion on the basis of a rule of customary international law stipulating that in the case of a total dissolution of a state (*dismembratio*) its property had to be distributed among the successor states according to equitable principles, which in turn required negotiations between them in order to establish the distribution ratio. The central holding of the courts was:

*"Under customary international law, in the case of "dismembratio" state property is to be distributed according to the international principle of "equity" (Reinisch/Hafner, op cit 41) In such a case Article 18 of the "Vienna Convention on Succession of States in Respect of State Property, Archives and Debts" of 1983 prepared by the International Law Commission provides for the passing of movable State property to the successor states in "equitable proportions" Thus, the successor states have an international law title to distribution recognized by the community of states"*⁷⁹

The customary character of the equitable distribution principle is based on the opinion of two public international law authors⁸⁰ as well as on the assumption that the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts⁸¹ codified customary international law in this respect. This latter assumption is equally corroborated by the opinion of the cited authors.⁸²

State Succession from an International Law Perspective, 2 ARIEL 1997, 213 See also the parallel proceedings against Creditanstalt, OGH I Ob 2313/96w, 28 January 1997, SZ 1996 No. 69/283, p 900-909

⁷⁸ The term 'dismembratio' refers to the complete dissolution of the predecessor state and replacement by two or more successor states, cf. *Seidl-Hohenveldern, Volkerrecht*⁸ (1994) 299 Even though technically the break-up of the SFRY could also be regarded as a case of subsequent secessions, the community of states viewed it as a case of 'dismembratio', thus forcing the successor State, the Federal Republic of Yugoslavia (FRY) to apply for membership in the United Nations See *Seidl-Hohenveldern/Hummer in Neuhold/Hummer/Schreuer, Osterreichisches Handbuch des Volkerrechts Vol 1*⁴ (2004) 158

⁷⁹ OGH 4 Ob 2304/96v (*Effects of State Succession/State Property – Republic of Croatia et al v Girocredit Bank A G Der Sparkassen*), 17 December 1996, SZ 1996 No 69/281, p 886-94, at 892

⁸⁰ *Reinisch/Hafner, Staatsukzession und Schuldubernahme beim "Zerfall" der Sowjetunion, Schriftenreihe des FOWI Vol. 9* (1995)

⁸¹ Article 18 Vienna Convention on the Succession of States in respect of State Property, Archives, Debt, 8 April 1983, UN-Doc A/CONF 117/14, not yet in force ("1. When a State dissolves and ceases to exist and the parts of the territory of the predecessor State form two or more successor States, and unless the successor States concerned otherwise agree: (a) immovable State property of the predecessor State shall pass to the successor State in the territory of which it is situated, (b) immovable State property of the predecessor State situated outside its territory shall pass to the successor States in equitable proportions, (c) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territories to which the succession of States relates shall pass to the successor State concerned, (d) movable State property of the predecessor State, other than that mentioned in subparagraph (c), shall pass to the successor States in equitable proportions 2 The provisions of paragraph 1 are without prejudice to any question of equitable compensation among the successor States that may arise as a result of a succession of States").

⁸² OGH 4 Ob 2304/96v (*Effects of State Succession/State Property – Republic of Croatia et al v Girocredit Bank A G Der Sparkassen*), *supra* note 79, at 889 ("It is in this sense that Art. 8 of the 1983 "Vienna Convention

While a more detailed assessment of the codifying character of Article 18 of the Vienna Convention is lacking, the Supreme Court proceeded to an interesting discussion of various international documents that appear to evidence an *opinio iuris* that the concept of an equitable distribution of state property had its basis in customary international law. The Court referred to UNGA [sic] Resolution 1022⁸³ (leaving it to the Member States to release funds and assets frozen pursuant to SC Resolutions 757 and 820, specifically pointing out that these funds and assets had to be released without prejudice to claims of the successor states to such property),⁸⁴ to Opinion No. 9 of the Badinter-Commission⁸⁵ (that state property of the SFRY located in third countries must be distributed equitably among the successor states in accordance with an agreement to be reached among them)⁸⁶ and to the EU Declaration of 9 April 1996⁸⁷ (which makes evident the requirement of an agreement among the successor states on the distribution of assets).⁸⁸

The Court's outcome that the distribution of the funds of the SFRY would have to be settled by negotiations among its successor states themselves was corroborated by reliance on the *communio incidens* ("accidental community")⁸⁹ jurisprudence (corresponding to the

on Succession of States in Respect of State Property, Archives and Debts", prepared by the International Law Commission, defines "State property of the predecessor State" as property and rights which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State. The purpose of this codification was to formulate existing customary international law (*Reimisch/Hajner, Staatensukzession und Schuldubernahme beim „Zerfall“ der Sowjetunion, Schriftenreihe des FOWI [1995] 44*)')

⁸³ Ibid, at 892 The court mistakenly referred to Resolution 1022 as having been adopted by the UN General Assembly In fact, Resolution 1022 (1995) of 22 November 1995 (35 ILM 259 (1996)) was adopted by the Security Council of the United Nations

⁸⁴ Security Council Resolution 1022 (1995) [on suspension of measures imposed by or reaffirmed in Security Council resolutions related to the situation in the former Yugoslavia], UN-Doc S/RES/1022 (1995) The Security Council, in operative clause 5, decided that "all funds and assets previously frozen or impounded pursuant to resolutions 757 (1992) and 820 (1993) may be released by States in accordance with law, provided that any such funds and assets that are subject to any claims, liens, judgements, or encumbrances, or which are the funds or assets of any person, partnership, corporation, or other entity found or deemed insolvent under law or the accounting principles prevailing in such State, shall remain frozen or impounded until released in accordance with applicable law" In operative clause 6 it further decided that "the suspension or termination of obligations pursuant to this resolution is without prejudice to claims of successor States to the former Socialist Federal Republic of Yugoslavia with respect to funds and assets"

⁸⁵ OGH 4 Ob 2304/96v (*Effects of State Succession/State Property – Republic of Croatia et al v Girocredit Bank A G Der Sparkassen*), *supra* note 79, at 892

⁸⁶ Conference for Peace in Yugoslavia Arbitration Commission ('Badinter-Commission'), Opinion No 9, 31 ILM 1523 (1992), at 1525 ("The Arbitration Commission is therefore of the opinion that property of the SFRY located in third countries must be divided equitably between the successor States, [that] the SFRY's assets and debts must likewise be shared equitably between the successor states, [and that] the states concerned must peacefully settle all disputes to succession to the SFRY which could not be resolved by agreement in line with the principle laid down in the United Nations Charter")

⁸⁷ OGH 4 Ob 2304/96v (*Effects of State Succession/State Property – Republic of Croatia et al v Girocredit Bank A G Der Sparkassen*), *supra* note 79, at 892

⁸⁸ Declaration by the Presidency on Behalf of the European Union on Recognition by EU Member States of the Federal Republic of Yugoslavia, 9 April 1996, PESC/96/30 ("The European Union considers that hereafter the development of good relations with the Federal Republic of Yugoslavia and of its position within the international community will depend on a constructive approach by the FRY to () [an] agreement among all the States of the former Yugoslavia on succession issues")

⁸⁹ In analyzing the question whether the international law title to distribution of the successor states could be secured by an injunction issued by an Austrian court, the Court noted that the theory of 'communio incidens' as created for cases of cease of existence of foreign corporations would equally apply to the case of the

German “*Spalttheorie*”/“doctrine of severance”)⁹⁰ used in cases of limiting the extraterritorial effect of foreign expropriations. The Court found that any unilateral disposal of the funds in question by the FRY would amount to an uncompensated expropriation of the other co-owners in violation of the Austrian *ordre public*. It thus concluded that the funds were now held by a joint-ownership community of all successors who each had a legal interest to prevent unilateral disposal over the property

b) Effects of State Succession - *Soviet Embassy Building Case*

In another case concerning state succession in respect of real property located abroad, the so-called *Soviet Embassy Building Case*,⁹¹ the Austrian Supreme Court effectively left the content of rules of customary international law open. The case arose from a request of the Russian Federation to change the ownership entry in the Austrian land register concerning the Embassy premises of the USSR in Vienna from the USSR to Russian Federation. According to the Russian Federation, it was legally identical with the USSR whose international legal personality it continued. Thus, it was entitled to be recognized as the sole owner of the premises. The Supreme Court merely noted that the correct legal qualification of the break-up of the USSR was heavily disputed in international law doctrine,⁹² and concluded that the proper identification of the rightful ownership claims was not an “obvious” question. It thus rejected the request which would have required the correction of an “obvious” incorrectness.⁹³

While the Supreme Court did not rule on the content of any customary international law governing the effect of state succession on state-owned real property located abroad, it made some interesting general remarks on the applicable sources of public international law and in particular the difficulty of ascertaining custom. It held:

“In the absence of applicable international treaty law governing legal problems arising from cases of state succession (neither the Vienna Convention on Succession of States in Respect of Treaties nor the Vienna Convention on the Succession of States in respect of State Property, Archives and Debts achieved the necessary number of ratifications), unwritten international law has to be discerned, primarily international customary law,

‘dismembratio’ of the SFRY. Thus, the state property of the dissolved state would constitute a joint-ownership community of all successor states. See *supra* note 79, at 893

⁹⁰ The doctrine of severance, developed mainly by the German Supreme Court for the area of corporate law, severs the link which fictionally localizes the rights of the shareholders exclusively at the foreign seat of the corporation concerned, thus awarding these rights to the shareholders wherever assets of the corporation may be found, thus also in the forum state, cf. *Seidl-Hohenveldern*, Public International Law Influences on Conflict of Law Rules on Corporations, Hague Academy, 198 Recueil des Cours 1968, 71

⁹¹ OGH 5 Ob 152/04w (*Effects of State Succession on Real Property Abroad / The Soviet Embassy Building in Vienna*), 09.11.2004, RPfISIG 2004 No 2908, p 18-29

⁹² It referred to *Reinisch/Hafner*, Staatsukzession und Schuldubernahme beim “Zerfall” der Sowjetunion, Schriftenreihe des FOWI Vol 9 (1995) 910

⁹³ OGH 5 Ob 152/04w (*Effects of State Succession on Real Property Abroad / The Soviet Embassy Building in Vienna*), *supra* note 91, at 28 (“Even if one acknowledged the direct applicability of customary international law for State authorities when deciding preliminary questions regarding claims of a private law nature, there would be no space for *ex-parte* proceedings concerning an amendment of the land register which requires obvious incorrectness and thus ‘obvious succession’. Just as proceedings regarding the land register exclude any time-consuming attempts to discern foreign law, assessing and evaluating dubious customary international law is no valid option for affirming a state succession in such proceedings.”)

*but also general principles of law. Since cases of state succession are a relatively rare phenomenon in international relations, it is difficult to prove the existence of the classical elements constituting international customary law, i.e. state practice and supportive opinio iuris. Therefore, scholarly writing on international law is of particular importance (cf. Reimisch/Hafner, Staatsukzession und Schuldübernahme, 35)*⁹⁴

What is notable here is the lack of any discussion of a potential codifying nature of the Vienna Conventions – which the Supreme Court attested in the earlier case concerning SFRY bank accounts⁹⁵ – and the ensuing lack of discussion of legal writings with regard to the claimed legal effect of state succession on state-owned real property located abroad. The Court was certainly correct in finding that the comparative scarcity of state succession instances implies a lack of sufficient state practice to easily ascertain customary international law. Also the increased relative weight of scholarly writings or legal doctrine seems plausible.

While the lack of any attempt to ascertain the content of a potential customary rule is certainly disappointing for the reader interested in state succession law, the Court's mere reference to a lack of consensus regarding the qualification of the dissolution of the USSR is perfectly comprehensible from the point of view of judicial economy. It did not have to determine the content of a customary international law rule concerning the effect of state succession on real property located abroad; all it had to demonstrate was that the effect was not "obvious". And that was the case for two reasons: first, because one could differ whether the Russian Federation was a continuator of the USSR or a successor state, secondly because the rules on state succession in property were uncertain.

In a companion case,⁹⁶ the Austrian Supreme Court equally rejected a request by the Ukraine to change the ownership entry in the Austrian land register concerning other premises in Vienna formerly owned by the USSR. The applicant had argued that as a result of the *dismembratio* of the USSR and in consequence of a number of international agreements between the Russian Federation and Ukraine, it would be entitled to these premises. The Court, however, held that the correct legal qualification as *dismembratio* or separation of states from the USSR with identity between the Russian Federation and the USSR was a controversial issue and that therefore the entitlement of Ukraine was not sufficiently "obvious" to trigger a mere correction of the land register. With reference to the *Soviet Embassy Building Case*, the Court held that "a land register proceeding is not suited to ascertain the content of questionable customary international law."⁹⁷

c) Enforcement Proceedings against Foreign States – Czech Art Objects Case

⁹⁴ *Ibid.*, at 28

⁹⁵ See OGH 4 Ob 2304/96v (*Effects of State Succession/State Property – Republic of Croatia et al v Girocredit Bank A G Der Sparkassen*), *supra* note 79

⁹⁶ OGH 5 Ob 238/04t (*Effects of State Succession on Real Property Abroad II*), 09 11 2004, ZfRV 2005 No 2005/13, p 76-78

⁹⁷ *Ibid.*, at 78

A fairly recent Supreme Court decision, addressing the scope of enforcement immunity of foreign states, illustrates the simplified ascertainment of the content of customary international law rules by Austrian courts. In the 2012 case concerning *Enforcement Proceedings against the Czech Republic*,⁹⁸ a private company had sought the enforcement of an arbitral award rendered against the Czech Republic and requested the Austrian courts to permit the sale of three objects of art (two paintings and a bronze sculpture), all of which belonged to the Czech Republic and were on display at an exhibition at Vienna's Belvedere Gallery, in order to satisfy an outstanding claim worth approximately 1 million EUR.

The Austrian courts had to address a mix of questions concerning the enforcement of a foreign commercial arbitration award and the scope of the immunity from enforcement measures enjoyed by a foreign state. This combination led to some confusion which the Supreme Court had to correct.

The court of first instance declared the arbitral award enforceable and permitted in principle execution measures in Austria. However, after having originally granted enforcement measures, the court ended such proceedings *ex officio* following the receipt of a note by the Austrian Ministry of European and International Affairs which stated that, according to the rules of customary international law, assets "*extra commercium*" were excluded as objects of enforcement proceedings and that the Czech Republic thus enjoyed enforcement immunity concerning the three objects of art. Accordingly, the court of first instance had relied on a customary law-based immunity of cultural objects on loan from one state to another.

The Court of Appeals revoked the lower court's decision, arguing that the Czech Republic, by entering into an arbitration agreement, had subjected itself to the arbitration proceedings and had thus waived its immunity for contentious court proceedings relating to the arbitration. This immunity in the contentious proceedings, however, was to be distinguished from immunity from enforcement proceedings. In the context of enforcement proceedings, an asset's dedicated purpose determined whether said asset was available for enforcement. Only those assets that solely served purposes of a private law nature were available for enforcement. The immunity governing cultural objects owned by the state would not apply where such cultural objects were clearly designated for commercial purposes or for sale. The Austrian law on the temporal grant of immunity of cultural object on loan⁹⁹ would not prevent broader protection of state-owned cultural objects on the basis of customary international law. The Court of Appeals finally noted that in enforcement proceedings assets designated for purposes of a private law nature were subject to enforcement. This exception, however, would not mean that assets traditionally designated for official/sovereign purposes were subject to enforcement. The cultural objects in the present case were considered assets designated for official/sovereign purposes and thus excluded from being subject of enforcement measures.

⁹⁸ OGH 3 Ob 18/12m (*Enforcement Proceedings against the Czech Republic*), 11.07.2012, JBl 2012, p. 729-33.

⁹⁹ Federal Law on the Temporary Immunity of Cultural Objects on Loan for Public Exhibition (Bundesgesetz über die vorübergehende sachliche Immunität von Kulturgut-Leihgaben zum Zweck der öffentlichen Ausstellung), Austrian Federal Law Gazette I No. 133/2003, amended by Austrian Federal Law Gazette I No. 65/2006.

Because of this broad immunity the Court of Appeals quashed the entire proceedings (including the enforceability of the arbitral award)

On final appeal, the Supreme Court in its analysis first noted that proceedings for the enforcement of foreign awards and judgements were not part of regular enforcement proceedings, but rather *sui generis* proceedings which may lead to a declaration of enforceability regardless whether the opposing party possessed any assets subject to enforcement proceedings. On this basis, it held that the enforceability of the arbitral award rendered against the Czech Republic had to be assessed on its own terms (basically pursuant to the criteria laid down in the New York Convention without regard to the availability of assets subject to execution measures).

As regards the central issue of the enforcement immunity regarding the three art objects the Austrian Supreme Court equally demanded further clarification from the lower courts. However, it made a general finding concerning the scope of state immunity from enforcement measures. Recurring extensively to Austrian and German civil procedure scholarship and modestly on German jurisprudence, the Court stipulated the existence of the generally accepted purpose criterion in order to distinguish between assets subject to enforcement measures and assets exempt from such measures. It held:

“According to the prevailing view on restrictive/relative state immunity in enforcement proceedings a state enjoys immunity from enforcement only for assets that serve official/sovereign purposes (Matscher in Fasching² Article IX EGJN Rz 218M Geimer, Internationales Zivilprozessrecht⁶ [2009] Rz 590, v Schonfeld, Die Immunität ausländischer Staaten vor deutschen Gerichten, NJW 1986, 2980, Kroll, Die Pfandung von Forderungen des russischen Staates gegen deutsche Schuldner – Investitionsschutz und Vollstreckungsimmunität, IPRax 2004, 223, Weller, Vollstreckungsimmunität Beweislast, Beweismaß, Beweismittel, Gegenbeweis und Beweiswürdigung, RIW 2010, 599, Weller, Vollstreckungsimmunität für Kunstleihgaben ausländischer Staaten, IPRax 2011, 574, Lange, Internationale Rechts- und Forderungspfandung 2004, 51, dBVerfG 2 BvM 9/03 NJW 2007, 2605) “¹⁰⁰

Accordingly, the Supreme Court concluded that the Czech Republic would not generally enjoy immunity from enforcement. Rather, assets not used for official/sovereign purposes could be subject to enforcement. The Court further held:

“The burden of proof for facts that justify immunity from enforcement measures generally lies on the party invoking such immunity (Lange, Forderungspfandung 82f, Geimer, IZPR⁶ Rz 527, Kroll, IPRax 2004, 227, Weller, RIW 2010, 600, Zimmermann in MünchKomm ZPO³ [2008] § 20 GVG Rz 15, Walter, Gibt es eine Beweislastverteilung bei der Immunität von Staaten? RIW 1984, 14, v Schonfeld, NJW 1986, 2982, BGH VII ZB 37/08 RIW 2010, 72) “¹⁰¹

¹⁰⁰ OGH 3 Ob 18/12m (*Enforcement Proceedings against the Czech Republic*), *supra* note 98, at 731 (para 2 4)

¹⁰¹ *Ibid.*, at 732 (para 3 4 1)

In order to substantiate this finding, the Court finally relied on a decision of the German Constitutional Court (2 BvM 1/76 NJW 1978, 485)¹⁰² which had pointed out that requiring a foreign state to comprehensively contribute to court proceedings in order to properly assess the question of immunity from enforcement would violate the foreign state's sovereignty and would thus be impermissible. However, this lowering of the standard of proof was based on the notion that the burden of proof was on the judgment debtor ("*in dubio pro jurisdictione*").¹⁰³

While not truly engaging with the German jurisprudence, this Austrian Supreme Court judgment demonstrates a principled willingness to look across borders in order to ascertain the scope of a customary international law-based immunity from enforcement measures of foreign states. Though almost exclusively based on a limited number of authors the outcome appears to be in conformity with customary standards.

3) Mere Reference to Customary International Law in General or to Doctrine and Publicists

With *Hoffmann v Dralle*¹⁰⁴ dating back to 1950, the vast majority of Austrian court decisions dealing with customary international law ever since have not come even remotely close to the breadth and diligence of the customary law analysis of 'shining example' of Austrian international law jurisprudence. Motivated most likely by a sense of pragmatism and the goal of efficiently clearing their case dockets, courts have dealt with customary international law in a rather superficial way. What should in theory amount to an analysis of state practice and *opinio iuris* presents itself in reality often as a mere statement that a certain customary rule exists or does not exist. While such a statement is on a few occasions supported by at least the appearance of a more thorough discussion, most courts have settled for supportive arguments found in scholarly writings to justify a rule under custom. In some cases, courts based their decisions on customary international law without even mentioning the term, a reference to 'general international law' or the mere assumption of customary law was all the court needed to decide the case.

¹⁰² BVerfG 2 BvM 1/76 ("*Philippine Embassy Bank Accounts Case*"), 13.12.1977, NJW 1978, 485-94, 65 ILR 146. In this case concerning the question whether there was a general rule under international law that enforcement measures based on a judgment against a foreign state regarding its non-sovereign activity, against a bank account of that state or of its embassy, existing within the country and intended to cover the embassy's official expenses and costs, was *per se* inadmissible or only insofar as it would interfere with the functionality of the embassy as a diplomatic representation, the German Constitutional Court held that enforcement measures by the host state against a foreign state regarding non-sovereign acts (*acta iure gestionis*) of that state through objects located in the national territory of the host state was inadmissible insofar as these objects at the time of commencement of the enforcement measure were serving sovereign purposes of the foreign state. Additionally, the Court held that receivables coming from an ongoing general bank account of a foreign state's embassy that existed in the host state and was designated for covering costs and expenses of the embassy (operating account) were not subject to enforcement measures by the host state. Eventually, the Court held that there had not been established a customary rule that was sufficiently general and backed by the necessary legal consensus that the host state was generally prohibited from taking enforcement measures against a foreign state.

¹⁰³ OGH 3 Ob 18/12m (*Enforcement Proceedings against the Czech Republic*), *supra* note 98, at 732 (para 3 4 2).

¹⁰⁴ See OGH 1 Ob 171/50 (*Dralle v Republic of Czechoslovakia*), *supra* note 36.

i) Weak analysis of custom

In a handful of cases, the Austrian Supreme Court engaged in what seemed at first glance like the beginning of a thorough customary law analysis. However, after a few paragraphs the alleged analysis turned out to be at best a theoretical outline for the informed reader that lacked any substantial ascertainment of either state practice or *opinio iuris*.

a) UNIDO Special Missions Case

The proceedings concerning the arrest of a former Syrian Ambassador pursuant to an international arrest warrant¹⁰⁵ are a good example. Concerning the defense claim that the arrested had been on an official *ad-hoc* mission to UNIDO in his function as Director-General of the Syrian Tobacco Company, thus enjoying diplomatic immunity under the UNIDO Headquarters Agreement, the Court noted that

*“the status of representatives of states sent out ad-hoc – also to international organizations – is primarily determined by the respective headquarters agreements, subsidiarily by customary international law, for the ascertainment of which (within certain limits) the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975 as well as by analogy the United Nations Convention on Special Missions may be consulted (cf. Kock/Fischer, Das Recht der internationalen Organisationen, 581)”*¹⁰⁶

However, without engaging in any sort of customary law analysis (e.g. by making any reference to state practice or cases involving other international organizations), the Court simply found that none of the aforementioned sources supported the assumption that there could be an *ad-hoc* mission to UNIDO without the agreement of the organization. Without stating its sources, the Court finally concluded that a quintessential precondition for the arrival of the representative of a state to constitute an *ad-hoc* mission was an *ex ante* approval on behalf of UNIDO of such a mission. In the absence thereof, such an arrival could not be qualified as a special mission.¹⁰⁷

b) Illegitimate Child of the former Prince of Liechtenstein Case

In a case¹⁰⁸ concerning the application for an affiliation order against the Prince of Liechtenstein and his three siblings, the applicant alleged that she was an illegitimate child of the previously deceased Prince of Liechtenstein (the defendant's father) and thus entitled to

¹⁰⁵ OGH 12 Os 3/98 (*UNIDO ad-hoc Mission Case*), 12 February 1998, SSt 1998 No. 63/4, p. 14-18

¹⁰⁶ *Ibid.*, at 17

¹⁰⁷ *Ibid.*, at 18

¹⁰⁸ OGH 7 Ob 316/00x (*Illegitimate Child of the Prince of Liechtenstein Case*), 14 February 2001, SZ 2001 No. 74/20, p. 122-9

bring suit against his four children as his successors to have the Prince's parentage approved and declared by the Court. Confronted with possible exceptions to the absolute immunity of heads of state, the Court first noted that

*“[c]ustomary international law and increasingly also international treaties provide for certain exceptions to the jurisdiction of Austrian courts with regard to particular natural or legal persons (.) (Ipsen Volkerrecht 4 339 Rn 29, Neuhold/Hummer/Schreuer, Handbuch des Volkerrechts, Rz 832, 1642, Mayr in Rechberger, ZPO² Rz 2 zu Article IX EGJN) ”*¹⁰⁹

Relying on the academic writings of acclaimed international law publicists, the Court, without providing any concrete examples of state practice, deduced as a core principle that

*“foreign heads of state by virtue of their office not only enjoy functional immunity for their official acts but also so-called absolute immunity with regard to their private acts (Matscher in Faschung², Rz 242, Herdegen, Volkerrecht 246 Rn 10, Neuhold/Hummer/Schreuer, Handbuch des Volkerrechts, Rz 1643, Delbruck/Wolfrum in Dahm, Volkerrecht I/12 253) This principle, by virtue of customary international law, extends basically to the members of the family of the head of state forming part of his household, according to currently established state practice, however, the beneficiaries of absolute immunity are limited to the ‘closest family members of a head of state forming part of his household’ (opinion of the Legal Office of the Austrian Federal Ministry of Foreign Affairs, Austrian Diplomatic Practice in International Law, ZOR, vol 44, 329, Ipsen, Volkerrecht 339 Rn 9, Article 37 of the Vienna Convention on Diplomatic Relations) ”*¹¹⁰

In the context of immunity for (former) heads of state, the Court found that

*“the international community more and more demanded a limitation of this privileged status and viewed such immunities as irrelevant before courts and administrative tribunals in cases of serious breaches of international law (e.g. genocide, crimes against humanity and torture) which could no longer be seen in relation to any official acts of a head of state (Herdegen, Volkerrecht 246 Rn 10, Luke, Die Immunität staatlicher Funktionsträger, Bd 16 der Berliner Juristischen Universitätschriften – Öffentliches Recht) ”*¹¹¹

In regard of civil proceedings, the Court found that a similar tendency could be noted and referred to German literature on civil procedural rules¹¹² which considered the doctrine of absolute immunity as “retreating”. Similarly, the Court relied on German literature on international law¹¹³ which – by citing foreign state practice – claimed that “one could reasonably argue that the extension of personal immunity to the entire private life of the head of state including his commercial activities would constitute a non-justifiable and no longer timely assessment of government.” Correspondingly, the cited scholars argued that launching legal action against a head of state for commercial or other activities unrelated to his/her

¹⁰⁹ *Ibid.*, at 124

¹¹⁰ *Ibid.*, at 125

¹¹¹ *Ibid.*,

¹¹² *Martiny*, Handbuch des Internationalen Zivilverfahrensrechts (1984) Vol III/1, Aneerkennung ausländischer Entscheidungen nach autonomem Recht, 259 (Rz 559).

¹¹³ *Delbruck/Wolfrum*, Die Grundlagen Die Volkerrechtssubjekte, in *Dahm*, Volkerrecht I/1² (1989)

political or international legal position would not violate international law. The Court, however, refrained from mentioning (and analyzing) the foreign state practice that the two authors had cited.

The Court's conclusion that legal proceedings against a foreign head of state were barred by immunity were finally justified by an interesting reliance on the *Waite and Kennedy* demand¹¹⁴ of the availability of alternative means of effective legal redress.¹¹⁵ Without expressly relying on that case, the Supreme Court recognized the inherent tension between the right of access to court as protected by Article 6 ECHR and immunity from jurisdiction.¹¹⁶ The court was satisfied, however, that the plaintiff could pursue its claims before the courts of Liechtenstein and was thus not deprived of her right of access to court by the immunity granted to the defendant before Austrian courts.¹¹⁷

c) German OSCE 'Representative' Case

In a case¹¹⁸ concerning a rental payment claim by a landlord against his tenant who was the permanent 'representative' of the Federal Republic of Germany with the OSCE and, in his function as head of the liaison office of the OSCE Parliamentary Assembly in Vienna, also an employee of the OSCE, the Court discussed the question of the customary nature of the rules on immunity concerning international organizations.

The Court first noted that international organizations were subjects of international law and enjoyed broad immunity. Unlike states, which only enjoyed immunity for acts they were carrying out in an official capacity (*acta iure imperii*), the Court, by relying on academic literature dealing with the issue,¹¹⁹ found that the immunity of international organizations was absolute and noted that the legal basis for both immunities and privileges of international organizations was to be found in the organization's charter, headquarters agreements, customary international law or domestic laws.

The Court then distinguished the question of immunity of international organizations from the immunity of their organs, civil servants and the various representatives of States serving at the organizations. It first qualified the legal relationship at issue as a tri-polar relation between the sending state, the host state of the organization and the organization itself, which fell into the domain of the multilateral law of diplomacy. Turning to the legal sources of the multilateral law of diplomats at international organizations, the Court noted that the Vienna Convention on the Representation of States in Their Relations with International

¹¹⁴ *Waite and Kennedy v Germany*, *supra* note 60

¹¹⁵ *Ibid.*, para 68 (“[] a material factor in determining whether granting [] immunity from [] jurisdiction is permissible is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.”)

¹¹⁶ OGH 7 Ob 316/00x (*Illegitimate Child of the Prince of Liechtenstein Case*), *supra* note 108

¹¹⁷ See also *Reinisch*, *Das Recht auf Zugang zu Gericht und völkerrechtliche Immunitäten in Österreich*, in *Jablonek/Kucsko-Stadlmayer/Muzak/Perthold-Stoitzner/Stoger* (eds.), *Vom praktischen Wert der Methode* Festschrift Heinz Mayer zum 65. Geburtstag (2011), 631-648, at 647f

¹¹⁸ OGH 6 Ob 150/05k (*German OSCE 'Representative' Case*), 1 December 2005, SZ 2005 No 175, p 467-471

¹¹⁹ *Seidl-Hohenveldern/Loibl*, *Das Recht der internationalen Organisationen einschließlich der supranationalen Gemeinschaften*⁷ (2000)

Organizations of a Universal Character¹²⁰ had not yet entered into force and could at best be applied factually as an expression of general international law. It did not, however, specify what it meant by ‘factually applying international law’. In continuing, the Court then touched the question of customary international law in the area and held that

“[s]ince international organizations have gained prominence only after World War II, it is doubtful whether there is indeed customary international law in this area. In any event, it is highly questionable if there is customary law with regard to the rules on immunity of the Vienna Convention on the Immunity of Delegations to Organs of International Conferences, in particular regarding the OSCE. The majority of doctrinal views in international law find that the OSCE does not have a distinct legal personality under international law (Ipsen, *Volkerrecht*⁵, 604). OSCE member states had not yet made the decisive step from a ‘negotiation process towards an international organization’ and were characterizing their permanent missions as ‘permanent representations at the OSCE institutions in Vienna’ (Ipsen, *Volkerrecht*⁵, 530).”¹²¹

Eventually, the Court left the question of the status of immunity of the OSCE itself unanswered. It did, however, refer to the Austrian Federal Law on the Legal Status of the institutions of the OSCE in Austria (‘OSCE-Law’),¹²² whose provisions the Court deemed *leges speciales* to the Vienna Convention it had cited earlier. Since these provisions covered the defendant in both his functions (as head of the liaison office of the OSCE Parliamentary Assembly in Vienna and as a permanent representative of Germany at the liaison office), the Court finally had to decide whether the privileges and immunities granted to the United Nations in Vienna by Austrian domestic law (the reference point used by the OSCE-Law) would prevent the suit at hand from being admissible in court. To this end, the Supreme Court referred the case back to the court of first instance which then held the head of the liaison office of the OSCE Parliamentary Assembly equal to a senior officer of the United Nations, thus awarding the defendant full immunity from civil proceedings before Austrian courts.¹²³

d) Algerian Embassy Bank Accounts Case

¹²⁰ Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 14 March 1975, UN-Doc. A/CONF.67/16 (1975)

¹²¹ OGH 6 Ob 150/05k (*German OSCE ‘Representative’ Case*), *supra* note 118, at 470

¹²² Bundesgesetz über die Rechtsstellung von Einrichtungen der OSZE in Österreich, Austrian Federal Law Gazette I No. 511/1993, amended by Austrian Federal Law Gazette I No. 157/2002. § 1 grants legal personality to the Secretary General of the OSCE, the OSCE-Secretariat, the Permanent Council of the OSCE, the OSCE Forum for Security Co-operation and the OSCE Representative on Freedom of the Media. Under § 3, institutions of the OSCE located in Austria together with their employees and experts are granted the same immunities and privileges that exist for the United Nations in Vienna and its similarly situated employees and experts. The same immunities and privileges are granted by § 3 para 2 to offices of institutions of the OSCE located abroad as well as the Liaison Office of the OSCE Parliamentary Assembly in Vienna together with their officers. § 4 then awards the same immunities and privileges to the permanent foreign representations and delegations (as well as their members) of the OSCE Member States at the OSCE institutions listed in § 1.

¹²³ BG Josefstadt 6 C 19/06f (unpublished).

In the aftermath of the *Philippines Bank Accounts Case*¹²⁴ decided a few years earlier by the German Constitutional Court, the Austrian Supreme Court in the 1986 *Algerian Embassy Bank Accounts Case*¹²⁵ held that while there was no rule in international law prohibiting enforcement against foreign states as such, there was a rule regarding the enforcement in property that serves the performance of sovereign functions

Plaintiff in this case had obtained a default judgment against the Republic of Algeria, which had subsequently been declared enforceable. When an attachment order on a bank account held by the Algerian Embassy in Vienna was issued, Algeria appealed the attachment, claiming that the bank account in question was an official account allocated for the performance of sovereign functions.

Following the view taken by the Austrian Ministry of Foreign Affairs in a note to the court of first instance that an ongoing general bank account of a foreign state's embassy which exists in the host state and is designated for covering costs and expenses of the embassy (operating account) was excluded from enforcement measures of the host state, the Court of Appeals found that granting such enforcement would violate international law. The Supreme Court confirmed, noting that enforcement against an account of an embassy could only be deemed legitimate under international law if plaintiff could prove that the account served exclusively private purposes of the embassy. In concurring with the German Constitutional Court's holding in the *Philippines Bank Accounts Case*, the Supreme Court found that

*“Due to the difficulties involved in judging whether the ability of a diplomatic mission to function was endangered, international law gave wide protection to foreign states and determined such protection by reference to the typical abstract danger and not the specific threat to such ability to function in any particular case.”*¹²⁶

In reaching its conclusion, the Supreme Court first relied on the views taken by renowned authors of international law. It explicitly mentioned *Neuhold/Hummer/Schreuer*¹²⁷ who had found that enforcement in bank account savings of a foreign state was not *per se* allowed just because the foreign state might also have assets designated for private purposes. Additionally, *Verdross/Simma*¹²⁸ in their analysis of international law related jurisprudence on enforcement proceedings had shown that courts were mainly focusing on the designated purpose of assets of a foreign state in the host state. Their main source of reference had been the opinion issued by the German Constitutional Court in the *Philippines Bank Accounts Case*. In restating this opinion and subsequently using it as a guideline, the Austrian Supreme Court reiterated the German Court's words that at the time of the decision there had not been any state practice that was either general enough or supported by *opinio iuris* in order to constitute a general rule under international law which would prohibit enforcement measures against a foreign state as such. There was, however, a general rule under international law prohibiting enforcement by the authorities of the host state based on a judicially approved execution title

¹²⁴ See *supra* note 102

¹²⁵ OGH 3 Ob 38/86 (*Algerian Embassy Bank Accounts Case*), 30 April 1986, SZ 1986 No. 59/76, p. 379-383, 77 ILR 489

¹²⁶ 77 ILR 489

¹²⁷ *Neuhold/Hummer/Schreuer*, *Osterreichisches Handbuch des Völkerrechts* Vol. I (1983)

¹²⁸ *Verdross/Simma*, *Univerelles Völkerrecht*³ (1984) 770f

against a foreign state concerning non-sovereign acts of the foreign state (*acta iure gestionis*) in objects of the foreign state located in the territory of the host state, without the consent of the foreign state when these objects had served sovereign purposes of the foreign state at the time the enforcement measure was initiated.¹²⁹ Furthermore, the Court mentioned a decision of the British Court of Appeal of 1983¹³⁰ that *Verdross/Simma* had provided as a source for their views.

Concerning the question of mixed accounts, the Supreme Court explicitly departed from a previous decision issued in 1958¹³¹ where it had found that enforcement against a bank account of a foreign mission was inadmissible only if the account was exclusively designated for the exercise of sovereign rights of the foreign state but admissible if it was also used for private purposes. In this context the Supreme Court in 1958 had noted that ‘*the mere fact that the bank account is in the name of the Republic of Indonesia “for its legation” does not permit the inference that the account exists exclusively for the exercise of the sovereign rights of a foreign state (representation abroad) and is not an asset serving private law functions*’¹³²

In its 1986 *Algerian Embassy Bank Accounts Case* decision, the Supreme Court followed the example of the German Constitutional Court and held that ‘*assets held in a general bank account of the mission of a foreign state in Austria, which is allocated (also) to cover the expenses and costs of the legation, are not subject to execution in Austria without the consent of the foreign state.*’¹³³ Thus, plaintiff would have to prove that an embassy bank account was used exclusively for the exercise of private functions in order to legitimately pursue execution against it

ii) Reference to Custom based exclusively on Scholarly Writings

The most commonly used form of ‘analysis’ by Austrian courts when dealing with customary international law is a simple reference to the published works of renowned legal authors in the respective field. Without making a mention of the elements of custom or how they might be ascertained, customary international law simply exists if and to the extent that scholars claim it does, with the referenced authors coming almost exclusively from Austria or Germany. The pool of sources is thereby not limited to scholarly writings in the field of international law. In immunity cases, for instance, with the question of immunity and the admissibility of the claim being preliminary procedural issues, Austrian courts regularly base their reasoning on Austrian authors and commentaries in the field of civil procedure¹³⁴ where

¹²⁹ 77 ILR 489, 492f

¹³⁰ *Alcom Ltd v Colombia et al*, 22 ILM 1037 (1983), 79 AJIL 1984, 451

¹³¹ OGH 6 Ob 126/58 (*Neustein v Republic of Indonesia*), 6 August 1958, 65 ILR 3

¹³² 65 ILR 3, 9

¹³³ 77 ILR 489, 494

¹³⁴ Most prominently figure *Rechberger*, *Kommentar zur ZPO* (2006), *Faschung*, *Kommentar zu den Zivilprozessgesetzen* Vol 1, EGJN (2002), etc

certain immunity-related questions of customary international law have been extensively discussed

Examples of this phenomenon are manifold. In the *Temelin Nuclear Power Plant Case*,¹³⁵ for instance, an Austrian citizen owning real estate close to the border brought suit against the Republic of Czechoslovakia to enjoin the erection of a nuclear power plant. The court, without making any reference to existing state practice or *opinio iuris*, held that

*“according to customary international law the principle of territorial sovereignty applies. This principle, however, is limited by international environmental law in so far as that no state has the right to take action on foreign territory (especially of a neighboring state) or to allow for such actions from its own territory (cf Moser, OJZ 1987, 99 mwN). Such violations of international law by one state, however, can only be invoked by the affected neighboring state but not by a national of the neighboring state (cf Verdross/Simma, Universelles Völkerrecht³, § 1300).”*¹³⁶

Similarly, when a Liberian national challenged an order of enforcement issued by an Austrian court by claiming to be a Liberian ‘diplomat’ and thus enjoying immunity from jurisdiction to enforce pursuant to the Vienna Convention on Diplomatic Relations, the Court held that *“Austria is bound by the content of the Convention on Diplomatic Relations whether or not Liberia has acceded to the Convention since it codifies customary international law (cf Mayr in Rechberger, ZPO, FN 16 to Article IX EGJN, Stohanzl ZPO GMA 14, comment 2 to Article IX EGJN).”*¹³⁷

In discussing the question of domestic jurisdiction in a case dealing with Austrian cartel law and foreign competition distortions by a German corporation that had contracted with the German province Bavaria,¹³⁸ the Supreme Court noted that *“[i]f and under what circumstances a foreign state can be sued before a domestic court is governed by different norms of customary international law as well as international treaties (Matscher in Fasching I Article IX EGJN Rz 115). By virtue of general international law, foreign states are largely exempted from domestic jurisdiction (Matscher, Rz 196). What constitutes a state is provided for by international law (Matscher, Rz 196), territorial divisions of a (federal) state are also included (cf Matscher, Rz 197).”*¹³⁹

Along the same lines, this time in the area of international tax law, the Constitutional Court noted that *“the principle that states can only levy taxes on matters to which they are closely enough related is recognized as a rule under customary international law (cf Vogel, Doppelbesteuerungsabkommen, Kommentar, 3 Auflage, 1996, Rz 7 mwN, Schaumburg,*

¹³⁵ OGH 7 Nd 504/89 (*Temelin Nuclear Power Plant Case*), 24 April 1989, available at http://www.11s.bka.gv.at/Dokumente/Justiz/JJT_19890427_OGH0002_0070ND00504_8900000_000/JJT_19890427_OGH0002_0070ND00504_8900000_000.pdf

¹³⁶ *Ibid.*, at 2

¹³⁷ OGH 3 Ob 258/98g (*Liberian ‘Diplomat’ Case*), 11 November 1998, available at http://www.11s.bka.gv.at/Dokumente/Justiz/JJT_19981111_OGH0002_0030OB00258_98G0000_000/JJT_19981111_OGH0002_0030OB00258_98G0000_000.pdf

¹³⁸ OGH 16 Ok 3/08 (*German Wood Cartel Case*), 16 July 2008, SZ 2008 No 102, p 96-119

¹³⁹ *Ibid.*, at 102

Internationales Steuerrecht, 1993, 13, Tipke/Lang, Steuerrecht, 16 Auflage, 1998, §5 Rz 14, Doralt/Ruppe, Grundriß des österreichischen Steuerrechts, II, 3 Auflage, 1996, 287) ¹⁴⁰

Taking it even a step further, some cases illustrate how scholarly writings are seen as the exclusive source for parties as well as courts to either support or deny the existence of a rule under customary international law

In the *Indonesian Airlines Case*,¹⁴¹ for instance, an entire segment of the court's judgment revolved around the question if a certain rule under customary international law had been established by two Austrian scholars and what exactly the content of that rule was. The claim that gave rise to the case concerned the demand of an Austrian corporation of payment of roughly 2 million US dollars from a state-owned Indonesian airline company which had its seat in Jakarta but ran an off-line station in Vienna. When the defendant argued that it was a recognized principle under customary international law that no state could adjudicate a case that lacked a sufficient link to that state, the Court first felt compelled to clarify that such a rule did not exist under customary international law

Rather, the Court found that defendant's reference to sources of literature,¹⁴² which the alleged principle had been based on, had been misquoted by the defendant. Cited correctly, the Court elaborated that the customary rule described by the two authors would read: "*It can be seen as a rule under customary international law that no state is permitted to conduct proceedings in a case that has no domestic link*"¹⁴³ While the Court acknowledged that such a rule might exist under customary international law, it found that the case at hand provided sufficient links for Austrian jurisdiction and could thus be heard before Austrian courts

In essence, for the court the existence or non-existence of the customary rule in question depended on the correctness of the citation of the scholarly opinion that one of the parties had raised. No analysis or discussion whether or not the alleged principle in the case was actually evidenced by supportive (or maybe challenged by conflicting) state practice or *opinio iuris*, had found its way into the judgment

iii) Reference to 'general international law'

Interestingly, sometimes Austrian courts seem to avoid a proper analysis of the elements of customary international law simply by using the term 'general international law' and supporting it with a variety of works written in the relevant field. Resembling the wording of Article 9 of the Austrian Constitution (which speaks of generally recognized rules of

¹⁴⁰ VfGH G 15/98, V 9/98 (*International Tax Law*), 17 December 1998, VfSlg 1998 No. 15395, p 812-826, at 824

¹⁴¹ OGH 8 Ob 105/99w (*Indonesian Airlines Case*), 25 November 1999, available at http://www.ris.bka.gv.at/Dokumente/Justiz/JJT_19991125_OGH0002_0080OB00105_99W0000_000/JJT_1999_1125_OGH0002_0080OB00105_99W0000_000.pdf

¹⁴² *Fischer/Kock, Allgemeines Völkerrecht*⁴ (1994)

¹⁴³ See *supra* note 141, at 4

international law),¹⁴⁴ no distinction is made between a rule under custom or a general principle of international law. No elaboration on how the alleged rule under ‘general international law’ came into existence or evidence of corresponding practice of other states is provided either. The generality of ‘general international law’ is considered convincing enough in itself to support the court’s argument, its vagueness makes it possible to include rules of customary international law without making even a reference to state practice or *opinio iuris*.

By way of example, in a case concerning the claim of an Austrian citizen against the SFRY for compensation for the destruction of her car during an airstrike of the Yugoslavian army,¹⁴⁵ the Court held that “*aside from regulations of international treaties, existing general international law establishes the doctrine of relative (restricted) immunity of states which are exempted from domestic jurisdiction only when acting in an official capacity (acta iure imperii) but not when acting in a private capacity (acta iure gestionis)*” () *An air-force operation of a state constitutes by its very nature and according to general international law an official act (Mayr in Rechberger, ZPO Article IX EGJN Rz 5)*”¹⁴⁶

Quite similarly, when the distribution of magazines by a German corporation was deemed to infringe Austrian competition laws, the Supreme Court examined the question under which circumstances domestic enforcement measures forcing a foreign party to carry out acts abroad would constitute extraterritorial enforcement and thus an (at least indirect) interference with the foreign state’s sovereignty.¹⁴⁷ In this respect, the Court – without specifying its sources – referred to “general international law” and held that “*under general international law a state is not obliged to tolerate or assist the carrying out of a sovereign act or its enforcement by another state in its territory (Verdross/Simma, op cit § 1020)*”¹⁴⁸

Sometimes, courts mix their literature-based references to customary and ‘general’ international law in the same case within subsequent paragraphs. In the previously mentioned case of the alleged Liberian diplomat claiming immunity from enforcement¹⁴⁹ the Supreme Court, while at first pointing out that the content of the Vienna Convention on Diplomatic Relations applied also to states that had not yet acceded to the Convention by virtue of customary international law, held:

“*Only persons who are sent as diplomats and accepted by the receiving state are regarded diplomatic representatives in bilateral relations (cf Kock in Neuhold/Hummer/Schreuer, Handbuch des Völkerrechts, 1571) This holds particularly true also for special missions which have to be examined under general international law (Dahm/Delbruck/Wolfrum, Völkerrecht, 297, Fischer/Kock, Allgemeines Völkerrecht, 202, see also the Convention adopted by Resolution A/Res 2530 of the UNGA and opened for signature on 8 December 1969)*”¹⁵⁰

¹⁴⁴ See *supra* note 7

¹⁴⁵ OGH 10 Ob 525/94 (*Yugoslavian Army Airstrike Case*), 11 April 1995, SZ 1995 No 68/72, p 421-3

¹⁴⁶ *Ibid*, at 422

¹⁴⁷ OGH 3 Ob 113-148/94 (*Distribution of Periodicals Case*), 26 April 1995, SZ 1995 No 68/81, p 487-96

¹⁴⁸ *Ibid*, at 491

¹⁴⁹ See *supra* note 137

¹⁵⁰ See *supra* note 137, at 3

Moreover, the term ‘general international law’ seems to be of use for courts when distinguishing the assessment of acts under international law from an assessment under domestic law. Accordingly, in a case concerning questions of state immunity and business transactions of diplomatic representations in the context of a purchase agreement for several properties in Vienna on which the defendant had set up its diplomatic representation,¹⁵¹ the Supreme Court noted that

*“[a]ccording to general international law foreign states are only exempt from domestic jurisdiction in relation to acts that were performed in an official capacity (acta iure imperii), in proceedings concerning acts of a private nature (acta iure gestionis) foreign states are, however, equally subject to the domestic jurisdiction in conformity with domestic law (cf. JBl 2004, 390 [Karollus], Matscher in Fasching Rz 203, Mayr in Rechberger, ZPO, Neuhold/Hummer/Schreuer, Handbuch des Völkerrechts, 886). The assessment of whether an act has to be qualified as a state act or an act subject to civil law, has to be based on general international law, not on the respective domestic laws (Matscher in Fasching, Rz 209, Mayr in Rechberger, Rz 5)”*¹⁵²

iv) Assumption and/or Implication of a Rule under Customary International Law without any Form of Analysis

Finally, on a few occasions courts in their lines of argument have gone as far as to simply assume and/or imply that a certain rule (which should technically be rooted in customary law) exists, again based on scholarly writings of acclaimed authors in the field. Unlike in the previously mentioned categories, these cases make no reference to the terms ‘custom’ or ‘customary international law’ at all. The rule that the court relies on is considered such an established axiom of international law, that a discussion of its elements or application in previous cases or other jurisdictions is not even deemed necessary. Examples cover a wide range of topics of international law, from issues relating to territoriality and sovereignty to state succession as well as – most prominently – cases of immunity.

On the issue of extraterritorial enforcement,¹⁵³ for example, the Supreme Court almost categorically held that *“[a]n interference which directly and actually affects the territory of the respective state is prohibited in any case (Seidl-Hohenveldern, Völkerrecht, 1505), [] A state may not exercise its sovereignty on another state’s territory without the latter’s consent (Seidl-Hohenveldern, op cit 1363). Thus, a witness may not be brought with brute force from foreign to domestic territory, but the state can take this infringement of its laws as a motivation to seize domestic assets of the respective person (Seidl-Hohenveldern, op cit 1364)”*¹⁵⁴

¹⁵¹ OGH 2 Ob 32/08g (*Properties Purchase Agreement Case*), 24 September 2008, JBl 2009, p. 457-60.

¹⁵² *Ibid.*, at 458.

¹⁵³ See *supra* note 147.

¹⁵⁴ See *supra* note 147, at 491.

A similarly abstract reasoning occurred in a case concerning the issues of state succession and compensation for expropriation¹⁵⁵ An Austrian citizen who had been arrested in 1952 by soldiers of the Soviet Occupation Power in Austria, sentenced to 25 years imprisonment for espionage and whose property had been confiscated, brought suit against the Republic of Austria for compensation for expropriation In his argument, he claimed that Austria by waiving any claims against the Allied Powers in the names of all Austrian citizens according to Article 24 of the Austrian State Treaty of 1955¹⁵⁶ had acted in a manner similar to an expropriation. Thus, Austria should be responsible for any harm inflicted on the applicant by the Soviet Union (as a predecessor of today's Russian Federation)

Turning to the area of claims for compensation for expropriation related to state successions, the Court held that “*according to the rules of international law there is no succession in personal rights and obligations in the context of state responsibility When a sovereign state disappears its responsibility under international law for any violations of international law disappears as well (Seidl-Hohenveldern in Neuhold/Hummer/Schreuer, Osterreichisches Handbuch des Volkerrechts³ IV/1 Rz 815, Seidl-Hohenveldern, Volkerrecht⁹ Rz 1409f)*”¹⁵⁷

In a case concerning the jurisdictional immunity of a foreign state and of NATO military forces,¹⁵⁸ the Supreme Court noted that

“*[a]ccording to international law, foreign states are exempt from the jurisdiction of domestic courts only for acts they have performed in the exercise of sovereign authority which is vested in them, also under domestic law, foreign states are only subject to domestic jurisdiction with regard to legal disputes arising out of private law relations This is a corollary of the principle of sovereign equality of states in international law (cf Ipsen, Volkerrecht 334 Rn 16, Vitzthum, Volkerrecht Rn 91ff with reference to Article 2(1) of the UN Charter) including the principle of territorial supremacy derived therefrom Acts iure imperii are to be distinguished from acts iure gestionis not according to the pertinent domestic law but pursuant to general international law (cf Schreuer, Die Durchsetzung zivilrechtlicher Anspruche gegen auslandische Staaten, OJZ 1991, 41)*”¹⁵⁹

Finally, when deciding the claim of an Austrian construction company against the OPEC Fund for receivable construction work fees,¹⁶⁰ the Supreme Court, analyzing the question of immunities of international organizations, first noted that the exemption of an international organization and its assets from domestic jurisdiction (immunity) was usually based on international agreements or on headquarters agreements between the international

¹⁵⁵ OGH 1 Ob 149/02x (*Compensation for Expropriation Case*), 30 September 2002, SZ 2002 No 124, p 191-203

¹⁵⁶ Staatsvertrag betreffend die Wiederherstellung eines unabhängigen und demokratischen Österreich, 15 May 1955, UNTS 217 (1955) 223

¹⁵⁷ See *supra* note 155, at 200

¹⁵⁸ OGH 2 Ob 156/03k (*NATO Military Forces Case*), 28 August 2003, JBl 2004, p 390-394

¹⁵⁹ *Ibid*, at 390

¹⁶⁰ OGH 10 Ob 53/04y (*Company Baumeister Ing Richard L v O Case*), 14 December 2004, SZ 2004 No 176, p. 458-64, ILDC 362 (AT 2004)

organization and the host state. It added that international organizations were enjoying broader privileges than foreign states. In this respect it very generally held that

“while foreign states according to domestic law as well as current international law enjoy immunity only for official acts but not for private acts, the immunity of an international organization must be deemed absolute within its functional limits. The different treatment of foreign states and international organizations within the domestic jurisdiction can be explained through the fact that due to the functional character of the legal personality of any international organization all of its acts must be closely linked to its organizational purpose (Seidl-Hohenveldern/Loibl, *Das Recht der internationalen Organisationen einschließlich der supranationalen Gemeinschaften*⁷ Rz 1908). It has been held already that international organizations enjoy immunity for claims of a landlord regarding the tenancy contracts for the organization’s seat () (Neuhold/Hummer/Schreuer, *Osterreichisches Handbuch des Völkerrechts* F³ 174) ”¹⁶¹

IV. Conclusion

Customary international law before Austrian courts started out as a success story after World War II. The in-depth discussion of state practice of different kinds of regional, cultural and political origins, that *Hoffmann v Dralle*¹⁶² offered in 1950 amounts to an exceptionally diligent Supreme Court analysis of jurisprudence in the area of international law. What came later, however, could not follow suit. While a few cases have offered at least some light form of analysis with a few judgments of foreign courts in similar matters discussed, the vast majority of Austrian jurisprudence dealing with customary international law elaborates the elements of state practice and *opinio iuris* superficially at best. Usually, courts rely on the writings of legal scholars both in the area of international law as well as domestic substantive or procedural law to assume that a certain customary rule exists. In other cases, courts have considered customary law in a certain area as sufficiently established so that an analysis of its application in another area seemed redundant and was thus simply implied.

The reasons for this development are almost certainly not to be found in analytical deficiencies of today’s judges or their lack of knowledge of international law. Neither can it be insufficiently available resources. Compared to the scarcity of available international law journals and reports on foreign state practice (then all still printed exclusively on paper) at the time *Hoffmann v Dralle* was decided, the abundance of material both offline as well as online of today’s world is simply overwhelming. Never has it been this easy to research how foreign courts have decided cases, what views high ranking political figures have expressed on behalf of their states or what opinions were shared on certain issues in various international *fora*. The so-called transnational judicial dialogue between courts of different states has never been this easy to activate.

¹⁶¹ *Ibid*, at 460

¹⁶² See OGH I Ob 171/50 (*Dralle v Republic of Czechoslovakia*), *supra* note 36

From the analysis of the practice of Austrian courts when dealing with customary international law in the past 60 years it seems much more probable that the courts' increasingly superficial approach to the topic has been caused by rather trivial reasons. In times where courts are pressured into deciding cases as quickly as possible, where they are encouraged to clear their case-dockets by using the most efficient, yet still legally valid approach and where scholarly writings, published by experts in the field, are readily available and often only a mouse-click away, the reference to literature seems the most straightforward route to choose for a judge.

While this pragmatic approach is understandable, it seems doctrinally problematic. A piece of scholarly work elaborating a rule of custom, once published, is static, state practice, however, might be in flux. In a globalized world with bi- and multilateral cooperation of states taking place in a large variety of fields of international law, a certain practice that was once considered manifest and consistent might have declined into inconsistent, partial application. On the other hand, practice that was previously doubtful might have reached the necessary consistency to be accepted as a customary rule. Without a proper analysis of recent developments, the mere reliance on established academic views might lead to results that do no longer reflect the reality of international law. What makes *Hoffmann v Dralle* so truly remarkable is that through its in-depth discussion it could in a doctrinally thorough fashion show how a rule that had once been a corner stone of international law had gradually changed; how the concept of absolute immunity for states had through time been replaced by the concept of restrictive immunity. Had it simply relied on literature from the days of the past, this realization might not have happened.

Lastly, on a more general level, taking analytical shortcuts by equating customary international law with scholarly opinions will eventually undermine custom as an immensely important source of international law. Not only will a superficial approach to custom on a Supreme Court level set the wrong example for lower courts in properly distinguishing between the two essential elements that form custom, thus slowly leading to an erosion of customary international law's foundational columns, but since courts, by reflecting and discussing foreign state practice and establishing a corresponding *opinio iuris*, actively contribute to the formation of custom themselves, it remains quintessential that their analyses present the thoroughness on which the progress of international law can thrive.

As most prominently pointed out by Article 38 of the Statute of the International Court of Justice, customary international law is an evidence of a general practice accepted as law. Such evidence needs to be properly researched. For the last 60 years, however, one must conclude that the diligence of customary law analysis conducted by Austrian courts has not quite lived up to the original expectation.