The determination of customary international law in European courts (France, Germany, Italy, The Netherlands, Spain, Switzerland)

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1. Introduction

The aim of this article is to give a short overview of the way in which continental European courts determine customary international law. The overview is limited to The Netherlands, Germany, Austria, Switzerland, France, Italy, Spain, Portugal and Greece.1 Because of its brevity, the overview is of a superficial nature and only highlights the main points of a very complex subject.

The article commences with some introductory remarks on the background of customary law application in the selected countries where judicial practice exists. Thereafter, it summarizes the results of an extensive inquiry into the determination of the customary rule in these countries, whilst also drawing comparisons between the various methodologies.2 It concludes with the outlining of some of the most interesting suggestions put forward by eminent researchers on how to improve the determination of the unwritten international norm, as well as some personal observations.

As the emergence of a customary norm must be supported by State practice and opinio juris, those wishing to determine customary law in conformity with fundamental principles of international law3 should seek evidence of both elements. Domestic courts, however, seldom follow this procedure. Nor do they seem to adopt any uniform, alternative written or unwritten method.4 Any clear indications as to how the determination takes place in each country can only be gathered from an extensive

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1 See also, for each of these countries, P.M. Eisemann, ed., The Integration of International and European Community Law into the National Legal Order (Kluwer Law International: The Hague, 1996). Note, in particular, section three of each chapter.
2 S. Stirling-Zanda, L’application judiciaire du droit international coutumier, Etude comparée de la pratique européenne (Schulthess: Zurich, 2000).
study of domestic methods of legal interpretation and, in particular, from national judicial practice pertaining to customary law.

The subsequent overview only takes into consideration decisions that do reveal some measure of determination, as opposed to merely concluding or implying the existence of a customary rule.

2. Background to the determination of customary international law

2.1 What norm, constitutional or other, allows courts to apply customary law as such?

Even though this might be widely known, it remains useful to recall how customary law is incorporated into the various legal systems. In Switzerland and The Netherlands, as is the case in most other countries, courts apply customary international law on the basis of an unwritten rule. In both countries, it is complemented by legislation that codifies or refers to customary rules with respect to specific subject matters.

In Italy, Austria, Greece, Portugal, Germany and France (albeit less clearly), the status of customary law in the municipal legal system is explicitly regulated in their Constitutions. In these countries, customary international law can thus only enter the legal system to the extent that the Constitution, as interpreted by preparatory documents, legislation and constitutional practice, allows it. As we shall see below, this may significantly affect the way in which customary law is determined and applied. The constitutional reference to customary law does not in itself facilitate its automatic, direct application, and several other factors must be taken into consideration. For instance, very little judicial practice seems to exist in Portugal. The same can be said of Greece, with the remarkable exception of recent proceedings concerning damages for war crimes, which set aside a defense of state immunity by Germany. The fact is that usually – regardless of whether the Constitution authorizes the direct application of customary international law – such direct application is regulated by unwritten principles, evolving practices and specific legislative renvois. In Spain, for example, no constitutional disposition directly relevant to customary law exists, but article 21 of the

5 See infra, sec. 2.2, eighth factor.

6 Prefecture of Voitia v. Federal Republic of Germany, Court of First Instance of Levadia, Greece, 30 October 1997, as reported by A. Bianchi, 92 Am. J. Int’l L. 765–68 (1998). The court awarded the survivors £18 million against the German Government. See M. Gavouneli, “War Reparation Claims and State Immunity”, 50 Revue Hellénique de Droit International 595–608 (1997) [hereinafter RHDI]. The decision was upheld by the Supreme Court (Aeropag) in April 2000. A planned auction of German assets in Greece was halted by a ruling on 17 September 2001 that ordered Ministerial approval for seizure and sale of assets. This approval was subsequently refused. The Aeropag’s decision was overturned on 17 September 2002 by the Supreme Special Court, that acted in accordance with articles 28 and 100(f) of the Greek Constitution and advised the claimants to submit their case to the European Court of Human Rights. The decision of the Supreme Special Court contains detailed guidelines (see para. 9) on how the determination of customary law is carried out.