The application of customary international law by national courts: Introduction

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The articles collected in this issue of Non-State Actors and International Law address the question of how national courts identify, construe and apply rules of customary international law.

The initiative to address a special issue to this question was induced by a number of recent cases, in which national courts were asked to address complex and controversial questions of customary international law. In the United Kingdom, the House of Lords, in the Pinochet Case, had to consider the existence and content of customary international law in relation to the crime of torture. In March 2001, the Scottish High Court of Justiciary was asked to consider the rules of customary international law pertaining to the possession of trident missiles (Lord Advocate’s Reference No. 1 of 2000). In the Netherlands, the Appeals Court of Amsterdam considered the customary international law on crimes against humanity and torture in the Bouterse case, which involved the question whether Bouterse, former army commander in Surinam, could be prosecuted for his role in the execution of fifteen people in Surinam in 1982.

The application of customary international law by national courts is not a new phenomenon. National courts are regularly confronted with arguments based on customary international law and apply customary international law rules routinely in such matters as jurisdiction and immunities. However, the aforementioned cases are distinguishable because of the controversial substance of the claims in relation to the invocation of customary international norms.

There is evidence that around the world, national courts are more and more confronted with complex claims based on customary international law. This is in large part due to the fact that customary law increasingly is invoked by non-state actors. Individuals and legal persons regularly invoke customary international law, for instance in the sphere of human rights law or humanitarian law. Customary international criminal law is also increasingly part of the prosecution of individuals in national courts. There thus exists a direct relationship between the increasing range of subjects in international law, the role of national courts as institutions where claims involving these subjects are litigated, and the application of customary international law.

This development makes it relevant to revisit the question of how national courts apply customary international law and re-examine their proper role in doing so. How do courts ‘find’ custom? What is the role of attorneys in ‘proving’ the existence of customary law? How assertive should national courts be in defining customary international law — particularly in light of their potential lack of expertise in public international law and the substantial work involved in determining relevant state practice and opinio iuris? Do ‘experts’ have a role to play in assisting national courts with determining the content of customary international law?

The volume starts with two overviews of the application of customary international
law in national courts, and the problems that are encountered by courts, by Simonetta Stirling-Zanda and Jan Wouters. These articles are followed by four case-studies that identify how, in specific cases, national courts dealt with complex issues of customary law. These include the Australian case Polyukhovich v. The Commonwealth (Henry Burmester), the Bouterse case in the Netherlands (J.H.M. Willems), the Pinochet case (David Lloyd Jones), and the Nuclear Weapons case in the Court of Session in Edinburgh (Alan Boyle). The final contribution by Maurice Mendelson reflects on the implications of what the other contributors have written about the effect of customary international law on domestic law.

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