

The Law of State Immunity

Third Edition

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Introduction

The law of State immunity relates to the grant in conformity with international law of immunities to States to enable them to carry out their public functions effectively and to the representatives of States to secure the orderly conduct of international relations. Although modern international law does not require the courts of one State to refrain from deciding a case merely because a foreign State is an unwilling defendant, there remains today a hard core of situations where a foreign State is entitled to immunity. When disputes arise a State or a State agency may prevent their adjudication in another State's court by pleading State immunity. From a purely practical point of view it is therefore important to know when and how a plea of State immunity may be made and to what type of dispute it applies. At this point the complexities of the subject begin and the topic becomes one of international law.

The plea as one of mixed international and municipal law

Immunity is a plea relating to the adjudicative and enforcement jurisdiction of national courts which bars the national court of one State from adjudicating the disputes of another State. As such, it is a doctrine of international law which is applied in accordance with national law in local courts. Its requirements are governed by international law but the individual national law of the State before whose courts a claim against another State is made determines the precise extent and manner of application. As Hess writes 'it is the special feature of State immunity that it is at the point of intersection of international law and national procedural law'.¹

Consequently, the law of State immunity is a mix of international and national law. This interaction complicates the law relating to State immunity and creates considerable tensions.

The functions which State immunity serves

State immunity serves three main functions:

- (i) as a method to ensure a 'stand-off' between States where private parties seek to enlist the assistance of the courts of one State to determine their claims made against another State;
- (ii) as a method of distinguishing between matters relating to public administration of a State and private law claims;
- (iii) as a method of allocating jurisdiction between States in disputes brought in national courts relating to State activities in the absence of any international agreement by which to resolve conflicting claims to the exercise of such jurisdiction.

¹ Hess, 'The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and their Property' (1993) 4 EJIL 269 at 271.

The sources of the law of State immunity

From the 1970s onwards, many jurisdictions by their national legislation or the decisions of national courts adopted a restrictive doctrine of immunity, in particular the Council of Europe adopted the European Convention on State Immunity (ECSI) and the US and the UK national legislation, the Foreign Sovereign Immunities Act 1976 and the State Immunity Act 1978 respectively: but the absence of a multilateral instrument setting out the rules of State immunity has remained a long-standing obstacle to any uniform law. In 1991, after some 20 years' work, the International Law Commission (ILC), a specialized agency of the General Assembly of the United Nations, finalized its Draft Articles on Jurisdictional Immunities of States and their Property. Based on these Draft Articles and, after lengthy debate and further revision, an international convention as the first authoritative written text of the international law of State immunity was adopted by resolution 53/38 of 16 December 2004 by the UN General Assembly; it was entitled the UN Convention on the Jurisdictional Immunities of States and their Property (UNCIS).

The UNCIS is not yet in effect as treaty law: 30 ratifications are required to bring it into force (Article 30); 28 States, including China, India, and the UK signed the Convention and, as at 1 June 2013, 14 States have deposited ratifications.² Sweden and Japan have enacted legislation giving effect to the provisions of the Convention in their national systems. Until this UN Convention comes into force, State immunity continues to derive its legal authority from customary international law.

Despite the claim of some US courts that immunity is merely 'a privilege granted by the forum State to foreign States... as a gesture of comity',³ the ICJ has now confirmed, by reference to an extensive survey of State practice carried out by the ILC in preparing the above Draft Articles, that State immunity had been adopted as 'a general rule of customary international law rooted in the current practice of States'.⁴ The International Court has further identified of particular significance as the relevant State practice 'the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention',⁵ all of which material is referred to in this book.⁶

Article 38(1)(d) of the ICJ Statute recognizes 'the teachings of the most highly qualified publicists of the various nations' as a subsidiary means for the determination of the rules of law. In this connection, the writing on State immunity is prolific. At one time or another, any international lawyer worth his or her salt has seen fit to express views on some aspect of the law of State immunity, often to castigate some national court for preserving immunity. This book builds on the monographs and writings of these numerous jurists,⁷ the invaluable

² Austria, France, Iran, Italy, Japan, Kazakhstan, Lebanon, Norway, Portugal, Romania, Saudi Arabia, Spain, Sweden, Switzerland.

³ *Republic of Austria v Altmann*, US Supreme Ct, 327 F 3d 1246 (2004); (2004) 43 ILM 1421.

⁴ *Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)*, Judgment, ICJ Reports 2012 (hereafter *Jurisdictional Immunities*), para 56.

⁵ *Jurisdictional Immunities*, para 55. Of equal significance in support of this State practice is *opinio juris*, which the ICJ stated is 'reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States'.

⁶ *Jurisdictional Immunities*, para 55.

⁷ One may mention Akande, Badr, Bankas, Crawford, Cosnard, Dessedjian, Lalive, Schreuer, Synvet, and Trooboff. A fuller list appears in the bibliography.

historical accounts of Sucharitkul and Sinclair, and the report of the Australian Law Reform Commission preparatory to the introduction of the Foreign States Immunities Act 1985. With the adoption of the UNCSI, one hopes that it may now be possible to set aside much of the earlier writing and focus on the proper interpretation of its provisions. But in the present interim stage prior to the Convention coming into force and of aligning national laws with its provisions to permit ratification, it seems advisable to continue to present earlier solutions and to seek out current State practice regarding controversial points; here *State Immunity: Selected Materials and Commentary* edited by Dickinson, Lindsay, and Loonam (hereafter Dickinson et al, *Selected Materials*) has been found to be particularly useful.

The recent development of the law of State immunity

The law of State immunity is not static. The last 100 years have seen enormous changes in the doctrine and practice, and indeed in the last decade there have been important decisions by international and national courts that have clarified and developed the law further.

In 2001 the relationship of State immunity to the protection of human rights came before the European Court of Human Rights (ECtHR); in deciding three cases relating to a foreign State's violation of a litigant's right of access to court the Strasbourg Court stated that 'the European Convention on Human Rights cannot be interpreted in a vacuum' and that State immunity is a concept of international law and a part of the body of relevant international law which the Convention as a human rights treaty must take into account.⁸

Until 2002 no issue relating to State immunity had come before the International Court of Justice, but in that year in the case concerning the *Arrest warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* the International Court made a ruling as to the immunity from criminal jurisdiction of an incumbent Minister for Foreign Affairs,⁹ and in 2012 in the *Obligation to Prosecute or Extradite (Belgium v Senegal)* the same Court examined the extent to which a delay in a treaty obligation to exercise universal jurisdiction over a former Head of State accused of torture constitutes a breach of international law.¹⁰ Also in 2012 the International Court reviewed the law of State immunity in the *Jurisdictional Immunities* case concerning a claim brought by Germany against Italy (with Greece intervening) for the disregard of its immunity by Italian courts in proceedings relating to war damage caused by Nazi Germany during the Second World War.¹¹ Although in this third case the Court restricted its judgment to declaring that State immunity applied to acts committed by the armed forces of one State during international armed conflict on the territory of another State, it also ruled that State immunity was of a procedural nature (see below).¹²

There have also been cases on State immunity in the courts of national jurisdictions, in particular the UK, US, France, Italy, Germany, and Greece.

The development of State immunity can be divided into three models, as described below.

The three models on which immunity is based

State immunity has, to date, demonstrated three different models on which it has been based: the First Model, the absolute doctrine, where the relationship is between two States,

⁸ *Al-Adsani v UK* App No 35753/97 (ECHR, 21 November 2001), (2002) 34 EHRR 111, para 54, 123 ILR 23; *Kalogeropoulos v Greece and Germany*, ECHR No 0059021/00, Judgment on Admissibility, 12 December 2002; 129 ILR 537.

⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo/Belgium)* Judgment, Merits, ICJ Reports 2002, p 3, 128 ILR 1, 41 ILM 536 (2002).

¹⁰ *Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment, ICJ Reports 2012.

¹¹ *Jurisdictional Immunities*.

¹² *Jurisdictional Immunities*, para 93.

the foreign State and the State of the forum; the Second Model, the restrictive doctrine, where a distinction between the State's exercise of public powers as opposed to engagement in private relations restricts immunity to the former allowing proceedings relating to commercial matters against a foreign State in national courts by private individuals; and the Third Model, immunity as a procedural plea, where a procedural/substantive distinction is used to restrict the scope of immunity and its impact on questions of substantive law. These three models do not strictly describe a historical progression—indeed they overlap and infiltrate each other. Thus, as regards the First and Second models, some States continue to adhere to the absolute doctrine while others have adopted the restrictive approach. And the Second and Third models may be seen as swings of a pendulum; while the restrictive doctrine has limited the application of immunity through, *inter alia*, the narrowing of which acts are considered 'in exercise of sovereign authority', the procedural/substantive distinction allows immunity to be retained regardless of the lawfulness of the act of a foreign State. All three models can help to understand the changes in purpose which the plea of State immunity serves. A full description is contained in Chapter 2. A brief overview is provided here.

The First Model: the absolute doctrine, the independence of the State

In the First Model, international society is treated as made up of competing sovereign States in bilateral relations with each other, each enjoying internal exclusive competence coupled with external equality with and independence from other States. The plea of State immunity in the First Model acts as a bar against one State from sitting in judgment on another State; it excludes one State from even addressing, let alone deciding or enforcing, a claim brought in its local courts against another State, unless the consent of that State was obtained.

The Second Model: the restrictive doctrine

In the Second Model a distinction is drawn between the public and private law acts of the State, with immunity confined to public acts. The doctrine makes a distinction between acts performed in exercise of sovereign authority which remain immune and acts of a private or commercial nature in respect of which proceedings in national courts may be brought. This distinction has in the main proved workable but the absence of objective criteria on which to base the distinction for the two types of act has left it open to criticism and inconsistent application. The overall focus in respect of immunity from adjudication under this restrictive doctrine is more on the act than the actor as the determinant of issues of immunity. As such, it has similarities with the pleas raised by the doctrines of act of State and non-justiciability which also observe a policy of restraint towards the acts of foreign States (Chapter 3). Nonetheless the personal nature of the plea of State immunity produces different consequences from these related doctrines (Chapter 1).

Although the UNCSI now provides the first authoritative written codification of the international law relating to State immunity based on such a restrictive doctrine (Chapter 9), the five problem areas identified by the UNGA Legal Committee and its working party have not been entirely resolved; in particular the criterion for the distinction between immune and non-immune acts upon which the whole restrictive doctrine depends has not been satisfactorily solved in the definition of 'commercial transaction' set out in Article 2(2) of the Convention (Chapter 12); nor has it been determined whether primacy is to be given to forum law or to that of the law of the State seeking immunity in defining the agencies or other 'emanations' of the State (Chapter 10). Given the intensive diplomatic effort to achieve the adoption of the 2004 UN Convention, it is not surprising that the precise extent of its application—particularly

to activities of armed forces of a foreign State and to the exercise of criminal jurisdiction—was not spelt out with complete clarity.

The Third Model: Immunity as a Procedural Plea

Contrary to expectations raised by the Second Model of further restriction of the bar of immunity consequent on the revision of the structure of international law, the Third Model describes a more exclusionary phase focusing on the technical procedural nature of the plea of immunity. This procedural limitation has recently been confirmed in the ruling in *Jurisdictional Immunities of States (Germany v Italy, Greece intervening)*. In that 2012 judgment the ICJ rejected Italy's claim against Germany in respect of war damage committed by German armed forces in 1943–45 declaring that in customary international law the territorial tort exception does not extend to acts 'committed by the armed forces and other organs of the State in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum State' (paragraph 77). In addition, the Court made a general ruling that State immunity is a procedural plea.¹³ In consequence of this procedural character, the plea of State immunity excludes questions as to the lawfulness of the act of a foreign State.

The ICJ made clear that the limitation of immunity as applied by the restrictive doctrine provides no easy route by which reparation can be obtained in national courts for all non-contractual delictual or other types of injury resulting from injury committed by a foreign State. These trends and changes are discussed more fully in subsequent chapters of the book, including Chapter 10 (the definition of the foreign State), Chapter 14 (the exception to immunity for employment contracts made by 1) the foreign State and 2) an International Organization), Chapters 16 and 17 (immunity from enforcement), Chapter 18 (immunities of individuals), and Chapter 19 (special regimes).

Structure of the book

Part I of this book deals with general aspects of the law relating to State immunity. Chapter 1 provides a basic account of the elements of State immunity covering the institution of proceedings and the nature of the plea. Chapter 2 elaborates the development of the concept of State immunity, dividing it into the three models. Chapter 3 compares the plea of state immunity, where the personal status of a foreign State or the sovereign nature of its acts is treated as depriving the national court of another State of jurisdiction, to the related but different pleas of 'act of State' and 'non-justiciability' which may also be raised in proceedings against private individuals.¹⁴ Chapter 4 examines in closer detail the concept of jurisdiction in its relation to the plea of State immunity.

Part II summarizes the sources of the law of State immunity, which, in the absence until 2002 of any decision of an international tribunal, was largely determined by reference to State practice in the major industrial developed nations. This Part contains summaries of relevant treaty law and codification projects (Chapter 5), a historical overview of the development of the restrictive doctrine of State immunity (Chapter 6), an account of English and US law (Chapters 7 and 8), with a shorter outline covering the law of State immunity in certain of the

¹³ *Jurisdictional Immunities*, para 93.

¹⁴ The common law plea of 'act of State' relates to a governmental public act of a foreign State which the forum court recognizes as valid and effective in the forum State whereas a plea of non-justiciability concerns relations between foreign States, to which international law applies and where 'no judicial or manageable standards by which to judge these issues' are applicable to enable a national court to determine the claim.

main civil jurisdictions. Part II concludes with a chapter dealing with the general aspects of the UN Convention on Jurisdictional Immunities of States and their Property, its legislative history, status, structure, exclusions, and implementation by the States who have ratified UNCSI (Chapter 9).

Part III covers in detail the substantive and procedural rules relating to the application of State immunity with particular reference to the provisions of UNCSI, and of the 1976 US Foreign Sovereign Immunities Act (FSIA) and the 1978 UK State Immunity Act (SIA). It would seem likely that the provisions of the UN Convention will be construed by reference to such State practice, and in particular the decisions of national courts which have worked out the detailed application of the law. Particularly relevant in this context is likely to be the practice of the UK since the UN Convention's provisions are formulated in many respects in a manner similar to those in the UK SIA.

Thus Part III examines first the definition of the State enjoying immunity, with its external and internal attributes, with detailed discussion of the position of constituent units, State entities, and representatives of the State (Chapter 10). This is followed by an examination of exceptions to immunity from adjudication under the heads of waiver of immunity by consent of the State (Chapter 11), the commerciality or private law nature of the acts on which the restrictive doctrine is based (Chapter 12), and the proceedings in which immunity cannot be invoked, the commercial and related exceptions (Chapter 13). Whilst initially it was hoped to follow with a chapter setting out the extent to which protection of fundamental human rights and prohibition of international crimes contrary to norms of *jus cogens* had extended the exceptions to State immunity, it became apparent that the Third Model emphasizing the procedural nature of immunity excluded such a treatment. In consequence, Chapter 14 deals with the exception to immunity for employment contracts made by (1) the foreign State and (2) an international organization, which charts how increased protection of human rights, particularly of migrant and foreign workers, have been taken into account by national courts in their application of this exception. The territorial tort exception is examined in Chapter 15. In Chapters 16 and 17 an account is provided of the immunity of the foreign State from coercive measures of execution, both pre- and post-judgment, imposed by national courts or administrative agencies of the forum State. These rules are discussed by reference to Part IV of the UNCSI, the 1991 ILC Commentary, the ECSI, and national legislation and decisions of courts of the UK, the US, and other jurisdictions. The debates of the ILC and the working group set up by UNGA Sixth Committee are summarized, the outstanding problem areas discussed, and a final section reviews possible ways forward. These chapters on enforcement demonstrate that further restriction of State immunity does not merely turn on expanding exceptions to or abandoning completely immunity from adjudication. It highlights the continued political significance of a plea of immunity and the unsatisfactory 'half a loaf' position of restricting immunity from adjudication without parallel restriction of immunity from enforcement.

Part IV addresses in detail different types of immunities including those relating to international organizations. These immunities interact with State immunity, each influencing the scope and development of the other. Chapter 18 looks at the immunities of individuals in the service of the State, including the head of State, head of government, foreign minister, officials when on special mission, and other personnel to whom immunity is accorded. Chapter 19 addresses the special regimes that apply to international organizations, diplomats, consuls, and visiting armed forces.

Conclusions and considerations regarding the future prospects of the international law relating to State immunity will be found in Part V.

State immunity as a case study of the structure of international law

In concluding this Introduction, it should also be noted that, quite apart from the elucidation of the applicable rules of State immunity, the doctrine provides a valuable case study of the present nature of the international community and in particular the interaction of international law and national law, and of the formation of customary international law from national law sources. Ultimately the extent to which international law requires, and national legislations and courts afford, immunity to a foreign State as a defendant before another State's courts depends on the underlying structure of the international community and the degree to which one State may adjudicate the disputes of another State. In order to understand the structure of international law, theory must be tested against reality, and the significance of trends and patterns must be discerned. A study of State immunity directs attention to the central issues of the international legal system.

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