The Law of State Immunity: Papers by Professor Alberto Costi, Professor of Law, Victoria University of Wellington

Table of Contents

L'Immunité de Juridiction de l'Etat en Matière de Procédure Civile: Position de la Cour Internationale de Justice (The Jurisdiction of the State Immunity of Civil Procedure Material: Position of the International Court of Justice)

Alberto Costi, Victoria University of Wellington - Faculty of Law

L'Arrêt De La Cour Internationale De Justice Dans L'Affaire Des Immunités Juridictionnelles De L'État (The Judgement of the International Court of Justice in the Jurisdictional Immunities of the State Case)

Alberto Costi, Victoria University of Wellington - Faculty of Law


Alberto Costi, Victoria University of Wellington - Faculty of Law

French Abstract: Le 3 février 2012, la Cour internationale de justice (CIJ) rendait son jugement sur l'immunité juridictionnelle de l'État en matière de procédure civile. L'affaire concernait l'immunité de juridiction de l'Allemagne devant les instances judiciaires italiennes suite à la commission de violations graves du droit international humanitaire perpétrées par le Reich allemand contre des ressortissants italiens et grecs au cours de la Seconde Guerre mondiale. Tranchant en faveur de l'État allemand, la Cour affirmait dans son jugement majoritaire que la République italienne avait failli à son obligation de respecter l'immunité reconnue à l'Allemagne par le droit international. Après avoir décrit les faits de l'affaire et analysé la décision de la CJ, l'auteur fait valoir que le jugement de la majorité fondé sur un raisonnement positiviste reflète l'état du droit international coutumier en matière d'immunité de l'État.

English Abstract: On 3 February 2012, the International Court of Justice (ICJ) delivered its judgment on the jurisdictional immunity of the State. The case concerned Germany's immunity before the Italian courts following the perpetration of grave violations of international humanitarian law by the German Reich against Italian and Greek citizens during World War II. Deciding the case in favour of Germany, the majority of the Court stated that the Republic...
of Italy had violated its obligation to respect the immunity recognised to Germany under international law. After describing the facts of the case and analysing the ICJ's decision, the author argues that the majority judgment is founded on a positivist approach reflecting the current state of customary international law on state immunity.

"L'Arrêt De La Cour Internationale De Justice Dans L'Affaire Des Immunités Juridictionnelles De L'État (The Judgement of the International Court of Justice in the Jurisdictional Immunities of the State Case)"

Victoria University of Wellington Legal Research Paper No. 24/2019

ALBERTO COSTI, Victoria University of Wellington - Faculty of Law
Email: Alberto.Costi@vuw.ac.nz

French Abstract: Cet article offre une critique de l’arrêt de la Cour internationale de justice (CIJ) sur l’immunité juridictionnelle de l’État en matière de procédure civile rendu le 3 février 2012. Opposant la République fédérale d’Allemagne à l’Italie, l’affaire concernait l’immunité de juridiction de l’Allemagne devant les instances judiciaires italiennes suite à la commission de violations graves du droit international humanitaire perpétrées par le Reich allemand contre des ressortissants italiens et grecs au cours de la Seconde Guerre mondiale. La Cour trancha en faveur de l’Etat allemand, affirmant dans son jugement majoritaire que la République italienne avait manqué à son obligation de respecter l’immunité reconnue à l’Allemagne par le droit international. Nous introduisons d’abord brièvement la règle de l’immunité de l’État, relatant son historique et son évolution. Nous décrivons ensuite les faits de l’affaire, les arguments des parties et la décision de la CIJ. Suit une analyse de l’arrêt en deux temps. En premier lieu, nous faisons valoir que, de lege lata, le jugement de la majorité fondé sur un raisonnement positiviste reflète l’état du droit international coutumier en matière d’immunité de l’État. En deuxième lieu, nous nous demandons s’il ne faudrait pas, de lege ferenda, reconnaître une exception à l’immunité de l’État pour des violations des normes de jus cogens, lorsqu’il n’y a pas de voies de recours alternatives. Finalement, nous sommes d’avis que l’émergence d’une telle exception parait actuellement peu réalisable en marge de la pratique des États, et que le jugement de la CIJ pourrait ralentir, voire ossifier, l’évolution du droit en la matière. Avec cette contribution, nous avons voulu rendre hommage au professeur Jacques-Yves Morin, dont les classes nous inspirèrent à poursuivre une carrière académique dévouée au jus inter gentes.

English Abstract: The article offers a critique of the judgment of the International Court of Justice (ICJ) on the jurisdictional immunity of the State delivered on 3 February 2012. Opposing the Federal Republic of Germany to Italy, the case concerned Germany’s immunity before the Italian courts following the perpetration of grave violations of international humanitarian law by the German Reich against Italian and Greek citizens during World War II. The ICJ decided the case in favour of Germany, the majority of the Court stating that the Republic of Italy had violated its obligation to respect the immunity recognised to Germany under international law. We first introduce the rule of State immunity. We then describe the facts of the case, the arguments of the parties and the Court’s decision. A two-part analysis of the judgment follows: first, de lege lata, we argue that the majority judgment is founded on a positivist approach reflecting the current state of customary international law as concerns state immunity; second, de lege ferenda, we query whether violations of norms of jus cogens should give rise to an exception to State immunity, when no alternative remedies are available to the victims. Finally, we believe that it is unlikely for such an exception to emerge in the foreseeable future in view of current State practice, and that the ICJ judgment could slow down, or even ossify, any evolution of the law on the subject. With this article, we wish to pay tribute to Professor Jacques-Yves Morin, whose classes inspired us to pursue an academic career in international law.

"L'Immunité De Juridiction De L'Etat En Matière De Procédure Civile: Position De La Cour Internationale De Justice (The Jurisdictional Immunity of the State in Civil Claims: Position of the International Court of Justice)"

(2014) 20 Yearbook of the New Zealand Association for Comparative Law
Victoria University of Wellington Legal Research Paper No. 25/2019

ALBERTO COSTI, Victoria University of Wellington - Faculty of Law
Email: Alberto.Costi@vuw.ac.nz

French Abstract: Le 3 février 2012, la Cour internationale de justice (CIJ) rendait son jugement sur l’immunité juridictionnelle de l’État en matière de procédure civile. L’affaire concernait l’immunité de juridiction de l’Allemagne devant les instances judiciaires italiennes suite à la commission de violations graves du droit international humanitaire perpétrées par le Reich allemand contre des ressortissants italiens et grecs au cours de la Seconde Guerre mondiale. Tranchant en faveur de l’État allemand, la Cour affirmait dans son jugement majoritaire que la République italienne avait failli à son obligation de respecter l’immunité reconnue à l’Allemagne par le droit international. Après avoir décrit les faits de l’affaire et analysé la décision de la CIJ, l’auteur fait valoir que le jugement de la majorité fondé sur un raisonnement positiviste reflète l’état du droit international coutumier en matière d’immunité de l’État.

English Abstract: On 3 February 2012, the International Court of Justice (ICJ) delivered its judgment on the jurisdictional immunity of the State. The case concerned Germany’s immunity before the Italian courts following the perpetration of grave violations of international humanitarian law by the German Reich against Italian and Greek citizens during World War II. Deciding the case in favour of Germany, the majority of the Court stated that the Republic of Italy had violated its obligation to respect the immunity recognised to Germany under international law. After describing the facts of the case and analysing the ICJ’s decision, the author argues that the majority judgment is founded on a positivist approach reflecting the current state of customary international law as concerns state immunity.

About this eJournal
Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the
The Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the Faculty of Law at Victoria University of Wellington. Some issues collect a number of papers on a similar theme to form a suite of papers on a single topic. Others issues are general or distribute mainly recent work.

The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachusetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

**Submissions**

To submit your research to SSRN, sign in to the SSRN User Headquarters, click the My Papers link on left menu and then the Start New Submission button at top of page.

**Distribution Services**

If your organization is interested in increasing readership for its research by starting a Research Paper Series, or sponsoring a Subject Matter eJournal, please email: sales@ssrn.com

**Distributed by**

Legal Scholarship Network (LSN), a division of Social Science Electronic Publishing (SSEP) and Social Science Research Network (SSRN)

**Directors**

LAW SCHOOL RESEARCH PAPERS - LEGAL STUDIES

BERNARD S. BLACK
Northwestern University - Pritzker School of Law, Northwestern University - Kellogg School of Management, European Corporate Governance Institute (ECGI)
Email: bblack@northwestern.edu

RONALD J. GILSON
Stanford Law School, Columbia Law School, European Corporate Governance Institute (ECGI)
Email: rgilson@leland.stanford.edu

Please contact us at the above addresses with your comments, questions or suggestions for LSN-LEG.

**Subscription Management**

You can change your journal subscriptions by logging into SSRN User HQ. If you have questions or problems with this process, please email Support@SSRN.com or call 877-SSRNFhelp (877.777.6435 or 212.448.2500). Outside of the United States, call 00+1+212+4482500.
Site Subscription Membership

Many university departments and other institutions have purchased site subscriptions covering all of the eJournals in a particular network. If you want to subscribe to any of the SSRN eJournals, you may be able to do so without charge by first checking to see if your institution currently has a site subscription.

To do this please click on any of the following URLs. Instructions for joining the site are included on these pages.

- Accounting Research Network
- Cognitive Science Network
- Corporate Governance Network
- Economics Research Network
- Entrepreneurship Research & Policy Network
- Financial Economics Network
- Health Economics Network
- Information Systems & eBusiness Network
- Legal Scholarship Network
- Management Research Network
- Political Science Network
- Social Insurance Research Network
- Classics Research Network
- English & American Literature Research Network
- Philosophy Research Network

If your institution or department is not listed as a site, we would be happy to work with you to set one up. Please contact site@ssrn.com for more information.

Individual Membership (for those not covered by a site subscription)

Join a site subscription, request a trial subscription, or purchase a subscription within the SSRN User HeadQuarters: https://hq.ssrn.com/Subscriptions.cfm

Financial Hardship

If you are undergoing financial hardship and believe you cannot pay for an eJournal, please send a detailed explanation to Subscribe@SSRN.com

To ensure delivery of this eJournal, please add LSN@publish.ssrn.com (Haradasa/Prebble/Stephens) to your email contact list. If you are missing an issue or are having any problems with your subscription, please Email Support@ssrn.com or call 877-SSRNHELP (877.777.6435 or 585.442.8170).

FORWARDING & REDISTRIBUTION

Subscriptions to the journal are for single users. You may forward a particular eJournal issue, or an excerpt from an issue, to an individual or individuals who might be interested in it. It is a violation of copyright to redistribute this eJournal on a recurring basis to another person or persons, without the permission of SSRN. For information about individual subscriptions and site subscriptions, please contact us at Site@SSRN.com

Copyright © 2019 Elsevier, Inc. All Rights Reserved