Quebec Court Refuses Jurisdiction on Forum of Necessity Basis

There has not been much to report from Canada for the past few months. The Supreme Court of Canada's jurisdiction decision in the Van Breda quartet of cases is still eagerly awaited. There was some thought these decisions would be released by the end of February but it now appears that will not happen. These cases were argued in March 2011.

Fortunately, Professor Genevieve Saumier of McGill University has written the following analysis of a recent Quebec Court of Appeal decision which might be of interest in other parts of the world. The case is *ACCI v. Anvil Mining Ltd.*, 2012 QCCA 117 and it is available here (though only in French, so I appreciate my colleague's summary). I am grateful to Professor Saumier for allowing me to post her analysis.

> *In April 2011, a Quebec court concluded that it had jurisdiction to hear a civil liability claim against Anvil Mining Ltd. for faults committed and damages inflicted in the Democratic Republic of Congo where the defendant exploits a copper mine.*
>
> *The facts behind the claim related to actions alleged to have been taken by the defendant mining company in the course of a violent uprising in Kilwa in the Democratic Republic of Congo in October 2004 that caused the deaths of several Congolese (the number is disputed). In essence, the plaintiff alleges that the defendant collaborated with the army by providing them with trucks and logistical assistance.*
>
> *The defendant, Anvil Mining Ltd, is a Canadian company with its head office in Perth, Australia. Its principal if not its only activity is the extraction of copper and silver from a mine in Congo. Since 2005, the company has rented office space in Montreal for its VP (Corporate Affairs) and his secretary. It is on the basis of this connection to the province of Quebec that the plaintiff launched the suit there. The plaintiff is an NGO that was constituted for the very purpose of instituting a class action against the defendant, for the benefit of the victims of the 2004 insurgency in Congo.*

The defendant contested both the Quebec court's jurisdiction and, in the alternative, invoked forum non conveniens to avoid the exercise of jurisdiction. At first instance, the court held that it had jurisdiction over the defendant on the basis of its establishment in Quebec (the office in Montreal) and that the claim was related to the activities of the defendant in Montreal (the two conditions for jurisdiction under 3148(2) Civil Code of Quebec given the foreign domicile of the defendant). Interpreting this second conditions broadly, the court held that the VP's frequent visits to Congo and his activities to attract investors in Quebec were linked to the defendant's activities in Congo and therefore to the claims based on those activities.

In rejecting the alternative forum non conveniens defense to the exercise of jurisdiction, the court considered the other fora allegedly available to the plaintiffs, namely Congo and Australia. A claim had already been made before a Congolese military court but it had been rejected. The plaintiff claimed that the process before the Congolese court, competent to hear the claim, was in breach of fundamental justice for a number of reasons. As to the Australian court, the plaintiff claimed that an attempt to secure legal representation in that country had failed because of threats made by the Congolese regime against both the victims and the lawyers they were seeking to hire in Australia. The Quebec court accepted this evidence and held that the defendants had failed to show that another forum was more appropriate to hear the case, a requirement under art. 3135 C.C.Q. It appears that the plaintiffs had also presented an argument based on art. 3136 C.C.Q. ("forum of necessity"), but since jurisdiction was established under art. 3148 and forum non conveniens was denied, the court decided not to respond to the argument based on forum of necessity. Still, the court did state that "at this stage of the proceedings, it does appear that if the tribunal declined jurisdiction on the basis of art. 3135 C.C.Q., there would be no other forum available to the victims," suggesting that Quebec may well be a "forum of necessity" in this case.

Leave to appeal was granted and the Quebec Court of Appeal reversed, in a judgment published on 24 January 2012. The Court of Appeal held that the conditions to establish jurisdiction under art. 3148(2) C.C.Q. had not been met. As a result of that conclusion, it did not need to deal with the forum non conveniens aspect of the first instance decision. This made it necessary to deal with the "forum of necessity" option, available under art. 3136 C.C.Q. The

Court found that the plaintiff had failed to show that it was impossible to pursue the claim elsewhere and that there existed a sufficient connection to Quebec to meet the requirements of article 3136 C.C.Q. In other words, the plaintiff had the burden to prove that Quebec was a forum of necessity and was unable to meet that burden.

The reasons for denying the Quebec court's jurisdiction under art. 3148(2) C.C.Q. are interesting from the perspective of judicial interpretation of that provision but are not particular to human rights litigation. Essentially the Court of Appeal found that the provision did not apply because the defendant's Montreal office was open after the events forming the basis of the claim. This holding on the timing component was sufficient to deny jurisdiction under 3148(2) C.C.Q. The Court also held that even if the timing had been different, it did not accept that there was a sufficient connection between the activities of the vice president in Montreal and the actions underlying the claim to satisfy the requirements of the provision.

The reasoning on art. 3136 C.C.Q. and the forum of necessity, however, are directly relevant to human rights litigation in an international context. Indeed, one of the challenges of this type of litigation is precisely the difficulty of finding a forum willing to hear the claim and able to adjudicate it according to basic principles of fundamental justice. In the Anvil case, the victims had initially sought to bring a claim in the country where the injuries were inflicted and suffered. While the first instance court had accepted evidence from a public source according to which that process was tainted, the Court of Appeal appeared to give preference to the defendant's expert evidence (see para. 100).

The Court of Appeal does not quote from that expert's evidence whereas the trial judge's reasons contain a long extract of the affidavit. And while the extract does not include the statement referred to by the Court of Appeal, it does include a statement according to which an acquittal in a penal court is res judicata on the issue of fault in a civil proceeding based on the same facts.

The obvious alternative forum was in Perth, Australia, where the defendant company had its headquarters (and therefore its domicile under Quebec law). There too the victims had sought to bring a claim but were apparently unable to secure legal representation or pursue that avenue due to allegedly unlawful interference by the defendant and government parties in the Republic of Congo.

While the first instance judge had accepted the plaintiff's evidence that Australia was not an available forum, the Court of Appeal quickly dismissed this finding, without much discussion.

Finally, the Court of Appeal returned to its initial findings regarding the interpretation of art. 3148 C.C.Q. to conclude that there was, in any event, an insufficient connection between Anvil and Quebec to meet that condition for the exercise of the forum on necessity jurisdiction. The court did not consider that under art. 3136 C.C.Q. it is unlikely that the timing of the connection should be the same as under 3148(2) C.C.Q. given the exceptional nature of the former basis for jurisdiction and the likelihood that the connections to the forum of necessity could arise after the facts giving rise to the claim.

The decision of the Court of Appeal in Quebec is disappointing in so far as its interpretation of the forum of necessity provision in the Civil Code of Quebec is quite narrow, particularly as regards the condition of a connection with Quebec; moreover, its application of the provision to the facts of the case deals rather summarily and dismissively with findings of fact made by the first instance judge without sufficient justification for its rejection of the evidence provided by the plaintiff and relied upon by the trial judge. Given the nature of the claims and of the jurisdictional basis invoked, it was incumbent on the Court of Appeal to provide better guidance for future plaintiffs as to what type of evidence will be required to support an article 3136 C.C.Q. jurisdictional claim and to what extent trial court findings in relation to such evidence will be deferred to in the absence of an error of law.

ICLQ at 60

International & Comparative Law Quarterly celebrates 60 years of international and comparative law scholarship.

The first issue for 2012 not only offers two articles exploring international private law issues, but also a susbtantial editorial reviewing 60 Years of Legal

Scholarship in the International & Comparative Law Quarterly, with a special section on the Contribution to Private International Law by James Fawcett.

The first of the two PIL articles is one by Mihail Danov (Brunel University) on EU Competition Law Enforcement: Is Brussels I Suited To Dealing with All the Challenges?

> *There are arguments indicating that Brussels I could be applicable to cross-border competition law proceedings before a National Competition Authority located in one Member State and private EU competition law proceedings before another Member State court. However, an analysis of the current private international law framework appears to indicate that Brussels I is not well suited to deal with the difficulties that could arise in this context. Given the fact that, in the new proposal for a regulation on jurisdiction and the recognition and enforcement of judgments there is no indication that special jurisdictional bases for competition law actions in the successor to Brussels I are on anyone's agenda, an option for a reform may be setting up a new and special regulation to be applicable with regard to EU competition law claims only.*

The second article is authored by Uglješa Grušic (PhD Candidate, LSE) on Jurisdiction in Employment Matters under Brussels I: A Reassessment.

> *This article examines the rules of jurisdiction in employment matters of Brussels I. It focuses on a paradox in that these rules aim to protect employees jurisdictionally, but in fact fail to accord employees a more favourable treatment when they need it most, namely when they appear as claimants. The article argues that the current rules fail to achieve the objective of employee protection, examines the reasons for this, proposes certain amendments that would improve the existing rules, and thereby engages in the debate surrounding the forthcoming review of Brussels I.*

Happy birthday !

Latest Issue of ZEuP: No. 1, 2012

The latest issue of the "Zeitschrift für Europäisches Privatrecht (ZEuP)", No. 1, 2012, has been released. The table of contents reads as follows (in brackets: pages in the issue):

A Case of Renvoi (or Something Akin to Renvoi)

Last Thursday R. Alford (Opinio Iuris) published a very interesting post on choice-of-law rules as applied to torts in Iraq. The question to be decided in *McGee v. Arkel Int'l* was what substantive law governs when a National Guardsman is electrocuted in Iraq while cleaning a Humvee due to faulty wiring of an electric generator maintained by a Defense Department contractor. Applying Louisiana choice-of-law principles, the Fifth Circuit concluded that Iraqi substantive law applied: the wrongful conduct and resulting injury occurred in Iraq, therefore Iraqi law should apply. This outcome was

reached notwithstanding and in perfect awareness of Iraqi law: Order 17, passed by the Coalition Provisional Authority, tries to avoid the application of Iraqi tort and contract law to contractors working in Iraq for the U.S. Defense Department.

A couple of comments following the post are worth reading. C. Vanleenhove, PhD candidate from Belgium, has kindly sent me his own opinion, which reads as follows:

> *For me personally this decision is not so surprising. The Louisiana Court applies its own conflict of laws rules to determine the applicable law. It – in my view correctly – asserts that Iraqi law governs this tort. It then looks into Iraqi law to find an immunity rule but cannot find one for torts (there is only for contracts in section 4 of CPA Order 17). So it concludes that Iraqi law applies to this dispute. On a side note, the court also looks at the Iraqi conflict of laws rule in section 18 of CPA Order 17 which it interprets (literally) as referring to U.S. law as a whole (thus including the U.S. conflict of laws rules). This is in my opinion caused by the lack of a rule analog to art. 20 of the Rome I Regulation excluding a renvoi. The problem here is one of a lack of precision and conflict of laws knowledge on the part of the drafters.*
>
> *What the majority in McGee seems to indicate is that if they would have been an Iraqi court interpreting the rule of section 18 of CPA Order 17, they would have read it as a reference to the law of the Sending State, including the conflict of laws rules. This is the U.S. court's opinion and there is no guarantee that an Iraqi court will take the same view if the case was brought before them. I think it's highly likely an Iraqi court would interpret it consistent with the intent to apply the (substantive) law of the sending state.*
>
> *I agree with the dissenting opinion by chief judge Jones where she says: "To say that the tort claims shall be handled "consistent with the Sending State's laws" need not include the Sending State's conflict of laws reference back to Iraq. Such an interpretation preserves the evident intent to apply the domestic law of Sending States to their contractors operating in Iraq".*

ERA Conference on New Legislative Proposals on Cross-Border Civil Litigation

On March 8-9, 2012, the Academy of European Law will host a conference on New Legislative Proposals on Cross-Border Litigation in Trier.

The conference will analyse the most important recent EU initiatives in the field of civil procedure: Brussels I, ADR & ODR, Collective Redress and Freezing of Bank Accounts.

Brussels I

Recast of the Brussels I Regulation: state of play
European Commission: Karen Vandekerckhove
Danish EU Presidency: Jens Kruse Mikkelsen

Analysis of the most topical issues
Stefania Bariatti

Collective Redress

Brussels I and collective redress
Mihail Danov

Hands-on experience with mass claims
Alexander Layton

A coherent approach to European collective redress
Ianika Tzankova

ADR and ODR

What member states, consumers and business need to do to establish effective ADR systems

Christopher Hodges

What changes does the Directive on ADR bring? How will the new EU-wide ODR platform work in practice?
Sebastian Bohr

ADR & ODR: a win-win solution for consumers and business alike?
Fatma Sahin

ADR and the rule of law: a critical approach
Joachim Zekoll

EU Wide Freezing of Bank Accounts

The Draft Regulation Creating a European Account Preservation Order (EAPO)
Marieke van Hooijdonk

What protection does the debtor receive?
Gilles Cuniberti

Assessment of the proposal
Burkhard Hess

The Common Law Perspective
Helen McCarty

Panel discussion: Who pays the costs? What will be the next steps?
Introduction by Jérôme Carriat

The full programme can be found here.

Service of Process through

Facebook or Twitter???

A curious piece of news published yesterday in Opinio Iuris by Julian Ku:

> ***Legal claims can now be served via Facebook in Britain, after a landmark ruling in the English High Court.***
>
> *Mr Justice Teare gave the go-ahead for the social networking site to be used in a commercial case where there were difficulties locating one of the parties.*
>
> *Facebook is routinely used to serve claims in Australia and New Zealand, and has been used a handful of times in Britain. However, this is the first time it has been approved at such a high level.*
>
> *Jenni Jenkins, a lawyer at Memery Crystal, which is representing one of the parties in the case said the ruling set a precedent and made it likely that service-via-Facebook would become routine.*
>
> > *"It's a fairly natural progression. A High Court judges has already ruled that an injunction can be served via Twitter, so it's a hop, skip and a jump away from that to allow claims to be served via Facebook," she said.*
>
> *In 2009, Mr Justice Lewison allowed an injunction to be served via Twitter in a case where the defendant was only known by his Twitter-handle and could not easily be identified another way.*

Amendment of Annexes to Brussels I

Commission Regulation (EU) No 156/2012 of 22 February 2012 amending

Annexes I to IV to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters has been published today (see OJ L 50).

Common European Sales Law, Third States and Consumers

This is the second post of a series discussing conflict issues raised by the European Commission's Proposal for a Regulation on a Common European Sales Law.

From a choice of law perspective, two important features of the Proposal are that the Common European Sales Law (CESL) would be optional, and that it would not be a 28th regime, but rather a second regime in the substantive law of each Member State. As a consequence, the CESL would only apply if the parties agree on its application, and if the law of a Member state is otherwise applicable. The CESL will, as such, never govern a contract; the law of a Member state will and, as the case may be, within this law, the CESL.

In the first post, I discussed the issues that the Proposal would raise for B2B contracts. Specifically, I argued that it was unrealistic to expect small and medium businesses to appreciate the difference between choosing CESL and choosing the law governing their contract, and that many contracts providing for CESL might thus fail to provide for the applicable law. I thus concluded that CESL should provide a rule ensuring that the law of a member state would govern in such cases.

In this post, I focus on B2C contracts.

The Impact of CESL on the Operation of Article 6, Rome I Regulation

The Proposal claims that the CESL does not affect applicable choice of law rules. For B2C contracts, this means that the applicable law should be determined by

application of either Article 6 of the Rome I Regulation for contracts falling within its scope, or else by Articles 3 and 4.

Recital 14 of the Preamble to the Draft Regulation states:

> *The use of the Common European Sales Law should not be limited to cross-border situations involving only Member States, but should also be available to facilitate trade between Member States and third countries. Where consumers from third countries are involved, the agreement to use the Common European Sales Law, which would imply the choice of a foreign law for them, should be subject to the applicable conflict-of-law rules.*

Despite the claim that the operation of the Rome I Regulation is unaffected, however, the European lawmaker does not want to apply article 6(2) of the Regulation. The Preamble further states that there is no need to compare the protection afforded to the consumer by the law chosen by the parties with CESL, because this law will not, it is argued, afford a higher protection than CESL.

Situation one: Article 6 does not apply

Some B2C contracts do not fall within the scope of Article 6 of the Rome I Regulation, for instance because the consumer was active rather than passive (see also Article 6(4)). In such cases, Article 4 will determine the applicable law absent a choice by the parties, and the law of the habitual residence of the seller will typically govern.

The analysis for B2B contracts is thus valid.

Situation two: Article 6 applies

For B2C contracts falling within the scope of Article 6, the law of the habitual residence of the consumer will govern the contract absent a choice by the parties.

If the parties choose CESL, but fail to choose the applicable law, a problem will arise when the consumer will be based outside of the European Union. The law of a third state will govern the contract, and it will thus be impossible to elect CESL within a legal system which does not include it.

As argued in my previous post, one way out of this would be to include a rule of interpretation in the CESL Regulation providing that the choice of CESL is an implicit presumption that the parties chose the law of a Member state. In contracts falling within the scope of Article 6, the problem will arise when the consumer will have his residence outside of the EU. As CESL is only available when one of the parties has its habituel residence in the EU, this would mean that the seller would have its habitual residence there. The rule should thus provide a presumption that the parties wanted this law to govern.

Conclusion

There is a need for opposite presumptions for B2B contracts and for B2C contracts falling within the scope of Article 6. Alternatively, a single presumption providing for the application of the law of the most closely connected Member state could be envisaged.

Possible New Provision

Article 11 of the Draft CESL Regulation could be amended to address these issues in several possible ways.

Single Presumption

> ***Article 11***
> ***Consequences of the use of the Common European Sales Law***
>
> *(1) Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.*
>
> *(2)Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member state.*
>
> *(a) This law shall be the law designated by Article 4 or Article 6 of the Rome I Regulation, or any other applicable choice of law rule.*

(b) If the law referred to in (a) is not the law of a Member state, this law shall be the law of the Member state which is the most closely connected with the contract.

Several Presumptions

Article 11
Consequences of the use of the Common European Sales Law

(1) Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.

(2)Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member state.

(a) This law shall be the law designated by Article 4 or Article 6 of the Rome I Regulation, or any other applicable choice of law rule.

(b) If the law referred to in (a) is not the law of a Member state, this law shall be the law of the habitual residence of the buyer, or the law of the habitual residence of the seller for contracts falling within the scope of Article 6 of the Rome I Regulation.

Brand and Fish on Choice of Law

Rules in Contract and Tort Cases in the PIL Japanese Act

Ronald Brand (University of Pittsburgh – School of Law) and Tabitha Fish (Saxon, Gilmore, Carraway & Gibbons, P.A.) have posted An American Perspective on the New Japanese Act on General Rules for Application of Laws on SSRN.

> *Any changes in rules of applicable law in one state are necessarily of interest to those concerned with the outcome of potential cross-border disputes. This makes the new Japanese Act on Application of Laws of interest beyond the borders of Japan. In this article, we focus on the new rules governing applicable law in contract and tort cases. The primary point of comparison is U.S. law, but there is also reference to the other major recent civil law developments brought about by the European Union's Rome I and II Regulations. Specific attention is given to how each of the sets of rules deals with the concept of party autonomy, taking into account the recent retreat in the United States from proposed changes to the party autonomy rule in Article 1 of the Uniform Commercial Code.*

The paper was published in the *Japanese Yearbook of International Law* in 2009.

Hess on Germany v. Italy

State Immunity, Violation of Human Rights and the Individual's Right for Reparations – A Comment on the ICJ's Judgment of February 2, 2012 (Germany v. Italy, Greece Intervening)

Burkhard Hess is a Professor of Law at the University of Heidelberg

In this blog, the pronouncement of the judgment of the ICJ in the case *Germany v. Italy* was announced, but no comment has been posted yet. I would like to start a discussion on this judgment and its implications for the development of

international law, because this judgment seems a landmark decision to me. My following comments are part of a more comprehensive article (written in German) commenting the judgment which will be published in *IPRax* 3/2012.

1. The Background of the Decision

As the background of the ICJ's judgment is well known to most of the readers of this blog it can be briefly summarised as follows: Since the 1990s, Germany has been sued by many victims of Nazi atrocities in European (and American) courts. The plaintiffs asserted that they had not been fully compensated for losses of the lives of their family members, for their personal injuries, for violations of their personal liberty and for losses of property through the reparation agreements after WW II. A major incentive triggering these lawsuits was the ambiguous wording of the Treaties on the Reunification of Germany (especially the so-called 2+4 Treaty) which stipulated to be "final regarding the legal effects of WW II", but did not comment on the reparation issue. In the late 1990s, German companies were sued in American and German courts for reparations of forced (or more correctly: slave) labour during the war. Finally, these claims were settled by a governmental agreement establishing the Foundation "Remembrance, Responsibility and Future" which provided for compensation for many, but not all victims of Nazi atrocities. Especially those victims who were not compensated initiated additional lawsuits against Germany (and German corporations) in their respective home-states.

In 2000, the Supreme Greek Civil Court gave a judgment against Germany and ordered the compensation of damages (of several million Euros) for atrocities committed by the German Wehrmacht and SS soldiers in the Greek village of Distomo where almost the whole population was killed in 1944. The Greek Court denied Germany's claim for sovereign immunity for two reasons: First the Court held that the crime committed by the German soldiers was considered a non-commercial tort in the forum state which was no longer covered by state immunity. Secondly, and more importantly, the Court opined that the claims were based on violations of jus cogens and, therefore, Germany was not entitled to immunity. However, two years later a Greek special court declared that this judgment was not to be enforced in Greece. In 2002, the plaintiffs challenged this case law in the ECHR, but without success. In 2004, the Italian Corte di Cassazione, in the *Ferrini*-decision gave judgment against Germany and denied the immunity for the same reasons: first because the crimes had been committed

by the soldiers of the German Reich on Italian soil and secondly, because the atrocities were qualified as war crimes and crimes against humanity belonging to jus cogens. According to the *Ferrini*-decision, jus cogens overrules state immunity which cannot bar the victims' civil action for damages. In 2008, the Corte di Cassazione rendered two additional judgments against Germany which confirmed that Italian courts had jurisdiction over Germany in compensation cases for war damages. Since 2005, the Greek claimants sought the enforcement of the Distomo decision in Italy and, finally, seized the Villa Vigoni, a property of the German State near the Lac Como which is used for cultural exchanges.

In 2008, Germany initiated proceedings in the ECJ under the European Convention on the Peaceful Settlement of Disputes of 1957 which confers the ICJ the jurisdiction for disputes among the Contracting parties on the interpretation of international law. Italy counterclaimed for war damages, but the ICJ rejected this counterclaim in 2010 as inadmissible because the European Convention of 1957 did not confer jurisdiction on disputes which arose before its entry into force. Finally, Greece intervened in the proceedings in order to "protect" the judgments of its courts and the ICJ permitted this intervention.

2. The Arguments of the ICJ

On February 2, 2012, the ICJ found by a majority of twelve to three judges that Germany's right to sovereign immunity had been infringed by the decisions of the Italian courts and by a majority of fourteen to one vote that the enforcement measures against the Villa Vigoni equally infringed Germany's sovereign immunity from enforcement measures. The majority opinion was written by President *Owada*; only the dissent of *Cancado Trindade* asserted that international law generally privileges human rights claims. Accordingly, the fundamental issue before the court was the relationship between jus cogens and state immunity. The importance of the decision is underlined by its clear outcome: although recent decisions of the ECtHR on the relationship of human rights protection to state immunity (*ECtHR, Al Adsani v. United Kingdom*, ECHR-Reports 2001-XI, p. 101, *Kalegoropoulou v. Germany and Greece,* ECHR Reports 2002 X-p.417), had been given by very small majorities (of only one vote), the majority of the ICJ is clear and unambiguous. The majority opinion on jurisdictional immunity unfolds in three steps: first, it enounces the importance of state immunity as a principle of the international legal order and derives from this premise thatItaly must demonstrate that modern customary law permits a

limitation of state immunity in the situation under consideration. Secondly, the Court scrutinises whether there is an exception from immunity in the case of tortuous conduct committed by foreign troops in the forum state. Thirdly, the Court addresses the issue of whether the violation of a peremptory norm (jus cogens) demands an exception from state immunity. The argument of the majority is based on a positivist approach to customary international law which can be summarised as follows:

2.1 Setting the Scene: State Immunity as a Fundamental Principle of International Law

The majority opinion acknowledges the importance of state immunity as a principle of the international legal order which is closely related to the principle of the sovereign equality of States, and in addition recognises that present international law distinguishes acta jure imperii and acta jure gestionis, Furthermore the Court states that the dispute depends on the determination of customary international law in this area of law. However, the Court notes that the underlying atrocities of the troops of the German Reich clearly were acta iure imperii, regardless of their unlawfulness. Consequently, the Court states thatItalymust prove that customary international law provides for an exception from state immunity in the present case.

2.2 The Territorial Tort Principle

The Court addresses the first argument ofItalythat the jurisdiction of the Italian courts could be based on an exception from state immunity in cases where the defendant state caused death, personal injury or damage to property on the territory of theforumState, even if the act performed was an act jure imperii. In this respect, the ICJ carefully reviews the pertinent practice and opinion juris which it finds in international conventions, national legislation and court decisions on this issue. The result, however, is unambiguous: with the exception of the Italian case law (and the Distomo decision which the Court considers overruled), there are almost no cases holding such an exception – although the ICJ cited several judgments which expressly stated that foreign troops on domestic soil still enjoy full immunity – even in the case of tortuous conduct.

2.3 State Immunity and jus cogens

The most important part of the judgment deals with the relationship between

state immunity and jus cogens. Again, the findings of the Court are rigid and succinct: It starts by expressing doubts on the argument that the gravity of a violation entails an exception from immunity. According to the Court, immunity from jurisdiction does not only shield the State from an adverse judgment, but from the judicial proceedings as such. However, an exception based on the "gravity of the violation of law" would demand an inquiry of the court on the existence of such gravity. Here, the Court differentiates between State immunity as a procedural defense and the (asserted) violations of international law which belong to the merits of the claim. In a second step, the Court inquires whether State practice supports the argument that the gravity of acts alleged implies an exception from immunity. Again, the Court does not find sufficient evidence for a new rule of customary law in this respect.

The distinction between procedure and substance is also used as the main argument against the assertion that jus cogens overrules state immunity. Again, the argument of the ICJ is unambiguous: There is no conflict of rules, because the rules address different matters: procedure and substance. The peremptory character of the norm breached does not per se entail any remedy in domestic courts. According to the ICJ, the breach of a peremptory norm of international law entails the responsibility of the state under international law, but does not deprive it from its claim for sovereign immunity (in this respect, the Court refers to its judgment in the Arrest Warrant of 11 April 2000, Congo v. Belgium, ICJ Reports 2002, p. 3 paras 58 and 78). Again, the Court quotes case law of national and international courts where the plea of immunity had been uphold in cases of violations of ius cogens.

The last part of the judgment addresses the so-called last resort argument: according to argument Italy asserted that the denial of immunity was the only way to secure compensation to the various groups of victims not included in the international reparation regime after WW II. Although the ICJ notes – with "surprise and regret" that the so-called Italian internees have been excluded from compensation, it nevertheless reiterates the argument that immunity and state responsibility are entirely different issues. The ICJ concludes that there is *"no basis in State practice from which customary international law is derived that international law makes the entitlement of a State dependent upon the existence of alternative means of securing redress."* (no 101). Furthermore, the Court sticks to the adverse practical consequences of such situation as the domestic courts

would be called to determine the appropriateness of international reparation schemes for the compensation of individual victims. Finally the Court states that it is well aware of the fact that its conclusions preclude judicial redress for the individual claimants, but recalls the State parties to start further negotiations in order to resolve the issue.

3. Evaluation

3.1 The Methodological Approach of the ICJ

The line of argument of the ICJ demonstrates a positivist approach mainly based on the determination of customary international law. According to this approach, the argument based on legal theory that the international legal order had changed and a new exception of state immunity was imminent, was not decisive. The majority of the Court held that any asserted change of the established rule on state immunity required the determination that such change was supported by state practice and opinion juris – consequently, the majority does not quote any scholarly opinion . The dissent of *Cancado Trindade* is different in its methodology and its conclusions: it is based on the idea that a new international constitutional order is emerging which is aimed at the enforcement of human rights. The dissent bases its argument on the opinion of international institutions and reputable scholars, not – as did the majority – on state consent. In this respect, the opinion of the majority is more conservative, but reflects much more the present state of international law. These considerations may explain the clear majority of the judgment which is supported by 12 of the 15 judges.

3.2 The Lacking Reference to American Case Law in the ICJ's Judgment

The practical consequences of the positivist approach of the majority are twofold: as the determination of state practice was decisive, the Court had not to review the line of arguments of national court decisions, but mainly focus on the outcome of these decisions. Accordingly, the Court could refrain from evaluating the different arguments used by domestic courts. However, there is some evaluation of state practice in the opinion of the majority: the ICJ gives considerable weight to national decisions which were supported by the European Court of Human Rights and improves the (indirect) dialogue of international courts and tribunals on the coherent application and development of international law. The opinion even quotes literally parts of the judgments of the ECtHR.

On the other hand, the ICJ does not refer to decisions on state immunity which are mainly based on the application of domestic law. However, it comes as a matter of surprise that the (pertinent) practice of American courts does not appear in the judgment – even the pertinent and prominent case *Amerada Hess v. Argentina*, or *Hugo Princz v. Germany*. The striking absence of American case law may be explained by the attitude of American courts to interpret international law via the lenses of domestic doctrines like the Alien Tort Claims Act and comity. However, according to the ICJ's decision in Germany v. Italy, sovereign immunity is not a matter of comity (as it is sometimes asserted by American authors), but directly determined by customary international law. Regarding the American practice, the Court simply noticed that the exception from immunity for "state sponsored terrorism" as provided for in 28 USC § 1605A "has no counterpart in the legislation of other states" and, therefore, was not considered relevant for the development of state immunity under international law (no 88). The question remains, however, whether national laws on State immunity which deviate considerably from international customary law in this field are compatible with international law.

3.3 The Impact of the Judgment on the so-called International Human Rights Litigation in Domestic Courts

One important aspect of the judgment relates to the individual's right of access to a court and its relationship with state immunity. In this respect, the findings of the Court are twofold: first, the Court does apparently not consider this fundamental right of the individual as part of jus cogens. Furthermore, the Court notes that public international law does not confer an individual right for full compensation to victims of war atrocities, but refers to set-off and lump sum agreements in the context of war reparations which clearly demonstrate that international law does not provide for a rule of full compensation of the individual victim from which no derogation is permitted (no. 94). These findings are important with regard to doctrinal thinking as advocated by authors like *H.H. Koh, J. Paust* and *B. Stephens* on the decentralised enforcement of human rights by civil courts. According to these authors, domestic courts shall actively implement peremptory human right laws in a decentralised way. This idea is – to some extent – borrowed from the case law of the ECJ which refers to national courts of EU-Member States as decentralised European courts. According to the present judgment of the ICJ, the situation in international law is distinct when

foreign states (and their agents) are targeted: In this case state immunity sets the limits and does not provide for any jus cogens exception.

However, the issue remains to what extent individuals or corporate actors may be sued for damages instead of the foreign state. Permitting these lawsuits (based mainly or even solely on international law) logically contradicts to the procedural bar of these lawsuits against the main actors (the States) under international law. However, the possibility remains to base such lawsuits on the private law of torts which applies to tortuous and criminal actions among private persons. In this respect, further clarification is needed and the decision of the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum* is imminent. It is hoped that the U.S. Supreme Court will take the ICJ's judgment in the present case into account.

Finally, it should be noted that the ICJ's landmark decision on State immunity does not exclude the possibility that domestic courts refer to international law when determining legal obligations of their own governments and administrations under international law. The same considerations apply to criminal responsibility of individuals under international and under domestic criminal law.