

D. Identification of customary international law

References to customary international law have been made in some government proposals.

- The government proposal on the ratification of United Nations Convention on Jurisdictional Immunity of States and Their Property (HE 26/2013 vp) expresses that the aim of the Convention is to codify customary international law on the issue. It is pointed out in the government proposal that the state immunity has widely been recognized but there have been different views on its exact scope and contents. The principle has had relevance in cases brought before Finnish courts, and the contents of the principle have been established in their judgments.
- The government proposal (HE 148/2013 vp) on the ratification of Arms Trade Treaty refers to customary international law when explaining the contents of article 6 paragraph 3 of the Treaty. Article 6 paragraph 3 sets a prohibition for transfers of conventional arms if, *inter alia*, the arms were used in attacks directed against civilian objects or civilians protected as such. It is explained in the government proposal that in the context of an intrastate conflict, deliberate attacks targeted at civilians who are not participating in hostilities, are viewed as breaches of customary international humanitarian law. These attacks are also prohibited by two Protocols to the Geneva Conventions.
- Questions regarding customary international law were raised in government proposal (HE 289/2014 vp) on the Kampala amendments to the Rome Statute of the International Criminal Court. It was noted that some parts of the definition of an act of aggression contained in United Nations General Assembly resolution 3314 of 1974, have been identified as customary international law for instance in the *Nicaragua* case of the International Court of Justice. The scope of the right of self-defense was also discussed. It was noted that article 51 of UN Charter recognizes the right of self-defense only when an armed attack has actually occurred. Some states refer to a broader customary right of self-defense that would justify the use of force when an armed attack is imminent. The content of such a customary right has not been clearly established in international law.

The jurisdictional immunity of a state was at issue in two decisions of the Finnish Supreme Court. In these cases the contents of customary international law were identified by reviewing legal literature and case law of other states. International conventions were also seen as a reflection of well-established state practice.

- Decision KKO 1993:120 concerned the dismissal of a Finnish citizen employed by the Embassy of Turkey in Finland. The Supreme Court had to decide whether the Finnish courts had jurisdiction in the lawsuit. The Supreme Court stated that according to international law, states enjoy immunity from the jurisdiction of the courts of another state although the immunity has, in certain cases, not been unrestricted. The Supreme Court made a reference to legal literature and case law of various states as well as to the European Convention on State Immunity and stated that the norms and principles of

the Convention were to be considered as a source when establishing contents of customary international law. Hence, the Supreme Court took the Convention into account despite the fact that Finland had not signed or ratified it.

- In decision KKO 2007:49 the Supreme Court reiterated that the jurisdictional immunity of another state in Finnish courts had to be evaluated on the basis of the binding norms of international law. The point of departure here is the principle on what the immunity from jurisdiction generally means in international law, i.e. the jurisdiction of the courts of a state is subject to agreement by the other state. The Supreme Court referred to a previous decision (KKO 1993:120) and stated that as confirmed in legal literature and case law of various states, the jurisdictional immunity of a state could not be unrestricted. In this material, a difference was made on one hand to an act of state and on the other, to an act of a private character. The Supreme Court also referred to the European Convention on State Immunity and to the UN Convention on Jurisdictional Immunities of States and Their Property, neither of which Finland had ratified at that time although the UN Convention was signed in 2005. The Supreme Court stated that both Conventions also reflected the principle of relativity of a state immunity.