

The Identification of Customary International Law by Austrian Courts

August Reinisch and Peter Bachmayer*

I. Introduction

Customary international law, that venerable bedrock of inter-state law, has received increased attention recently. After the International Law Association (ILA),¹ the International Law Commission (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 (ICJ) 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*).

* August Reinisch is Professor of International and European Law at the University of Vienna and Vice-Dean of the Law School of the University of Vienna. He may be contacted at august.reinisch@univie.ac.at. Peter Bachmayer is a project assistant with the EU-funded project ‘International Law Through the National Prism’. He may be contacted at peter.bachmayer@univie.ac.at.

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

² ILC Report 2012, ‘Formation and evidence of customary international law’, UN Doc. A/67/10 (2012), at 108-115, at 108.

³ ILC Report 2013, ‘Formation and evidence of customary international law’, UN Doc. A/68/10 (2013), at 93-100, at 100.

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

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, cases of state succession, 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.

⁴ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, 1986 ICJ Rep. 14, at 108-109, para. 207; *North Sea Continental Shelf Cases (Germany v. Denmark and Germany v. The Netherlands)*, Judgment of 20 February 1969, 1969 ICJ Rep. 3, at 44, para. 77.

⁵ *Ibid.*

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.* J.E. Alvarez, ‘A BIT On Custom’, 42 N.Y.U. J. Int’l L. & Pol. (2009) 17, at 71; J.W. Salacuse, ‘Is There A Better Way?: Alternative Methods of Treaty-Based, Investor-State Dispute Resolution’, 31 Fordham Int’l L.J. (2007) 138, at fn 35.

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 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 more specific

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 P. Bydlinski, ‘§ 10’, in P. Rummel, *Kommentar zum ABGB (2000-2007)* marg. no. 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 1 Ob 49/99h, 22 October 1999, SZ 1999 No. 161, 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 H. Koziol/R. Welsch, *Bürgerliches Recht*, vol. I (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 B. Simma/S. Wittich, ‘Das Völkergewohnheitsrecht’, in A. Reinisch (ed), *Österreichisches Handbuch des Völkerrechts*, vol. I (2013) 32, at 47-48; the 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, 1980 ICJ Rep. 73, at 89-90, para. 37; see also Report of the Study Group of the International Law Commission, *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

incorporation norm exists for the 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 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

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*), 9 November 2004, RPrISlG 2004 No. 2908, 18-29, at 27-28; an English translation is found in A. Breitegger *et al.*, 'Austrian Judicial Decisions Involving Questions of International Law', 9 ARIEL (2004) 231, at 244.

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

of customary law not only in the jurisprudence of international courts and tribunals, but also in the case law of national courts.¹³

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 iuris* 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.

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

¹³ M. Wood, Formation and evidence of customary international law, UN Doc. A/CN.4/653 (2012), 4; ILC Report 2013, *supra* note 3, 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 *Case Concerning the Continental Shelf (Libya v. Malta)*, Judgment of 3 June 1985, 1985 ICJ Rep. 13, at 29-30, para. 27.

¹⁵ M.N. Shaw, *International Law* (6th ed, 2008) 82; R. Jennings/A. Watts (eds.), *Oppenheim’s International Law*, vol. I (2008) 26; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, 2002 ICJ Rep. 3, at 23-24, para. 56.

¹⁶ M.H. Mendelson, ‘The Formation of Customary International Law’, 272 *Receuil des Cours* (1998) 155, at 198.

¹⁷ ILC Report ‘Ways and Means for Making the Evidence of Customary International Law More Readily Available’, 1950 YILC, Vol. 3 II, at 371-372; *Interhandel Case (Switzerland v. United States of America)*, Preliminary Objections, Judgment of 21 March 1959, 1959 ICJ Rep. 6, at 27.

¹⁸ J. Crawford, *Brownlie’s Principles of Public International Law* (2012) 24.

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

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

¹⁹ Mendelson, *supra* note 16, at 246.

²⁰ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, 1986 ICJ Rep. 14, at 108-109, 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, 1984 ICJ Rep. 246, at 293-294, para. 91; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, 2010 ICJ Rep. 14, at 83, para. 204; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226, at 254-255, para. 67.

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

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 ICJ.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

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

²³ *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A, 2 October 1995, para. 99; ILC Report ‘Ways and Means for Making the Evidence of Customary International Law More Readily Available’, 1950 YILC, Vol. 3 II, at 370, para. 54; Moremen, *supra* note 22, at 261.

²⁴ Moremen, *supra* note 22, at 261, 274.

²⁵ Mendelson, *supra* note 16, at 200.

²⁶ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, 2012 ICJ Rep. 99, at 132, 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. R.J. 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, at 1323; see also A. Reinisch, ‘The International Relations of National Courts: A Discourse on International Law Norms on Jurisdictional and Enforcement Immunity’, in A. Reinisch/U. Kriebaum (eds.), *The Law of International Relations: Liber Amicorum Hanspeter Neuhold* (2007) 289.

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 a transnational judicial dialogue can serve as prime evidence of an existing state 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

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

²⁹ Moremen, *supra* note 22, at 263.

³⁰ See ILC Report 2013, *supra* note 3, 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 P.R. Trimble, 'A Revisionist View of Customary International Law', 33 *UCLA L. Rev.* (1986) 665, at 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 III.

³³ Crawford, *supra* note 18, at 56.

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 her to have her 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 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 of 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

³⁴ Krotoszynski, *supra* note 27, at 1335.

³⁵ Mendelson, *supra* note 16, at 200; Moremen, *supra* note 22, at 290.

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.

A. 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 customary international law rightfully gave it a place in various prominent textbooks even beyond the German speaking world.³⁷

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

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

³⁷ See, e.g., L. Henkin *et al.*, *International Law – Cases and Materials* (1987) 901-905; M.N. Shaw, *International Law* (2008) 704-705; R. Jennings/A. Watts (eds.), *Oppenheim’s International Law*, vol. I (2008) 359; I. Brownlie, *Principles of Public International Law* (2008) 508; B. Simma/S. Wittich, ‘Das Völkergewohnheitsrecht’, in A. Reinisch (ed), *Österreichisches Handbuch des Völkerrechts*, vol. I (2013) 32, at 48.

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

³⁸ See *supra* note 36.

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

⁴⁰ See *supra* note 36, at 157.

⁴¹ See *supra* note 36, at 157-158.

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 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 Institut de Droit International resolutions and a draft resolution of 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

⁴² See *supra* note 36, at 161.

⁴³ 1919 Treaty of Saint-Germain-en-Laye (Treaty of Peace between the Allied and Associated Powers and Austria), 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 See *supra* note 36, at 163.

⁴⁵ As a humorous side note, it may be pointed out that the Court made reference to, *inter alia*, a *George Granville Chillmore*. It of course meant *George Grenville Phillimore*, one of the honorary general secretaries of the International Law

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 gestionis* are exempt from municipal jurisdiction. This subjection of the *acta gestionis* 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 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

Association in the early 20th century and joint editor with Sir Alexander Wood Renton of *Burge's Commentaries on Colonial and Foreign Laws*.

⁴⁶ See *supra* note 36, at 163.

⁴⁷ *Ibid.*, *supra* note 36, at 163.

⁴⁸ *Ibid.*, *supra* note 36, at 163.

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.

B. 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 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

⁴⁹ See *supra* note 42.

⁵⁰ VfGH B 783/04 (*Arbitration Panel for In Rem Restitution Case*), 14 December 2004, VfSlg 2004 No. 17415, 1129-1244; an English translation is provided in this volume of the *Review*, at 370 for an English summary and analysis of the case see *Anonymous v. Austria*, Individual constitutional complaint decision, 14 December 2004, B 783/04; ILDC 140 (AT 2004).

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, an out-of-court settlement for the 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 United States and a third presiding member to be determined by agreement of the party-

⁵¹ See text at *infra* note 53.

⁵² Schiedsinstanz für Naturalrestitution (*Arbitration Panel for In Rem Restitution*), Decision-No. 4/2004, 3 May 2004, in J. Aicher/E. Kussbach/A. Reinisch (eds.), *Decisions of the Arbitration Panel for In Rem Restitution*, vol. I (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; an unofficial translation may be found in 8 ARIEL (2003) 383; see generally M. Schoiswohl, ‘Austrian Measures for Victims of National Socialism – An Overview’, 8 ARIEL (2003) 327-342.

⁵⁴ 2001 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, reproduced in 8 ARIEL (2003) 380 and 381 (exchange of notes).

appointed arbitrators.⁵⁵ The Arbitration Panel 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

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 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

⁵⁵ Washington Agreement, Joint Statement, Annex A, point 3.d., reproduced in 8 ARIEL (2003) 370, 375: ‘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, *supra* note 53, at 391: ‘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 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, Joint Statement, Annex A, *supra* note 55, at 376, point 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.’

[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 the 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

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 European Convention on Human Rights (ECHR)⁶¹ must ensure a balance between the organizational interest in an

⁵⁸ See *supra* note 50, at 1143.

⁵⁹ See *supra* note 50, at 1138.

⁶⁰ *Waite and Kennedy v. Germany*, ECtHR, App. No. 26083/94, Judgment of 18 February 1999.

⁶¹ 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222.

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 organizations.⁶²

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 referenced 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

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 Praktijkids (1983) No. 2022, an English summary can be found in 15 NYIL 1984, 429; 94 ILR 323; District Court (Rechtbank) of The Hague, 9 July 1984, De Praktijkids (1984) No. 2006, an English summary can be found 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 A. Reinisch, ‘Privileges and Immunities’, in J. Klabbers/Å. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (2011) 135.

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.

1. 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* paradox⁶⁷ 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

⁶⁶ See also Memorandum by the Secretariat, Formation and evidence of customary international law, UN Doc. A/CN.4/659 (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 R.R. 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, 202-205.

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 *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

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 F. Holtzendorff, *Handbuch des Völkerrechts* (1887) 661.

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

⁷⁴ See *supra* note 69, at 204.

⁷⁵ *Ibid.*

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.

2. Treaties as a 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 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 continue the legal personality of former Yugoslavia, the

⁷⁶ Article 37 (4), 1961 Vienna Convention on Diplomatic Relations, 500 UNTS 95 (1964) (‘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, 886-894; an English translation of this decision may be found in G. Loibl/M.A. Reiterer/O. Dietrich, ‘Austrian Judicial Decisions Involving Questions of Public International Law’, 2 ARIEL (1997) 443, at 489; see also the parallel proceedings against Creditanstalt, OGH 1 Ob 2313/96w, 28 January 1997, SZ 1996 No. 69/283, 900-909; for case notes see A. Reinisch/K. Bühler, ‘Austria: Supreme Court decision in *Republic of Croatia et al v. Girocredit Bank A.G. der Sparkassen*. Introductory note’, 36 ILM (1997) 1520; K.G. Bühler, ‘Casenote: Two Recent Austrian Supreme Court Decisions on State Succession from an International Law Perspective’, 2 ARIEL (1997) 213.

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

⁷⁸ The term *dismembratio* refers to the complete dissolution of the predecessor state and replacement by two or more successor states; cf. I. Seidl-Hohenveldern, *Völkerrecht* (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 I. Seidl-Hohenveldern/W. Hummer, 'Die Staaten', in H. Neuhold/W. Hummer/C. Schreuer (eds.), *Österreichisches Handbuch des Völkerrechts*, vol. I (2004) 158.

⁷⁹ *Republic of Croatia et al. v. Girocredit Bank A.G. Der Sparkassen*, in Loibl *et al.*, *supra* note 77, at 496.

⁸⁰ A. Reinisch/G. Hafner, *Staatensukzession und Schuldenübernahme beim „Zerfall“ der Sowjetunion* (1995).

⁸¹ 1983 Vienna Convention on the Succession of States in Respect of State Property, Archives, Debt, UN Doc. A/CONF.117/14, not yet in force, Article 18 ('1. When a State dissolves and ceases to exist and the parts of the territory of the predecessor

in this respect. This latter assumption is equally corroborated by the opinion of the cited authors.⁸²

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

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 *Republic of Croatia et al. v. Girocredit Bank A.G. Der Sparkassen*, in Loibl *et al.*, ‘Austrian Judicial Decisions’, *supra* note 77, at 493-494: ‘It is in this sense that Art. 8 of the 1983 “Vienna Convention 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 (A. Reinisch/G. Hafner, *Staatensukzession und Schuldenübernahme beim “Zerfall” der Sowjetunion* (1995) 44).’

⁸³ *Ibid.*, at 496; the court mistakenly referred to Security Council Resolution 1022 as having been adopted by the UN General Assembly.

⁸⁴ UN Doc. S/RES/1022 (1995) [on suspension of measures imposed by or reaffirmed in Security Council resolutions related to the situation in the former Yugoslavia]; 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

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 German '*Spalttheorie*'/ doctrine of

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 *Republic of Croatia et al. v. Girocredit Bank A.G. Der Sparkassen*, in Loibl *et al.*, *supra* note 77, at 496.

⁸⁶ Opinion No. 9, Conference for Peace in Yugoslavia Arbitration Commission ('Badinter Commission'), 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 *Republic of Croatia et al. v. Girocredit Bank A.G. Der Sparkassen*, in Loibl *et al.*, *supra* note 77, at 496.

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 '*dismembratio*' of the SFRY. Thus, the state property of the dissolved state would constitute a joint-ownership community of all successor states, see *Republic of Croatia et al. v. Girocredit Bank A.G. Der Sparkassen*, in G. Loibl/M.A. Reiterer/O. Dietrich, *supra* note 77, at 497.

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 each of which 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 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 the 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

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. I. Seidl-Hohenveldern, ‘Public International Law Influences on Conflict of Law Rules on Corporations’, 123 *Recueil des Cours* (1968) 3, at 71.

⁹¹ *Effects of State Succession on Real Property Abroad/The Soviet Embassy Building in Vienna*, *supra* note 11; an English translation may be found in Breitetgger *et al.*, *supra* note 11, at 244; see also the parallel decision of 5 Ob 238/04t of the same day, reproduced *ibid.* at 258.

⁹² It referred to A. Reinisch/G. Hafner, *Staatensukzession und Schuldenübernahme beim „Zerfall“ der Sowjetunion* (1995) 910.

⁹³ *Effects of State Succession on Real Property Abroad/The Soviet Embassy Building in Vienna*, *supra* note 91, at 249 (‘even if one answered in the affirmative the question as to the direct application of international customary law by state organs in order to determine preliminary questions regarding claims under civil

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, 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. Reinisch/Hafner, *Staatusukzession 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. Eventually, 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

law, there is no room for proceedings concerning unilateral correction of the land register pursuant to § 136 of the land registration law that uses the notion of “manifest inaccuracy” and therefore “manifest or undoubted legal succession”. In the same way as the time-consuming ascertainment of foreign law is inappropriate in land register proceedings [...], ascertainment and evaluation of doubtful international customary law as a precondition for affirming a case of state succession proceedings regarding the land register must be rejected’).

⁹⁴ *Ibid.*

⁹⁵ See *Republic of Croatia et al. v. Girocredit Bank A.G. Der Sparkassen*, in Loibl *et al.*, *supra* note 77, and generally III.2.ii.a).

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 doubt whether the Russian Federation was a continuator of the USSR or a successor state, and secondly because the rules on state succession in property were uncertain.

In a companion case,⁹⁶ the 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 proceedings regarding the land register are not suited to ascertain the content of doubtful customary international law.⁹⁷

c. Enforcement Proceedings Against Foreign States –
Czech Art Objects Case

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

⁹⁶ OGH 5 Ob 238/04t (*Effects of State Succession on Real Property Abroad II*), 9 November 2004, ZfRV 2005 No. 2005/13, 76-78; an English translation is provided in Breitegger *et al.*, *supra* note 11, at 258.

⁹⁷ *Ibid.*, at 261.

⁹⁸ OGH 3 Ob 18/12m (*Enforcement Proceedings against the Czech Republic*), 11 July 2012, JBl 2012, 729-733; for an English translation see F. Dunkel *et al.*, 'Austrian Judicial Decisions Involving Questions of International Law', this volume of the Austrian Review, 297.

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 in principle permitted 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 objects 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

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.

traditionally designated for official or sovereign purposes were subject to enforcement. The cultural objects in the present case were considered assets designated for official or sovereign purposes and thus excluded from being subject to enforcement measures. 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 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 of restrictive or relative state immunity in enforcement proceedings a state enjoys immunity from enforcement (only) in cases where assets in question serve official or sovereign purposes.¹⁰⁰

Accordingly, the Supreme Court concluded that the Czech Republic would not generally enjoy immunity from enforcement. Rather, assets not used for official or sovereign purposes could be subject to enforcement. The Court further held that '[t]he burden of proof for facts that justify immunity from enforcement measures generally lies on the party invoking such immunity'.¹⁰¹

¹⁰⁰ *Enforcement Proceedings against the Czech Republic*, *supra* note 98, para 2.4; the Supreme Court cited Austrian and German literature as well as a decision of the German Constitutional Court (dBVerfG 2 BvM 9/03 NJW 2007, 2605).

¹⁰¹ *Enforcement Proceedings against the Czech Republic*, *supra* note 98, para 3.4.1; in addition to Austrian and German literature the Court also cited the German Supreme Court in BGH VII ZB 37/08 RIW 2010, 72.

In order to substantiate this finding, the Court cited the well-known decision of the German Constitutional Court in *Philippine Embassy Bank Accounts* 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.¹⁰² 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 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.

C. 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

¹⁰² *Philippine Embassy Bank Accounts Case*, 13 December 1977, Neue Juristische Wochenschrift 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 *Enforcement Proceedings against the Czech Republic*, *supra* note 98, para 3.4.2.

¹⁰⁴ See *Dralle v. Republic of Czechoslovakia*, *supra* note 36.

come even remotely close to the breadth and diligence of the customary law analysis of this ‘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 evening 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.

1. Insubstantial Analysis of Custom

In a handful of cases, the Supreme Court engaged in what seemed at first glance like the beginning of a thorough customary law analysis. However, after a few paragraphs the apparent 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. With regard to the defense claim that the arrested had been on an official *ad hoc* mission to the United Nations Industrial Development Organization (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

[t]he status of [...] Representatives of States sent out *ad-hoc* – also to international organizations – is in the first place determined by the respective headquarters agreements, subsidiarily by customary international law, for the ascertainment of which (within certain limits) the Vienna Convention

¹⁰⁵ OGH 12 Os 3/98 (UNIDO ad-hoc Mission Case), 12 February 1998, SSt 1998 No. 63/4, 14-18; an English translation is provided by K.G. Bühler et al., ‘Austrian Judicial Decisions Involving Questions of Public International Law’, 3 ARIEL (1998) 437, at 495.

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.¹⁰⁶

However, without engaging in any sort of customary law analysis (*e.g.* by making 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, an arrival could not be qualified as a special mission: ‘Without such agreement there is no special mission.’¹⁰⁷

b. *The Case Concerning an Illegitimate Child of the former Prince of Liechtenstein*

In a case 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 bring suit against his four children as his successors to have the Prince’s parentage approved and declared by the Court.¹⁰⁸ Faced 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’.¹⁰⁹

¹⁰⁶ *Ibid.*, at 500.

¹⁰⁷ *Ibid.*, at 501.

¹⁰⁸ OGH 7 Ob 316/00x (*Illegitimate Child of the Prince of Liechtenstein*), 14 February 2001, SZ 2001 No. 74/20, 122-129; an English translation is provided by S. Wittich *et al.*, ‘Austrian Judicial Decisions Involving Questions of International Law’, 6 ARIEL (2001) 281, at 350; see also S. Wittich, ‘Recent Austrian Cases on Questions of Jurisdictional Immunities’, 8 ARIEL (2003) 309, at 318-321.

¹⁰⁹ *Illegitimate Child of the Prince of Liechtenstein*, *supra* note 108, at 352.

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

not only enjoy functional immunity for their official acts but also so-called absolute immunity with regard to their private acts which, by virtue of customary international law, extends basically to the members of the family of the head of State forming part of his household; to be sure, according to current state practice the beneficiaries of absolute immunity are limited to the “closest family members of a head of State forming part of his household” (*see* the legal opinion of the Legal Office of the Austrian Federal Ministry of Foreign Affairs, *Austrian Diplomatic Practice in International Law, Zeitschrift für öffentliches Recht*, vol. 44, 329 [1992/93]; cf. also 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 increasingly calls for a limitation of this [privileged status] and if serious violations of international law (*e.g.* genocide, crimes against humanity and torture), which may not be held as falling under the official functions of heads of State, are at issue.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’ and ‘less important in recent times’. Similarly, the Court relied on German literature on international law¹¹³ which – by citing foreign state practice – claimed that ‘the assertion is warranted that the extension of personal immunity to the entire private life of the head of State, including, *e.g.*, commercial transactions carried out by him, conveys an inappropriate overestimation of [public authority] which does no longer conform to the necessities prevailing today’. Correspondingly, the cited scholars argued that launching legal action against a head of state for commercial or other activities unrelated to his/her

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, at 353.

¹¹² *Ibid.*, at 353-354; the Court cited D. Martiny/J.P. Waehler/M.K. Wolff, *Handbuch des Internationalen Zivilverfahrensrechts*, vol. III/1: *Anerkennung ausländischer Entscheidungen nach autonomem Recht* (1984) 259, Rz 559.

¹¹³ *Ibid.*; the Court cited J. Delbrück/R. Wolfrum, ‘Die Grundlagen. Die Völkerrechtssubjekte’, in G. Dahm (ed.), *Völkerrecht*, vol. I pt. 1, (1989) 253.

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 her 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 Organisation for Security and Co-operation in Europe (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 Supreme 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

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 *Illegitimate Child of the Prince of Liechtenstein Case*, *supra* note 108, at 354.

¹¹⁷ *Ibid.*, at 355; see also A. Reinisch, 'Das Recht auf Zugang zu Gericht und völkerrechtliche Immunitäten in Österreich', in C. Jabloner *et al.* (eds.), *Vom praktischen Wert der Methode. Festschrift Heinz Mayer zum 65. Geburtstag* (2011) 631, at 647-648.

¹¹⁸ OGH 6 Ob 150/05k (*German OSCE 'Representative' Case*), 1 December 2005, SZ 2005 No. 175, 467-471; for an English translation see S. Wittich, 'Austrian Judicial Decisions Involving Questions of International Law', 10 ARIEL (2005) 183, at 197.

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 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 become generally recognized only after the Second World War, it is doubtful whether there is indeed customary international law in that respect. In any event, there is certainly no 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. In doctrine, the distinct legal personality under international law of the OSCE is overwhelmingly denied (Ipsen, *Völkerrecht*, 5th edition, at p. 604 – with further references). According to this majority view, the member states of the OSCE have not yet made the decisive step from a 'negotiation process towards an international organization'. Accordingly they characterize their permanent missions as 'permanent representations to the OSCE institutions in Vienna' (Ipsen, *Völkerrecht*, 5th edition, at p. 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

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

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

¹²¹ *German OSCE 'Representative' Case*, *supra* note 118, at 200.

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*

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.

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).

¹²⁴ See *supra* note 102.

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

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 cited the standard Austrian textbook on international law,¹²⁷ according to which 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 Supreme Court

¹²⁶ *Algerian Embassy Bank Accounts Case*, *supra* note 125, at 489.

¹²⁷ H. Neuhold/W. Hummer/C. Schreuer, *Österreichisches Handbuch des Völkerrechts*, vol. I (1983) marginal note 474.

¹²⁸ A. Verdross/B. Simma, *Universelles Völkerrecht* (1984) 770-771.

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 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

¹²⁹ *Algerian Embassy Bank Accounts Case*, *supra* note 125, at 492-493.

¹³⁰ *Alcom Ltd. v. Colombia, et al.*, UK House of Lords, 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 *Ibid.*, at 9.

¹³³ *Algerian Embassy Bank Accounts Case*, *supra* note 125, at 494.

account was used exclusively for the exercise of private functions in order to legitimately pursue execution against it.

2. 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 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 authors and commentaries in the field of civil procedure¹³⁴ where 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, ÖJZ 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 Völkerrecht*3, § 1300).¹³⁶

¹³⁴ Most prominently figure two Commentaries on the Civil Procedure Act, that is, W. Rechberger, *Kommentar zur ZPO* (2006) and H. Fasching, *Kommentar zu den Zivilprozessgesetzen*, vol. I, EGJN (2002).

¹³⁵ OGH 7 Nd 504/89 (*Temelin Nuclear Power Plant Case*), 24 April 1989, available at http://www.ris.bka.gv.at/Dokumente/Justiz/JJT_19890427_OGH0002_0070ND00504_8900000_000/JJT_19890427_OGH0002_0070ND00504_8900000_000.pdf (last visited 27 April 2015).

¹³⁶ *Ibid.*, at 2.

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 conditions 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). According to 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, 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

¹³⁷ OGH 3 Ob 258/98g (*Liberian ‘Diplomat’ Case*), 11 November 1998, in K. G. Bühler *et al.*, ‘Austrian Judicial Decisions Involving Questions of Public International Law’, 4 ARIEL (1999) 302, at 355.

¹³⁸ OGH 16 Ok 3/08 (*German Wood Cartel Case*), 16 July 2008, SZ 2008 No. 102, 96-119; English translation available in K. Häusler *et al.*, ‘Austrian Judicial Decisions Involving Questions of International Law’, 13 ARIEL (2008) 171, at 293.

¹³⁹ *Ibid.*, at 294.

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

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 considered a principle of customary international law that no State may allow proceedings in a case that has no link to that State.'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.

3. 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

¹⁴¹ OGH 8 Ob 105/99w (*Indonesian Airlines Case*), 25 November 1999, English translation available in S. Wittich *et al.*, 'Austrian Judicial Decisions Involving Questions of International Law', 5 ARIEL (2000) 307, at 356.

¹⁴² P. Fischer/H. Köck, *Allgemeines Völkerrecht* (1994).

¹⁴³ *Indonesian Airlines Case*, *supra* note 141, at 359.

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 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

¹⁴⁴ See *supra* note 7.

¹⁴⁵ OGH 10 Ob 525/94 (*Yugoslavian Army Airstrike Case*), 11 April 1995, SZ 1995 No. 68/72, 421-423.

¹⁴⁶ *Ibid.*, at 422.

¹⁴⁷ OGH 3 Ob 113-148/94 (*Distribution of Periodicals Case*), 26 April 1995, SZ 1995 No. 68/81, 487-496.

¹⁴⁸ *Ibid.*, at 491.

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:

[O]nly persons who are sent as diplomats and accepted by the receiving State are regarded diplomatic representatives in bilateral relations (cf. Köck in Neuhold/Hummer/Schreuer, *Handbuch des Völkerrechts*, 1571). Thus, upon request of the sending State, the receiving State must ... have consented [to the diplomatic status of the person in question]. This holds particularly true also for special missions which have to be examined under general international law (Dahm/Delbrück/Wolfrum, *Völkerrecht*, 2nd edition, volume I, part 1, p. 297; Fischer/Köck, *Allgemeines Völkerrecht*, 4th edition, p. 202s; see also the Convention adopted by Resolution A/Res 2530 of the UNGA and opened for signature on 8 December 1969).¹⁵⁰

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 their sovereign power (*acta iure imperii*); in proceedings arising out of acts of commercial legal relations (*acta iure gestionis*) foreign states are, however, equally subject to the domestic jurisdiction in conformity with domestic law (the principle of relative immunity, see SZ/143; 2 Ob 156/03k = JBI 2004, 390 [with case note by Karollus]; [...] Matscher in Fasching Rz 203; Mayr in Rechberger, ZPO; Neuhold/Hummer/Schreuer, *Handbuch des Völkerrechts*, 4th edition, 2004, para 886). The assessment of whether

¹⁴⁹ *Liberian ‘Diplomat’ Case*, *supra* note 137.

¹⁵⁰ *Ibid.*, at 355.

¹⁵¹ OGH 2 Ob 32/08g (*Properties Purchase Agreement Case*), 24 September 2008, JBI 2009, 457-460; English translation in Häusler *et al.*, *supra* note 138, at 280.

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], para 209; Mayr [in Rechberger], para 5).¹⁵²

4. 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

A similarly abstract reasoning occurred in a case concerning the issues of state succession and compensation for expropriation.¹⁵⁵ An Austrian citizen

¹⁵² *Ibid.*, 281.

¹⁵³ See *supra* note 147.

¹⁵⁴ See *supra* note 147, at 491.

¹⁵⁵ OGH 1 Ob 149/02x (*Compensation for Expropriation Case*), 30 September 2002, SZ 2002 No. 124, 191-203; for an English translation see S. Wittich/M. Schoiswohl, ‘Austrian Judicial Decisions Involving Questions of International Law’, 7 *ARIEL* (2002) 257, at 281.

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

[a]ccording 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, *Österreichisches Handbuch des Völkerrechts* 3 IV/1 Rz 815; Seidl-Hohenveldern, *Völkerrecht* 9 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, *Völkerrecht*, 4th edition, 334 para 16; Vitzthum, *Völkerrecht*, 2nd edition, para 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

¹⁵⁶ 1955 Staatsvertrag betreffend die Wiederherstellung eines unabhängigen und demokratischen Österreich, 217 UNTS 223.

¹⁵⁷ See Wittich/Schoiswohl, *supra* note 155, at 287.

¹⁵⁸ OGH 2 Ob 156/03k (*Airport Linz v. USA*), 28 August 2003, JBl 2004, 390-394; for a comment see S. Wittich, 'Case Note', 99 AJIL (2005) 248; an English translation of the decision is provided by S. Wittich, 'Austrian Judicial Decisions Involving Questions of International Law', 8 ARIEL (2003) 423, at 430.

Durchsetzung zivilrechtlicher Ansprüche gegen ausländische Staaten, ÖJZ 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 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 and prevailing international law enjoy immunity only for sovereign acts but not for acts performed in their capacity as holders of private rights, the immunity of international organizations within the scope of their functional restrictions is in principle to be regarded as absolute [...]. The reason for the different treatment of foreign states and international organizations within the domestic jurisdiction arises from the fact that due to the functional character of the legal personality of any international organization all of its acts are inevitably closely linked to its organizational purpose (Seidl-Hohenveldern/Loibl, *Das Recht der internationalen Organisationen einschließlich der supranationalen Gemeinschaften*, 7th edition, para 1908). Thus it has already been held [by the Supreme Court] that international organizations enjoy immunity for claims of a landlord regarding the tenancy contracts for the organization's seat. [...] (Neuhold/Hummer/Schreuer, *Österreichisches Handbuch des Völkerrechts* I3 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

¹⁵⁹ See Wittich, *supra* note 158, at 435.

¹⁶⁰ OGH 10 Ob 53/04y (*Company Baumeister Ing Richard L v. O*), 14 December 2004, SZ 2004 No. 176, 458-64; ILDC 362 (AT 2004); for an English translation see Breitegger *et al.*, *supra* note 11, at 266.

¹⁶¹ *Ibid.*, at 268.

¹⁶² See OGH 1 Ob 171/50 (*Dralle v. Republic of Czechoslovakia*), *supra* note 36.

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.

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.