CHAPTER 9

The Public International Law Significance of the *Ascom* Case

Alexander Foerster & Sara Bengtson Urwitz[*]

§9.01 INTRODUCTION

On November 18, 2021, the Swedish Supreme Court delivered its decision in the case of *Ascom*.[1] Originating in an arbitral dispute under the Energy Charter Treaty, the case had become an opportunity for the court to contribute to the clarity of rules of the public international law on state immunity for the property of central banks and sovereign wealth funds.

The dispute was between Kazakhstan and some foreign investors, resulting in an arbitral award in favor of the latter. Following failed attempts by the state to have the award set aside, the investors successfully requested the Swedish Enforcement Authority that the award be enforced. The district court upheld the decision. The Court of Appeal reversed it. Leave to appeal was granted by the Supreme Court, limited to the question of whether state immunity protected the attached property from enforcement.

The property attached by the Enforcement Authority (financial instruments on a securities depository at a bank, receivables linked thereto, and funds on a cash account) was accumulated in and managed by the Kazakhstan central bank—the National Bank of Kazakhstan—as part of a sovereign wealth fund, the National Fund. The immunity protection for property belonging to a state's central bank is considered

* The authors have represented the Republic of Kazakhstan in the discussed enforcement proceedings before Swedish courts. The views expressed in this chapter represent the personal analysis by the authors and do not necessarily correspond to the views of Mannheimer Swartling Advokatbyrå or any of its clients. The authors would like to thank Pål Wrange, professor of public international law at Stockholm University, for insightful comments on a draft of this chapter.

1. Supreme Court Case Number Ö 3828-20.

to be especially strong. There are, however, disagreements about the more precise content of this principle.[2] The Supreme Court was thus called upon to determine this.

In the absence of specific Swedish rules on state immunity, the task before the Supreme Court was purely one of public international law. The question it had to solve involved fundamental international law issues of identification, interpretation, and evolvement of customary international law. Yet, the court did not answer it with reference to public international law and the methods it prescribes. This chapter analyzes what the court did instead. It is argued that the court's failure to take public international law seriously diminishes the decision's potential as an *agent of development* of public international law, limiting its function to *evidence* of such law.

In the following section, the international regime of state immunity is presented. The significance of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UN Convention) is explained, followed by a discussion of the implications hereof for national courts determining cases where the international rules of state immunity are at play. More specifically, the question of how national courts are to go about when solving state immunity cases is discussed, as is the question of what the significance is of national courts determining issues of international law. In light of this discussion, the Supreme Court's reasoning in *Ascom* is subsequently analyzed. The analysis is limited to the court's treatment of the precedential question of how the state immunity protection for the property of central banks is to be construed.

§9.02 THE INTERNATIONAL REGIME OF STATE IMMUNITY

[A] The UN Convention on Jurisdictional Immunities of States and Their Property

State immunity is a rule of customary international law.[3] States enjoy immunity because they are sovereign. They are equally sovereign, which means that they may not exercise jurisdiction over one another ("*in parem non habet imperium,*" "equals have no sovereignty over each other").[4]

With evolvements in the notion of sovereignty, the idea that states at all times enjoy immunity from other states' jurisdiction—*absolute* immunity—has been contested. Developed and developing states have had diverging views. So has West and

2. *See*, e.g., Brown, C. & O'Keefe, R., "Part IV: State Immunity from Measures of Constraint in Connection with Proceedings Before a Court" in *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (eds. O'Keefe, R. & Tams, C.), 1 ed., Oxford University Press, 2013, p. 389.
3. The ILC established the rule's "solidly rooted" character early on in its process of developing the *United Nations Convention on Jurisdictional Immunities of States and Their Property*, *see* Yearbook of the ILC 1980, vol. 2, Part II, p. 147, para. 26. The rule's existence was moreover confirmed by the International Court of Justice (ICJ) in judgment dated February 3, 2012 in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, para. 56.
4. *See*, e.g., European Court of Human Rights (ECtHR), judgment dated November 21, 2001 in *Al-Adsani v. the United Kingdom* (2002), para. 54.

East, spurred by ideological differences. Increased commercial activities by states have prompted a wish to ameliorate the status of commercial actors vis-à-vis their sovereign counterparts. Many states have thus adopted a *restrictive* approach to immunity, according to which commercial or private law acts performed by states are not protected.[5]

The International Law Commission (ILC) in 1977 recommended to the UN General Assembly that the topic of jurisdictional immunity be considered for codification.[6] Given the diverging views among states, this was a tricky quest. It took the Commission fourteen years to present a draft set of articles.[7] In 2004, after an additional thirteen years, the General Assembly unanimously adopted the UN Convention.[8] That the Convention finally, and after multiple consultation rounds with all Member States, was capable of coming into being was a result of its essential principles by 2004 being "broadly acceptable to States of all persuasions."[9] As shall be discussed (*see* section §9.05), the Swedish Supreme Court in its reasoning in *Ascom* took no note of either the thorough and inclusive drafting procedure or the unanimous support for the final version.

The restrictive doctrine of state immunity permeates the UN Convention. The Convention indeed allows for private actors to proceed against states in foreign courts with proceedings arising out of commercial transactions. These situations are formulated as exceptions to the main rule, enshrined in Article 5 of the Convention, that a state enjoys immunity. Important, however, is the distinction the Convention makes between immunity for the state itself and immunity for its property.[10]

The threshold for allowing an exception to the main rule of state immunity is set higher for measures of constraint against a state's property than for court jurisdiction over the state. Against certain types of state property, measures of constraints are not allowed at all. The distinction is due to the more intrusive nature of measures of constraint. These are considered to constitute a greater infringement of a state's sovereignty than the exercise of court jurisdiction.[11] While the UN Convention signified the breakthrough of the restrictive doctrine, the immunity protection afforded by the Convention is thus sometimes stronger than what the doctrine prescribes.

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5. *See*, e.g., O'Keefe, R. & Tams, C., "General Introduction" in *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (eds. O'Keefe, R. & Tams, C.), 1 ed., Oxford University Press, 2013, pp. 38–41. *See also* government bill 2008/09:204, pp. 36–37.
6. Yearbook of the ILC, 1977, vol. 2, Part II, p. 130, para. 110.
7. Yearbook of the ILC, 1991, vol. 2, Part II.
8. UN General Assembly resolution 59/38 of December 2, 2004.
9. *See*, e.g., O'Keefe, R. & Tams, C., "General Introduction" in *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (eds. O'Keefe, R. & Tams, C.), 1 ed., Oxford University Press, 2013, p. 39.
10. Cf. O'Keefe, R. & Tams, C., "General Introduction" in *The United Nations Convention on Jurisdictional Immunities of States and Their Property*: *A Commentary* (eds. O'Keefe, R. & Tams, C.), 1 ed., Oxford University Press, 2013, pp. 40–42.
11. *See*, e.g., the ICJ, judgment dated February 3, 2012 in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, para. 113; and Swedish Supreme Court case reported as NJA 2011 p. 475, para. 9.

With twenty-two states currently parties to the UN Convention and thirty required for its entry into force, the Convention has yet to become a source of law. The UN Convention is nevertheless significant, also without having obtained status as a treaty.[12]

[B] The Significance of the UN Convention

At least certain of the UN Convention's provisions *reflect*—are textual expressions of—customary international law rules on state immunity. The ICJ's decision in *Jurisdictional Immunities of the State,* for example, must be understood as clarifying that the pivotal parts of Article 19 of the Convention mirror customary international law.[13] The ECtHR has also repeatedly found that the Convention, or provisions thereof, reflect such law.[14]

The UN Convention moreover functions as *evidence* of customary international law: its very existence, unanimously adopted, supports the proposition that at least parts of its content reflect what states consider to be the law of state immunity.[15] A rule obtains customary international law status when it is reflected in widespread, consistent, and representative state practice, which is accepted as law (*opinio juris*).[16] In the comments to its Draft conclusions on the identification of customary international law, the ILC discussed the significance of treaties not having entered into force. The Commission noted that these may "be influential in certain circumstances, particularly

12. Cf. e.g., Webb, P., *Introductory Note to the United Nation Convention on Jurisdictional Immunities of States and Their Property*, United Nations' Audiovisual Library of International Law, 2017; O'Keefe, R. & Tams, C., "General Introduction" in *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (eds. O'Keefe, R. & Tams, C.), 1 ed., Oxford University Press, 2013, pp. 41–42.
13. *See* paras. 117–118 in ICJ, judgment dated February 3, 2012 in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, where the court held that it "considers that it is unnecessary for purposes of the present case […] to decide whether all aspects of Article 19 reflect current customary international law. Indeed, it suffices for the Court to find that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes […]."
14. *See*, e.g., ECtHR, Grand Chamber, judgment dated March 23, 2010 in *Cudak v. Lithuania*, paras. 66–67; and ECtHR, Fourth Section, judgment dated November 8, 2016 in *Naku v. Lithuania and Sweden*, para. 60. Albeit not the subject of discussion in the present context, it is worthwhile noting the difference in the approach to what constitutes customary international law regarding state immunity issues according to the ICJ, and, respectively, ECtHR. Compare para. 55 in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, and paras. 66–67 in *Cudak v. Lithuania*.
15. Cf. e.g., the New Zealand High Court, judgment dated December 21, 2006 in *Fang and Others v. Jiang and Others*, para. 65, where the UN Convention was referred to as a "very recent expression of the consensus of nations on this topic," and England & Wales High Court of Justice, judgment dated October 20, 2005 in *AIG Capital Partners et al. v. Republic of Kazakhstan and the National Bank of Kazakhstan*, para. 80, where it was called a "powerful […] demonstrat[ion] of international thinking."
16. *See* ICJ, judgment dated February 20, 1969 in *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark/Federal Republic of Germany v. the Netherlands)*, para. 74; and ILC, *Draft conclusions on identification of customary international law, with commentaries*, 2018.

where they were adopted without opposition or by an overwhelming majority of States."[17]

Also the process leading to the adoption of the UN Convention functions as evidence of what is customary international law. In *Jurisdictional Immunities of the State*, the ICJ held that state practice of particular significance in the determination of the scope and extent of immunity is to be found, e.g., in the statements made by states in the course of the study of the subject by the ILC, as well as in the context of the adoption of the UN Convention.[18]

The UN Convention is thus partly declaratory of the customary international law of state immunity. As evidence of this law, it has routinely been a starting point for courts determining cases on state immunity.[19] It may hence also be "a catalyst for […] development" of this law.[20] This prompts two questions of interest for the present article.

First, how should a national court, referring to the Convention as a reflection of and evidence of customary international law, proceed when determining cases on state immunity? What, second, is the significance of such referral by national courts? Are national judgments on state immunity directly contributing to the development of this field of international law? Or, are they merely providing evidence of their states' practice and *opinio juris*? These questions will be discussed in the following, as will the significance of *Ascom*.

§9.03 THE METHODOLOGY OF THE APPLICATION OF THE INTERNATIONAL LAW ON STATE IMMUNITY

Pursuant to Article 38(1) of the Statute of the ICJ, customary international law is a source of international law. The provision refers to its two constituent parts as "a general practice accepted as law." The well-established methodology for the determination of the existence and content of a rule of customary international law is to search for evidence of such general practice and its acceptance as law (*opinio juris*). It is thus a process of *identification*; of discerning a rule in practice.

17. ILC, *Draft conclusions on identification of customary international law, with commentaries*, 2018, conclusion 11.
18. ICJ, judgment dated February 3, 2012 in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, para. 55.
19. *See*, e.g., The New Zealand High Court, judgment dated December 21, 2006 in *Fang and Others v. Jiang and Others*, para. 65; and England & Wales High Court of Justice, judgment dated October 20, 2005 in *AIG Capital Partners et al. v. Republic of Kazakhstan and the National Bank of Kazakhstan*, para. 80. *See also* Webb, P., *Introductory Note to the United Nation Convention on Jurisdictional Immunities of States and Their Property*, United Nations' Audiovisual Library of International Law, 2017, p. 3. *See also* the Svea Court of Appeal's reasoning on this point, in its final judgment dated June 17, 2020 in matter No. ÖÄ 7709-19, p. 10.
20. O'Keefe, R. & Tams, C., "General Introduction" in *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (eds. O'Keefe, R. & Tams, C.), 1 ed., Oxford University Press, 2013, p. 43.

The requirement on a general practice refers primarily to conduct by states,[21] whether exercised by the executive, judicial, or legislative branch.[22] Available practice from a particular state should, however, be consistent. It must therefore be assessed as a whole.[23] To qualify as general, practice must be "both extensive and virtually uniform."[24] There is no absolute standard for either requirement. Practice must, however, be sufficiently widespread, representative, and consistent to fulfill the requirement of generality.[25]

A general practice does not in and by itself constitute a rule of customary international law. It must moreover be exercised out of a sense of legal right or obligation, *opinio juris*. It must thus be established that states have acted in a certain way because they thought themselves legally compelled or entitled to do so by international law.[26]

The ICJ has specified what constitutes relevant practice and *opinio juris* in the context of state immunity. In *Jurisdictional Immunities of the State*, the court explained that relevant practice includes judgments dealing with the question of whether a foreign state is immune, and the claims to immunity advanced by respondent states. Relevant reflections of *opinio juris* include the acknowledgment, by states granting immunity, that international law imposes upon them an obligation to do so, and, conversely, the assertion by respondent states that international law accords them a right to immunity.[27]

The identification of customary international law is to be distinguished from the *interpretation* hereof. Once a customary rule has been identified, it does not have to be identified anew each and every time it is to be applied. Yet, there will be instances when it is not possible to answer whether a particular situation falls within the scope of the rule. In such situation, the rule must be interpreted.[28] How customary rules in general are to be interpreted is a topic of scholarly debate.[29]

However, in a situation like the present, where a treaty functions as evidence of custom, the tools of *treaty interpretation* are available to determine the content of rules

21. *See*, e.g., ICJ, judgment dated June 27, 1986 in *Military and Paramilitary Activities in and against Nicaragua*, para. 183.
22. ILC, *Draft conclusions on identification of customary international law, with commentaries*, 2018, conclusions 4 and 5.
23. ILC, *Draft conclusions on identification of customary international law, with commentaries*, 2018, conclusion 7. *See also* ICJ, judgment dated February 3, 2012 in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, paras. 76 and 83.
24. ICJ, judgment dated February 20, 1969 in *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark/Federal Republic of Germany v. the Netherlands)*, para. 74.
25. ILC, *Draft conclusions on identification of customary international law, with commentaries*, 2018, conclusion 8.
26. *See*, e.g., ICJ, judgment dated February 20, 1969 in *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark/Federal Republic of Germany v. the Netherlands)*, paras. 76–77.
27. ICJ, judgment dated February 3, 2012 in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, para. 55.
28. Merkouris, P., "Interpreting the Customary Rules on Interpretation" in *International Community Law Review* (19) 2017, p. 135.
29. It is currently the subject of a research project, where rules on interpretation are induced from the case law of international courts and tribunals. *See* https://trici-law.com/project/.

of customary international law.[30] As put by Judge Sørensen in his dissenting opinion in the *North Sea Continental Shelf cases*: "If […] the provisions of [a] convention serve as evidence of generally accepted rules of law, it is legitimate, or even necessary, to have recourse to ordinary principles of treaty interpretation[…]."[31] Because the UN Convention is not necessarily fully congruent with custom, the principles of treaty interpretation should, however, be employed with some caution.

The international rules on treaty interpretation are set out in Articles 31–32 of the Vienna Convention on the Law of the Treaties ("Vienna Convention"), which codify customary international law.[32] Pursuant to Article 31.1 of the Vienna Convention, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." With this primary rule of interpretation placed at the beginning of Article 31, the Vienna Convention places priority on textual interpretation. The primacy of the text has also repeatedly been stressed by the ICJ.[33] The intention of the parties only occupies a subsidiary space, with Article 31.4 declaring that "a special meaning shall be given to a term if it is established that the parties so intended."[34] Supplementary means of interpretation, including the preparatory work of a treaty, are moreover tools of last resort. Pursuant to Article 32, recourse hereto may only be had to confirm the interpretation according to Article 31, or when the interpretation in accordance therewith "leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable."

As will become apparent in the following (*see* section §9.05), the Swedish Supreme Court in *Ascom* referred to neither the methods of identification of customary international law nor those of treaty interpretation. The failure to engage herein is

30. For a discussion of the appropriateness of using the international regime of treaty interpretation for interpretation of customary international law in general, *see* Fortuna, M., "Different Strings of the Same Harp: Interpretation of Customary International Rules, Their Identification and Treaty Interpretation" in *The Theory, Practice and Interpretation of Customary International Law* (eds. Merkouris, P., Kammerhofer, J. & Arajärvi, N.), Cambridge University Press, 2022, pp. 393–413..
31. ICJ, judgment dated February 20, 1969 in *North Sea Continental Shelf cases (Federal Republic of Germany v. Denmark/Federal Republic of Germany v. the Netherlands)*, Dissenting Opinion by Judge Sørensen, para. 13. To be noted is also that, in *Ascom*, all legal experts retained by both sides were in agreement of the suitability of treaty interpretation to determine the content of the relevant rules.
32. *See*, e.g., ICJ, judgment dated February 3, 2015 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, para. 138; judgment dated February 3, 1994 in *Territorial Dispute (Libya/Chad)*, para. 41; and judgment dated November 12, 1991 in *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, para. 48.
33. *See*, e.g., ICJ, judgment dated February 3, 1994 in *Territorial Dispute (Libya/Chad)*, para. 41. *See also* Sorel, J.-M. & Boré Eveno, V., "Observance, Application and Interpretation of Treaties" in *The Vienna Conventions on the Law of Treaties* (eds. Corten, O. & Klein, P.), Oxford Commentaries on International Law, 2011, para. 32.
34. Sorel, J.-M. & Boré Eveno, V., "Observance, Application and Interpretation of Treaties" in *The Vienna Conventions on the Law of Treaties* (eds. Corten, O. & Klein, P.), Oxford Commentaries on International Law, 2011, para. 48.

directly relevant to what we argue is the decision's limited international law significance. Before turning to the decision, we shall first discuss the role national decisions play in international law.

§9.04 THE SIGNIFICANCE OF DOMESTIC COURTS' APPLICATION OF THE INTERNATIONAL LAW ON STATE IMMUNITY

While state immunity is a rule of international law, by its very nature, pleas hereof tend to come before national courts.[35] Immunity cases are thus often such that national courts may make pronouncements on international law. The significance of such pronouncements may be dual.

First, as indicated in the previous section, the practice of national courts faced with the question of whether the assets of a foreign state are immune may count as *evidence* of state practice. Statements on international law may similarly count as evidence of *opinio juris*. Factors such as the court's hierarchical status, and whether its decision aligns with the position of other branches of government, impact the possibility for a court decision to represent evidence in support of a rule of customary international law.[36]

Second, Article 38(1)(d) of the ICJ Statute mentions judicial decisions as subsidiary means for the determination of international law. In ILC's Draft conclusions on the identification of customary international law, it is specified that also decisions of national courts may constitute such subsidiary means.[37]

As subsidiary means of interpretation, judicial decisions are not formal sources of law.[38] In practice, however, judicial decisions may play an important role in formulating international law.[39] The law of state immunity has perhaps been the primary example hereof, with national courts applying the doctrine of restrictive state immunity, paving the way for the UN Convention.[40] In these situations, national courts thus act as *agents of the development* of international law.

According to the ILC, the status of judicial decisions by national courts as subsidiary means of interpretation is, however, not automatic. Conclusion 13(2) of the Draft conclusions states that "[r]egard may be had, as appropriate" to decisions by national courts. Caution is thus required when turning to national judgments for guidance on the existence and content of customary rules. This is, ILC explains,

35. Cf., Fox, H. & Webb, P., *The Law of State Immunity*, 3 ed., Oxford University Press, 2015, p. 20.
36. ILC, *Draft conclusions on identification of customary international law, with commentaries*, 2018, conclusion 6 and 7.
37. ILC, *Draft conclusions on identification of customary international law, with commentaries*, 2018, conclusion 13(2).
38. Thirlway, H., *The Sources of International Law*, 2 ed., Oxford University Press, 2019, p. 131.
39. Roberts, A., "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" *International and Comparative Law Quarterly* (60) January 2011, p. 63.
40. Fox, H. & Webb, P., *The Law of State Immunity*, 3 ed., Oxford University Press, 2015, p. 17, and Roberts, A., "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" *International and Comparative Law Quarterly* (60) January 2011, p. 70.

because national courts may lack relevant international expertise, and their judgments may represent particular national interests.[41]

The reasons expressed by the ILC for this conditional status are echoed in scholarship. The role of national courts as agents of international law has since long been a subject of scholarly debate. It has been argued that national courts have a better position to enforce international law, and they have thus been called upon to act as guardians of the international legal order, making every effort to interpret international law "as it would be interpreted by an international tribunal."[42] Concerns have also been raised. Benvenisti has written that national courts tend to skew the interpretation of international law in order to protect national interests.[43] Abrahamson Chigara has rather worried about the abilities of national judges when they face the challenge of solving problems beyond their day-to-day practice. To protect the legitimacy and integrity of international law, he has therefore suggested lower national courts appoint expert academicians to illuminate the contested applicable international law.[44]

More prosaically, in their great volume on state immunity, Webb and Fox have pointed out that the "lasting impact" of all national court decisions will be dependent on their imitation or rejection in practice by other states and by the wider international community.[45] Whether a national decision will serve as a subsidiary means of determination may thus hinge less on the quality or international objectivity of the decision. In practice, factors such as from which state a decision emanates seem to carry more weight: Western and non-Western States alike turn primarily to the case law of Western states as a subsidiary source.[46] As will be returned to, also the *Ascom* court may have had an occidental bias.

There are, however, reasons to take seriously the rationale for ILC's hesitance to resort to national judgments in the determination of the existence and content of international law. Former ICJ judge Simma has written that, with the jurisprudence of domestic courts on questions of international law gaining relevance for the development of the law, there also "arises an increasing responsibility on the part of these courts to maintain the law's coherence and integrity."[47] In our view, this includes carefully abiding by the methodologies that international law prescribes, as well as making use of its recognized sources. Hopefully, "the lasting impact" of national judgments will also be dependent hereof. As mentioned, the decision in *Ascom* fails in

41. ILC, *Draft conclusions on identification of customary international law, with commentaries*, 2018, conclusion 13, comment 7.
42. *See* Institut de Droit International, *Resolution on The Activities of National Judges and the International Relations of their State*, September 7, 2003, available at https://www.idi-il.org/app/uploads/2017/06/1993_mil_01_en.pdf, accessed March 15, 2022.
43. Benvenisti, E., "Judicial Misgivings Regarding the Application of International Law: An Analysis of the Attitudes of National Courts" *European Journal of International Law* (4) 1993, p. 161.
44. Abrahamson, C.B., "The Administration of International Law in National Courts and the Legitimacy of International Law" *International Criminal Law Review* (17) 2017.
45. Fox, H. & Webb, P., *The Law of State Immunity*, 3 ed., Oxford University Press, 2015, p. 17.
46. Thirlway, H., *The Sources of International Law*, 2 ed., Oxford University Press, 2019, p. 140.
47. Simma, B., "Universality of International Law from the Perspective of a Practitioner" *European Journal of International Law* (20) 2009, p. 290.

this regard. We now turn to this decision. Some words on the Swedish approach to state immunity, as well as the case leading up to *Ascom*, serve as an introduction.

§9.05 THE *ASCOM* CASE

[A] Introduction

Sweden has no legislation on state immunity. The UN Convention is ratified, and Sweden has chosen to incorporate it by way of the Act on Immunity for States and Their Property (the "State Immunity Act," SFS 2009:1514, Sw. *lagen om immunitet för stater och deras egendom*) in 2009. The Act is to enter into force when the Convention does.[48] According to the *travaux préparatoires*, state immunity issues are thus "primarily" ("*främst*") determined with reference to customary international law before the entry into force of the State Immunity Act.[49]

The first case on enforcement immunity following the incorporation of the UN Convention came before the Supreme Court in 2011: Supreme Court case reported as NJA 2011 p. 475 ("*Lidingöhuset*").[50] The question was whether state immunity protected a real property owned by the Russian Federation from execution. Pursuant to Article 19 of the UN Convention, no post-judgment measures of constraint against the property of a state may be taken in connection with a proceeding before a court of another state unless one of the exceptions enumerated in the provision applies. The exception in Article 19(c) provides that measures of constraint may be taken if it has been established that the property is specifically in use or intended for use by the state for other than government non-commercial purposes.

The Supreme Court held that the Convention constitutes a codification of customary international law "in large—but not all—parts" ("*i stora—men inte alla—delar*").[51] The principle in Article 19(c) was said to be "recognized by many states" ("*erkänd av många stater*").[52] By and in itself, recognition by many states is not necessarily sufficient to render it custom. Whether it sufficed in this particular case was not explained. Despite thus not having clarified what source of law it was applying, the court nevertheless went on to apply its interpretation of the principle in Article 19(c).[53]

This lack of clarity regarding the source of law is also attached to the court's view on Article 21, on which the court made pronouncements *obiter dicta*. According to the court, immunity for property for other than government non-commercial purposes requires that the property be "used for the official functions of a state" ("*för en stats*

48. Government bill 2008/09:204, p. 109.
49. Government bill 2008/09:204, p. 90.
50. In international articles and commentaries, *Lidingöhuset* is often referred to as "*Sedelmayer*," named after the German businessman who had won the arbitral award against the Russian Federation, which he in *Lidingöhuset* sought enforcement of.
51. *Lidingöhuset*, para. 14.
52. *Lidingöhuset*, para. 14.
53. As pointed out by Wrange, the rule formulated by the Supreme Court in *Lidingöhuset* is not necessarily fully congruent with Art. 19(c). *See* Wrange, P., "Sedelmayer v. Russian Federation" *American Journal of International Law* (106) 2012.

officiella funktioner").[54] The court held that this does not mean that property is immune only by virtue of being owned by a state and used for non-commercial purposes, but state immunity should impede measures of constraint if the purpose of holding the property "is of a qualified kind" ("*är av ett kvalificerat slag*"). According to the court, this includes the kind of property set forth in Article 21 of the UN Convention.[55]

Property of central banks is one of the categories enumerated in Article 21 of the UN Convention. With the leave to appeal in *Ascom*, the Supreme Court thus had an opportunity to clarify the customary status of the principle in Article 21, as well as to elaborate on its content.

[B] The Supreme Court's Reasoning in the *Ascom* Case

In *Ascom*, the question was whether state immunity protected property accumulated in and managed by the National Bank of Kazakhstan against measures of constraint. The main issue was thus what immunity protection to award to the property of central banks.

The Supreme Court commenced its reasoning by explaining the concept of state immunity and the difference between court and enforcement jurisdiction.[56] In this part of the decision, appropriate but selective references to international law sources were made. The court then noted that there is no Swedish immunity legislation and that Swedish courts are "considered to be obliged" ("*domstolar anses […] vara skyldiga*") to observe the immunity that follows from customary international law.[57] Just as in *Lidingöhuset*, the court did, however, not outright say that customary international law was the applicable law in the case at hand. Judging by what the court then de facto did, the remaining ambiguity about the source of law applied appears to have served the purpose of giving the court greater leeway to construe the immunity principles as it pleased.

Next, the court held that, insofar as it shed light on the content of customary international law, the UN Convention was relevant.[58] In this context, the court made no mention of the history of the UN Convention nor discussed how it was the result of a long negotiation process in which all states had taken part and what possible implications that could have.

The court then cited Article 19 of the UN Convention. It referred to the *travaux préparatoires* of the 2009 Act, where it had been stated that there is no common state practice regarding restrictions on the principle of immunity from enforcement, but that the countries of the Western world had developed an approach according to which

54. *Lidingöhuset*, para. 14.
55. *Lidingöhuset*, para. 14.
56. *Ascom*, paras. 11–13.
57. *Ascom*, para. 14.
58. *Ascom*, para. 16.

enforcement would be permitted in property used or intended to be used for commercial purposes.[59] Since the court, as shall be seen, failed to explain the international law basis for its conclusion, a possible assumption is that this primarily occidental approach to enforcement immunity permeated its standpoint. That would expose the court to criticism. The sovereign interests at stake were not those of two Western countries, both accepting the standard of restrictive enforcement immunity. Rather, the sovereign interests were those of Sweden (the interest of exercising jurisdiction) and Kazakhstan (the interest of immunity). An expectation on the court in this situation is that it applied what it found was the rule of public international law in force.

The court subsequently turned to Article 21 of the Convention, taking up where it had left off in *Lidingöhuset*. The provision enumerates categories of property of a state which are not to be considered as property specifically in use or intended for use by the state for other than government non-commercial purposes under Article 19(c). Property of the central bank or other monetary authority of the state is one of these categories, mentioned in Article 21(1)(c).

According to the court, the scope of the immunity protection in Article 21(1)(c) "appears unclear in customary international law" ("*framstår […] som oklart i den internationella sedvanerätten*").[60] The conclusion appears to have been reached through a deductive process. The court made a general reference to the negotiations that preceded the UN Convention, stating that this applies "in particular in light of" ("*särskilt mot bakgrund*")[61] that, during these, there were different views on the issue and no clear state practice has subsequently developed.[62] This gives the impression that the attitudes among states during the development of the Convention, as well as subsequent state practice, had been evaluated. But no reference to any source was made.

Faced with the unclear immunity protection for central banks, the court resorted to a teleological interpretation of the more precise scope of this protection, guided by a purpose which itself formulated, with reference to neither the UN Convention nor its rich drafting history. It held that the reason why the property of central banks is entitled to near absolute immunity "must be considered" ("*måste anses vara*") to be that a central bank conducts activities within the area of monetary policy.[63] According to the court, the great importance of monetary policy to a state's central functions justifies this immunity protection in respect of property used within this activity.[64]

The court then again made a statement which gives the impression that it had evaluated state practice and *opinio juris*. It held that there is no unequivocal support for the position that absolute immunity under international customary law applies also in respect of property which a central bank has at its disposal without any connection to

59. *Ascom*, para. 18, referring to government bill 2008/09:204, pp. 45 and 56.
60. *Ascom*, para. 21.
61. *Ascom*, para. 21.
62. *Ascom*, para. 21.
63. *Ascom*, para. 23.
64. *Ascom*, para. 23.

the bank's monetary policy tasks. Yet again, with no reference to any public international law source, the court held that "such far-reaching entitlement to immunity does not appear to be justifiable" ("*[e]tt sådant vittgående immunitetsskydd framstår inte […] som motiverat*").[65] The court hence concluded that immunity protection for the property with no clear connection to the central bank's activities in the area of monetary policy was instead to be determined according to the principle expressed in Article 19(c).[66]

The court thus treated the problem of the unclear immunity protection for the property of central banks as a matter of interpretation. Nevertheless, it did not resort to the established principles of treaty interpretation, even though the UN Convention at the least is evidence for customary law. According to these principles, moreover, the teleological element is of minor importance.[67] A treaty is a compromise between the wills of the state parties, and the intentions behind the final specific provisions may differ among them. The provision in Article 31(1) of the Vienna Convention that a treaty shall be interpreted in the light of its object and purpose thus refers to the object and purpose of the instrument as a whole.[68] A treaty's preamble is generally useful for the determination hereof. A quick glance in the preamble of the UN Convention reveals that it is difficult to find other purpose of the instrument than legal certainty.[69]

It is not obvious that the scope of immunity protection for the property of central banks even is a question of interpretation. It appears that the lack of a consistent practice—in either a restrictive or absolute direction—was determinative for the Supreme Court's conclusion that the scope of immunity protection is unclear.[70] It held that there is no unequivocal support for the position that absolute immunity under international customary law applies in respect of central banks. It did not say that there neither is unequivocal support for the position that absolute immunity does *not* apply to such property. But it did acknowledge that the situation was unclear. What rule should in such a situation be applied?

In the *Asylum Case*, the ICJ did not accept that a customary rule would no longer be in force only because a certain new practice—not meeting the requirements for such practice to have obtained status as custom—was applied by certain states.[71] This means that a customary rule applies until a new one has replaced it. Faced with the unclear scope of immunity protection for the property of central banks, the Supreme

65. *Ascom*, para. 24.
66. *Ascom*, para. 24.
67. *Supra* note 34.
68. Gardiner, R., "The General Rule: The Treaty, Its Terms, and their Ordinary Meaning" in *Treaty Interpretation*, 2 ed., Oxford International Law Library, 2015, p. 37.
69. Cf. the preamble of the UN Convention, which, e.g., reads: "Believing that an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area[.]."
70. Cf. *supra* note 61.
71. ICJ, decision dated November 20, 1950 in *Asylum Case (Colombia v. Peru)*, p. 277. *See also* Wolfrum, R., "Sources of International Law" in *Max Planck Encyclopedias of International Law* (eds. Peters, A. & Wolfrum, R.), 2011, para. 30.

Court could thus have searched for the most recent applicable rule and asked whether this rule had been replaced by a new one. Another approach would have been to discuss whether absolute or restrictive immunity was the main rule (and the other consequently an exception).[72] This would have required a serious engagement with international law sources. Instead, the crucial parts of the decision are completely void of such engagement.

§9.06 CONCLUSION

Unfortunately, the scholarly concerns about judges in national courts applying public international law—that they are not sufficiently familiar with the regime and that they are too influenced by national particularities—appear to have been realized in the *Ascom* decision. The Swedish Supreme Court failed to take the regime seriously. This is despite the rich material available on the subject and despite the explicit guidance provided by the ICJ in the *Jurisdictional Immunities* case on how to go about when solving state immunity issues. The court moreover applied the restrictive doctrine also in respect of the property of central banks, which may align with the practice of some Western states but not necessarily with international law. The court's refusal to be clear about whether international law applied suggests that it was aware of the decision's shortcomings in this regard. Potentially, its intention was less to correctly reflect public international law and more to clarify a Swedish—or at least the Supreme Court's—position on the matter.

In any event, the failure by the Supreme Court to "speak and think" international law limits the decision's possibility of acting as an agent of development of this law; of being considered a subsidiary source of international law. Instead, its significance is limited to being a piece of evidence of the Swedish position on state immunity for the property of central banks, albeit an important one. To also be considered relevant Swedish state practice depends on whether the decision is viewed as congruent with the legislator's decision to incorporate the UN Convention, which is not necessarily the case. In contrast to the principle applied in *Ascom*, Article 21(1)(c) of the Convention after all makes no mention of the property of central banks having to have a clear connection with monetary policy to enjoy immunity protection.

72. This approach to the issue was also advocated in the expert opinions submitted to the Supreme Court by professors Pål Wrange and Chester Brown, respectively, both retained by the Republic of Kazakhstan, of which the Supreme Court made no mention. Both opinions are publicly available and could be obtained from the Supreme Court.