OXFORD

THE LAW OF STATE IMMUNITY

THIRD EDITION

HAZEL FOX CMG QC AND PHILIPPA WEBB

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Foreword

This, the third edition of a work which in just a decade has received renown throughout the world of international lawyers and beyond, presents a clash between two principles and attempts to show how that clash can be resolved. On the one side is the sovereign authority of the forum State in which a legal proceeding is being brought to decide the case through its Courts. Running with that sovereign authority, as a manifestation of territorial sovereignty, is the right, now well recognized, of the individual to have access to the courts to enforce their rights against the alleged wrongdoer. On the other side, if that alleged wrongdoer is a foreign state, it claims the benefit of its sovereign equality: it is juridically equal to all other States including the forum State.

In the common law, that second absolute view for long prevailed, although with limited exceptions, for instance, in respect of litigation concerning real property in the forum State. But, particularly as the functions of the State broadened and it came to be seen not only as a Prince but also as a trader in the marketplace, that absolute position came increasingly under attack. That attack, notably in respect of commercial activities, gave rise to litigation in many countries and to real challenges for national judges (cases from 18 jurisdictions are mentioned in the recent judgment of the International Court of Justice in *Germany v Italy*), to national legislation (11 enactments are mentioned in that case), the preparation of which also presents challenges to national law makers; to two multilateral treaties (the UN Convention on State Immunity and the European Convention; along with draft Inter-American Convention); to resolutions of the Institut de Droit International; and to much commentary including the two earlier editions of this splendid work.

The preparation of this new edition is more than justified by the volume of new material and by continuing uncertainties in, and debates about, basic issues such as the essence and extent of the commercial exception and the local tort exception, and the significance of the jurisdictional character of the immunity, especially where the allegedly unlawful act is a breach of a peremptory norm.

This book once again has wider values. It provides an excellent account of the law in development over two or more centuries and especially over the last half century. That account also highlights the interactions in this area of law between the sources of international law already mentioned. That is to say, although the book is essential for the specialists or those who have to address this area of law as counsel, judges, advisers, or national law-makers, it also provides much of interest and value to international lawyers generally. I must say that the careful and compelling arguments of Hazel Fox QC, now joined by Philippa Webb, an excellent young scholar and practitioner, make this judge, thinking also of his earlier national judging role, pause and reconsider. That is one of the things good scholarship should do.

Kenneth Keith
International Court of Justice

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Preface and Acknowledgments

The objectives of this work are to provide a guide to relevant material, to set out a general balanced view of the present state of the law and to put government lawyers and policy-makers in a position to make appropriate decisions as to its future direction.

The book is divided into five parts: structure and general concepts; sources; the current international law; other immunities; conclusions. Some readers, particularly those seeking an answer to a specific application of immunity, may prefer first to consult Part III which sets out article by article the provisions of the UN Convention on Jurisdictional Immunities of States and their Property (UNCSI) and discusses their application by reference to existing State practice, particularly English and US law. For them, having identified the particular problem, reference to Part I may help to place it in perspective with regard to the general concepts which govern the subject.

This third edition of *The Law of State Immunity* seeks not only to address recent developments at the national and international levels, but also to try to explain the evolution in the law. Thus, the previous edition's chapter on 'The Concept of the State: Theory and the Justification for State Immunity' has been replaced in this edition by Chapter 2: 'The Three Models of the Concept of State Immunity'. Our analysis of the third model, Immunity as a Procedural Plea, has been inspired in large part by the 2012 *Jurisdictional Immunities* Judgment of the ICJ. In the light of that judgment, we use the three models throughout the book to identify and explain trends in the development of the law.

As regards the substantive law on State immunity, we have identified areas that have undergone major developments and deserve closer attention. An increasing proportion of claims made in national courts relating to State immunity concern labour disputes involving a foreign State or an international organization. We have introduced a new Chapter 14: 'Immunity from Adjudication: The Employment Exception in respect of (1) A Foreign State and (2) An International Organization' that explores this aspect of the law of State immunity, including the influence of European human rights law. Secondly, we have introduced a separate chapter on the 'Territorial Tort Exception' (Chapter 15); the legality validity of this exception has been challenged by the *Jurisdictional Immunities* Judgment. Thirdly, Chapters 16 and 17 on 'State Immunity from Enforcement' has been elaborated in more detail as to the nature of the property and the relationship between immunity from adjudication and immunity from enforcement. In Part IV there is an expanded discussion of developments as regards other immunities: the immunities of individuals acting on behalf of the State (Chapter 18) and the immunities of international organizations and those covered by so-called special regimes (Chapter 19).

Since the publication of the second edition, UNCSI has gained further ratifications, though it has yet to enter into force. Its provisions have nonetheless been cited by national and international courts as evidence of customary international law. We have expanded Chapter 9 to address the legislative and judicial implementation of UNCSI by a number of the States Parties; the advisability of UK ratification is discussed in Chapter 7.

Chapter 4 (Jurisdiction), Chapter 10 (The Definition of the Foreign State) and Chapter 8 (US law) have been substantially revised and updated. At the time of writing, the *Jones v UK* and *Mitchell & Ors v UK* cases were still pending before the European Court of Human Rights.

In researching and writing Part IV and the related sections in the chapters on UK law and US law, we have been struck by an increasingly disaggregated or fragmented view of immunity (see Chapter 20).

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In this edition Hazel Fox, the sole author of the previous two editions has been joined by Philippa Webb. With an LLB from the University of New South Wales, Australia, an LLM and JSD from Yale, legal practice with Baker & Mackenzie, the UN Secretariat and the ICC Prosecutor's Office, and service as the legal officer and special assistant for three years to Rosalyn Higgins DBE, QC when President of the ICJ, Philippa was amply qualified to share the considerable labour in revising and accommodating the changes in law required in this new edition. Although only five years having passed since the publication of the second edition, there has been extensive activity—judicial, legislative, and academic—on the law of State immunity, not least in taking due account of the major decision of the International Court of Justice in the 2012 *Jurisdictional Immunities* case. Whilst it is for the reader to judge its quality, we confidently assert that the editorial partnership derived from Philippa's wide experience, Hazel's accumulated knowledge from teaching and practice of State immunity from the UK State Immunity Act 1978 onwards, and the intellectual stimulus and deeper legal analysis resulting from our joint activity provides greater clarity, thoroughness, and readability in this latest edition.

This Preface sets out what is new in this third edition. We are indebted to a number of people who have helped and encouraged us in updating, amending, and reshaping this book. We thank John Louth and Sir Frank Berman for early conversations on the purpose of the new edition and for their encouragement throughout the drafting process. We are grateful to Merel Alstein for her professional assistance and good advice at every stage. Professors Chimène Keitner and David P Stewart provided invaluable assistance with revising the chapter on US law; their contributions have been precise, insightful, and always timely. Alison Macdonald of Matrix Chambers has kindly updated and revised the section on procedure in the chapter on UK law. Peter Quayle of the European Bank for Reconstruction and Development provided (in his personal capacity) excellent comments on the new chapter on the employment exception, especially as it relates to international organizations. Thanks are also due to those who provided comments and information on specific sections of the book: Professor Andrea Biondi, Dr M Baldegger, Professor Lori Damrosch, Professor Carlos Espósito, Professor Keith Ewing, Dr Filippo Fontanelli, Christopher Keith Hall, Katerina Kappos, Professor Mizushima, Dr Roger O'Keefe, Sam Wordsworth, and Nout van Woudenberg. We are grateful for the editorial assistance of Katarzyna Lasinska, whose work was funded by a grant from the Centre for European Law at King's College London. Finally, we express our sincere gratitude to Judge Sir Kenneth Keith ONZ KBE QC for writing the Foreword to this edition.

Hazel Fox and Philippa Webb
April 2013

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List of Abbreviations

AALCO	Asian-African Legal Consultative Organization
ACJFS	Japanese Act on Civil Jurisdiction over Foreign States 2010
AEDPA	Anti-Terrorism and Effective Death Penalty Act 1996
AFP	Australian Federal Police
ASI	Agreement on Succession Issues
ATS	Alien Tort Statute 1789
CAVV	Dutch Advisory Committee on Issues of Public International Law
CFA	Court of Final Appeal
CJJA	Civil Jurisdiction and Judgments Act 1982
COE	Council of Europe
CPIUN	Convention on Privileges and Immunities of the United Nations
CPR	Civil Procedure Rules 1998
DARIO	ILC Draft Articles on the Responsibility of International Organizations
DPP	Director of Public Prosecutions
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECSI	European Convention on State Immunity
ELDO	European Launcher Development OrganiZation
EMBL	European Molecular Biology Laboratory
ESA	European Space Agency
ESDP	European Security and Defence Policy
ESRO	European Space Research Organization
FCO	Foreign and Commonwealth Office
FRY	Former Republic of Yugoslavia
FSIA	Foreign Sovereign Immunities Act 1976
HKSAR	Hong Kong Special Administrative Region
HRA	Human Rights Act 1998
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
ILC	International Law Commission
ILOAT	Administrative Tribunal of the International Labour Organization
IOIA	International Organizations Immunities Act 1945
ITC	International Tin Council
ITLOS	UN International Tribunal for the Law of the Sea
NTC	National Transitional Council
NYC	New York Convention 1958
PRC	People's Republic of China
PLO	Palestine Liberation Organization
RICO	Racketeer Influenced and Corrupt Organizations Act
SAR	Special Administrative Region
SFRY	States to the former Socialist Republic of Yugoslavia
SIA	State Immunity Act 1978
SCSL	Special Court for Sierra Leone
SOI	suggestion of interest
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement

TRIA	Terrorism Risk Insurance Act 2002
TRNC	Turkish Republic of North Cyprus
TVPA	Torture Victim Protection Act 1991
UNCLOS	UN Convention on the Law of the Sea
UNMEE	UN Mission in Ethiopia and Eritrea
UNSCI	UN Convention on Jurisdictional Immunities of States and their Property
VCCR	Vienna Convention on Consular Relations 1964
VCDR	Vienna Convention on Diplomatic Relations

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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 (UNCSI).

The UNCSI 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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PART I

GENERAL CONCEPTS

This part discusses the role of the plea of State immunity in proceedings before national courts, its relationship to other pleas and defences, and the underlying concepts in international law on which it is based.

The first chapter examines the nature of the plea of immunity and locates it as a preliminary procedural plea in relation to other preliminary pleas in national proceedings. The second chapter analyses the evolution of the concept of State immunity during the last 200 years using three models: the absolute doctrine; the restrictive doctrine; and immunity as a procedural plea. Chapter 3 distinguishes the plea of State immunity from the related but different concepts of act of State and non-justiciability, focusing on the approaches taken in the UK and the US. Allocation of jurisdiction discussed in Chapter 4 serves as the means by which the ambit of each State's exercise of authority and power is defined with State immunity in respect of other States forming one of the restrictions on that exercise.

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1

The Institution of Proceedings and the Nature of the Plea of State Immunity

Introduction

The plea of State immunity prevents a foreign State being made party to proceedings in the national court of another State directly, or indirectly by the bringing of proceedings against its property, and thereby prevents the subjection of an independent State to proceedings in another country relating to a dispute about its activities. Two other pleas, Act of State and non-justiciability may also be relevant in the common law in proceedings where as with State immunity the facts pleaded relate to a foreign State and its transactions (see Chapter 3).

The institution of proceedings

The making of a plea of immunity is only one of many matters that may fall to be considered on the institution of proceedings. A first stage is service of process by which the defendant is made aware of the claim, of the proposed court to adjudicate it, and of his required presence to answer the claim. Service of process requiring attendance in court of a person as representative of the State or on the premises of a diplomatic mission located in the forum State may constitute a breach of inviolability and is prohibited by diplomatic law.[1]

Service of process in relation to proceedings against a State will therefore necessarily be made through diplomatic channels out of the jurisdiction.[2] Other procedures relate to preservation of property which may be the subject-matter of the proceedings or which may be required to satisfy any judgment obtained. The party when served may wish to challenge the jurisdiction of the court, make application for a stay of proceedings, or seek an order for the case to be tried elsewhere. Where there is no appearance, the claimant may seek a judgment in default of appearance; where no defence is filed, summary judgment may be obtained.

Service of process

Service of process is a first stage in the institution of proceedings. Civil courts have fixed criteria for the exercise of their competence. Common law courts in proceedings *in personam* base jurisdiction on the presence of the defendant within the territory of the forum State. Where individuals have residence or domicile, or a corporation its place of registration or centre of business within the jurisdiction, the institution of proceedings between private parties by service of process should be reasonably straightforward.

[1] Vienna Convention on Diplomatic Relations 1961, Art 22; Denza, *Diplomatic Law* (3rd edn, 2008), 268–9 (on diplomats), 151–3 (on mission premises). The prohibition would seem to extend even to service by post.

[2] For particulars of English law, see Ch 7 on English law, procedure. See, generally, Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws* (16th edn, 2012), Chs 5, 10, and 12 (hereafter *Dicey*); Collier, *Conflict of Laws* (3rd edn, 2001), 72–83; Fawcett (ed), *Declining Jurisdiction in Private International Law* (1995) General Report, 1–70.

Whilst the provision of information to a State as to the court and the proceedings which are to be instituted against it may be in order, service of process requiring attendance in court of a person as representative of the State or on the premises of a diplomatic mission located in the forum State may constitute a breach of inviolability and is prohibited by diplomatic law.[3] Service of process in relation to proceedings against a State will therefore necessarily be made through diplomatic channels out of the jurisdiction.[4]

Where process has been served, a party may seek to obtain an order from the court enabling trial of the claim in the most appropriate court. Pleas of anti suit litigation, *lis alibi pendens* and *forum non conveniens* may be raised regarding the choice of the appropriate forum between two or more courts in different States.

State immunity to be taken as a preliminary plea

The order in which these pleas are taken varies from one national jurisdiction to another. The International Court of Justice (ICJ) in a decision relating to immunities of the United Nations (the immunity from legal process of an expert) declared that the national court is under an 'obligation to deal with the question of immunity from legal process as a preliminary issue to be decided expeditiously *ex limine litis*'.[5] It confirmed this position in its 2012 judgment in *Jurisdictional Immunities*: 'a national court is required to determine whether or not a foreign State is entitled to immunity as a matter of international law before it can hear the merits of the case brought before it and before the facts have been established…' (paragraph 82).[6] Once satisfied that the defendant is a foreign State, the forum court will dismiss the proceedings, unless satisfied that the foreign State has waived its immunity or that the proceedings fall within an exception to State immunity.

The formulation of immunity as a general rule of immunity with exceptions has the consequential effect that the court is itself required to give effect to immunity. The 2004 UN Convention on Jurisdictional Immunities of States and their Property (UNCSI) requires a State to 'ensure that its courts determine on their own initiative' that a foreign State's immunity is respected (Article 6(1)). In the common law, and as enacted by statute in section 2(1) of the State Immunity Act 1978 (SIA), English law requires the court to give effect to immunity even though the State does not appear. In US law, although immunity is taken at a preliminary stage, the plea is treated as a defence with the burden to establish status as a foreign State placed upon the defendant.[7]

[3] Vienna Convention on Diplomatic Relations 1961, Art 22; Denza, *Diplomatic Law* (3rd edn, 2008), 268–9 (on diplomats), 151–3 (on mission premises). The prohibition would seem to extend even to service by post.

[4] For particulars of English law, see Ch 7 on English law, procedure. See, generally, *Dicey*; Collier, *Conflict of Laws*, 72–83; Fawcett (ed), *Declining Jurisdiction in Private International Law* 1–70.

[5] *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, Advisory Opinion of 29 April 1999, ICJ Reports 1999, p 62, para 67 (the *Cumaraswamy* case). See Hazel Fox, 'Commentary: The Advisory Opinion on the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights: Who Has the Last Word on Judicial Independence?' (1999) 12 Leiden JIL 889.

[6] See the Index for specific references to this judgment throughout the book. The preliminary nature of the plea of immunity was indeed central to the Court's reasoning as to why the availability of State immunity was *not* dependent upon the gravity of the alleged unlawful act: 'If immunity were to be dependent upon the State actually having committed a serious violation of international human rights law or the law of armed conflict, then it would become necessary for the national court to hold an enquiry into the merits in order to determine whether it had jurisdiction. If, on the other hand, the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of the claim' (para 82).

[7] Dellapenna *Suing Foreign Governments and their Corporations* (2nd edn, 2002) 644, (1994) 88 AJIL 528, 644. Cf *Yugoslavia v Croatia* [2000] 1 L Pr 59, JDI (2000) 1936; and *Republic of Estonia*, 30 June 1993, 113 ILR 478 where the French Cour de Cassation held that, in the absence of an international treaty on the matter, the court was not required of its own motion to ascertain whether the State was entitled to immunity; immunity was not absolute and had to be claimed by the purported possessor.

A claim to State immunity is a public claim and it is arguable that it demands open litigation.[8]

Immunity as a rule of international law

Unlike the preliminary pleas referred to above, the entitlement of a foreign State before national courts to immunity is recognized not merely as a prescription with the force of law but also as a rule of international law.[9] The practice of civil law courts and common law jurisdictions (and indeed many US courts) recognize the international character of the rule of immunity. The European Court of Human Rights in *Al-Adsani* has noted that 'sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State.'[10] For UK law Lord Hoffmann in *Jones v Minister of Interior of Kingdom of Saudi Arabia* stressed the international law source of State immunity:

> As Lord Millett said in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588, state immunity is not a 'self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt' and which it can, as a matter of discretion, relax or abandon. It is imposed by international law without any discrimination between one state and another.[11]

The rule of State immunity ranks within a number of the sources of international law listed in the ICJ Statute, Article 38(1). Judicial decisions of national courts acknowledging the immunity of a foreign State rank under Article 38(1)(d) as 'a subsidiary means of determination of rules of law' and when put into effect qualify under Article 38(1)(b) as 'evidence of a general practice accepted as law' and thus of customary international law. Whilst Article 38(1)(c) identifies 'the general principles of law recognized by civilized states' as a source of international law, this source is now little relied upon—in part by its discredited reference to 'civilized states'.[12] Lauterpacht's explanation that the intention of this source was 'to authorize the International Court to apply the general principles of jurisprudence, in so far as they are applicable to relations of states'[13] is a particularly apt description of the doctrine of immunity which is formed by an amalgam of international and national law. Whilst the diversity and contradictions to be found relating to the treatment of State immunity in such judicial decisions calls for interpretative and comparative skills to detect the common international law rule which they uphold, a subject more fully discussed below and in Chapter 5, there can be little doubt that there is a general acceptance, both as a general principle of law

[8] In a claim made by an alleged wife of the King of Saudi Arabia for maintenance, the English Court of Appeal held the identity of the sovereign was relevant to any public debate of the issues raised by a plea of immunity and gave leave to the applicant for a public hearing as to the applicability of a plea of State immunity to the applicant's claim for maintenance, though it might well have retained such restrictions with regard to the subsequent investigation of the entitlement to and extent of such maintenance. *Harb v King Fahd Bin Abdul Aziz* [2005] 2 FLR 1108 at para 40. By reason of the King's death further proceedings in the English court were discontinued; thus the immunity point was not finally determined. *Aziz v Aziz & Sultan of Brunei* [2007] EWCA Civ 712 (11 July 2007) per Lawrence Collins, paras 93, 137, Sedley LJ paras 131–2. Cf *Anonymous v Anonymous*, NYS 2d 777 (AD1 Dept 1992) where reporting restrictions were imposed in divorce proceedings of a head of state; see also *Global Torch Management v Apex Global Management Ltd* [2013] EWCA Civ, Paras 13–15.

[9] Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010) 21(4) EJIL 853 (State immunity is a legally binding principle not a rule of international law, so States may differ in their rules relating to State immunity so long as they observe the boundaries set by other principles of international law).

[10] *Al-Adsani v UK* (2002) 34 EHRR 111, ECHR, para 56; 107 ILR 536.

[11] *Jones v Minister of Interior of Kingdom of Saudi Arabia & Ors* [2006] UKHL 26, [2006] 2 WLR 1424.

[12] Gaja, *Max Planck Encyclopedia of Public International Law*; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2006).

[13] Jennings and Watts, *Oppenheim's International Law* (9th edn, 1992), 37 and fn 2.

and as a rule of customary international law, of immunity as a legal bar in international law to certain national court proceedings being taken against a foreign State. The International Law Commission, in the preparation of its draft articles on the jurisdictional immunities of States and their property, after an extensive survey, concluded that the rule of State immunity had been 'adopted as a general rule of customary international law solidly rooted in the current practice of States'.[14] And finally the ICJ recently confirmed, with regard to 'the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention' that the current practice of States

> shows that whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.[15]

Immunity granted on terms of reciprocity or as a matter of discretion

The ICJ's ruling in *Jurisdictional Immunities* that immunity is a rule of law, as with the enactment of rules of State immunity in UNCSI and other international conventions or national legislation, directly restricts the extent to which the executive branch of a State may enlarge or reduce immunity (see further discussion under waiver in Chapter 11). Indeed, a foreign State denied immunity by a US court following the Supreme Court's direction in *Republic of Austria v Altmann* that immunity merely provides 'some *present* protection from the inconvenience of suit as a gesture of comity',[16] would now seem entitled to claim a breach of the international obligation to afford immunity. The effect in law of the practice of China[17] and Russia[18] along with other States to legislate on a basis of reciprocity would thus seem rendered uncertain. Arguably, in the future the grant of immunity on terms of reciprocity or as

[14] *Yearbook of the International Law Commission* (1980), vol II(2), p 147, para 26. But note in its 1991 Draft Articles on the Jurisdictional Immunities of States and their Property the ILC states: 'There is common agreement that for acts performed in the exercise of the "*prérogatives de la puissance publique*" or "sovereign authority of the State" there is undisputed immunity. Beyond or around the hard core of immunity, there appears to be a grey zone in which opinions and existing case law and indeed legislation still vary.' See Ch 12.

[15] *Jurisdictional Immunities*, para 56; see also para 106. As regards the immunity of State officials the ILC, in its report of the 60th Session, similarly agreed with the Special Rapporteur Kolodkin that 'the immunity of State officials from foreign criminal jurisdiction was based on international law, particularly customary international law, and not merely on international comity' UN Doc A/63/10 (2008) para 281. The 9th edition of Oppenheim's *International Law*, whilst noting that grant of immunity from suit may be a denial of a legal remedy in respect of what may be a valid claim, confirms this position: 'State practice is sufficiently established and generally consistent to allow the conclusion that, whatever the doctrinal basis may be, customary international law admits the general rule, to which there are important exceptions that foreign states cannot be sued', Jennings and Watts, *Oppenheim's International Law* I (9th edn, 1992), 342–3.

[16] *Republic of Austria v Altmann*, US Supreme Ct 327 F 3d 1246 (2004), (2004) 43 ILM 1421, citing *Dole Food Co v Patrickson*, 538 US 468, 479 (2003) (emphasis added).

[17] Article 3 of the Chinese Law of Judicial Immunity of 2005 stipulates that for countries that do not provide property of the central bank of the PRC and the financial administration organs of the Special Administration Regions of Hong Kong and Macao with immunity, or provide immunity at a level below this Law, the PRC will deal in line with the principle of reciprocity. Lijiang Zhu, 'State Immunity from Measures of Constraint for the Property of Foreign Central Banks: The Chinese Perspective' (2007) Chinese J Int Law 67 at 80 comments that the PRC's attachment to the principle of reciprocity is readily understandable since 'equality of state sovereignty does not come easily. It took China more than a hundred years' struggle to completely abolish the "unequal treaties" imposed by western powers'.

[18] Article 61 of the 1961 Fundamentals of Civil Procedure of the USSR provided: 'When a foreign State does not accord to the Soviet State its representatives or its property the same judicial immunities which, in accordance with the present Article, is accorded to foreign States, their representatives and their property in the USSR… the USSR… may impose retaliatory measures in regard of that State its representatives and that property in the USSR'. Arguably when a foreign State does not accord to the Soviet State the same judicial immunities accorded to foreign States, the USSR may impose retaliatory measures.

a matter of discretion will constitute a breach of the forum State's obligation to afford immunity; at most it can only be treated as evidence of the forum State's view, or *opinio juris*, that the facts of the case do not come within the entitlement to State immunity.

Protest

Express protest to a forum State's refusal of immunity may now become more frequent. State practice in the past shows that, rather than express protest, response to a refusal of immunity has resulted in non-appearance by a foreign State when summoned to appear or an appeal to the forum State to intercede on its behalf.[19] Formal protests have rarely been made; and when made, such representations more often object to the execution than to the giving of a judgment. A State has tended to ignore a refusal of immunity unless its property is jeopardized. Germany's decision to bring proceedings against Italy at the ICJ was motivated, at least in part, by the measures of constraint taken against Villa Vigoni, a property of the German State near Lake Como.[20] When the English Court of Appeal in *Alcom*[21] allowed attachment of the account of the Colombian diplomatic mission in London in execution of a default judgment relating to a commercial transaction, Colombia protested to the Foreign Office and cancelled a ministerial visit to Bogota. There were also wider repercussions, with several diplomatic missions moving their accounts out of the jurisdiction of English courts and considering action against the accounts of British missions abroad.[22] In consequence, the Attorney-General was briefed by Her Majesty's Government to act as *amicus curiae* on appeal, the outcome of which was the Lords' reversal of the decision of the lower court.

Acquiescence in the practice of another State considered to be contrary to international law cannot necessarily be deduced from the absence of diplomatic protest. In a critique of the *Arrest Warrant* case, Cassese refers to the assertion for many years of universal civil jurisdiction by US courts over serious violations of international law perpetrated by foreigners abroad and claims 'whether or not this trend of US courts is objectionable as a matter of policy or on legal grounds, it is a fact that it has not been challenged, or in other words has been acquiesced in, by other states'.[23] Yet, in an *amicus curiae* brief to the US Supreme Court in the *Sosa v Alvarez-Machain* proceedings, the European Commission challenged the application of the Alien Tort Claims Act to conduct undertaken outside the US by foreigners. It submitted in strong terms that the US Congress and US courts were obliged in determining when the immunity of a foreign State may be set aside to apply the substantive standards and jurisdictional limits imposed by international

[19] Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1952) 28 BYIL 220 at 227. A State's protest is made by refusal to appear.

[20] *Jurisdictional Immunities*, para 35. See also the protest by the People's Republic of China (PRC) to the UK government at the enactment legislation applicable to Hong Kong declaring State immunity to be no bar to proceedings brought in Hong Kong regarding aircraft located there which the Chinese Communist government claimed as its property and to the US government during the proceedings brought against the PRC by bondholders of Chinese railway stock (1951) 1 ICLQ 159–77, (1953) 3 ICLQ 136–43; Huang Jin and Ma Jingsheng, 'The Immunities of States and their Property: The Practice of the People's Republic of China' (1988) 1 Hague YBIL 163 at 168–9 and also referring to the Chinese government's protest in the '*Yonghao*' *Oil tanker* case at 169–70. Jin and Jingsheng, 'The Immunities of States and their Property' 168–9, 176–80; *Civil Air Transport Inc v Central Air Transport Corpn* [1953] AC 70; *Jackson v People's Republic of China*, 550 F Supp 869 (ND Ala 1982), dismissed on appeal on the ground that the FSIA was not retroactive: 794 F 2d 1490 (11th Cir 1986), 22 (1983) ILM 76. See also a third State's representations in the *Socobelge* case, in Ch 16.

[21] *Alcom Ltd v Republic of Colombia and Others* [1984] AC 580, [1983] 3 WLR 906, [1984] 1 All ER 1.

[22] Mrs E Denza, Legal Counsellor, FCO to ML Saunders, Law Officers' Department, 11 November 1983. Attachment of an aircraft of the visiting Yemen head of State also provoked protest.

[23] Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on *Congo* v. *Belgium* Case' (2002) 4 EJIL 853 at 859.

law.[24] Given that the consequences of national courts' decision have at most indirect impact on the overall foreign relations of one State with another, representations made by way of *amicus* brief to the supreme court of another State as well as by diplomatic note may surely qualify as a protest. It is to be noted that while Judges Higgins, Kooijmans, and Buergenthal in their joint opinion in the *Arrest Warrant* case noted in the Alien Tort Claims Act 'the beginnings of a very broad extraterritorial jurisdiction' in the civil sphere, they commented that '[w]hile this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States'.[25]

Countermeasures

Whether the law of countermeasures may be of relevance now that State immunity is a rule of international law seems questionable; namely, whether a forum State may invoke the law of countermeasures to justify a failure of its national court to accord such immunity by reason of the defendant State's violation towards the forum State of an international obligation.[26]

The concept of countermeasures was alluded to by Italy in its oral pleadings in the *Jurisdictional Immunities* case.[27] Italy contended that, by reason of Germany's breach of its international obligation to make reparations to Italian victims for violations of international humanitarian law by the German Reich during the Second World War, Italy was entitled to deny Germany immunity in its courts, even if this was a breach of *Italy's* own international obligation to grant immunity to Germany in civil proceedings brought in its national courts.[28] But the Court's dismissal of Italy's counterclaim asserting Germany's violation of its obligation owed to the Italian victims of war crimes and crimes against humanity committed by the German Reich left it without jurisdiction 'to rule on those questions' (paragraph 48). Although the Court considered 'it a matter of surprise —and regret—that Germany decided to deny compensation to a group of victims… [and] the legal protection to which [their] status entitled them' (paragraph 99), it made no ruling as to the responsibility of Germany for such denial of compensation and had no jurisdiction to do so.[29] Accordingly, there was no breach of an obligation owed to the forum State to justify the latter's withdrawal of immunity as a countermeasure.

The ICJ did not address the issue of countermeasures in its final judgment. Italy's consistent view had been that denying immunity to Germany was justified under international law on the basis of an exception to State immunity for grave human rights violations, and not that it was invoking a countermeasure in breach of its obligation to grant immunity.[30]

[24] US Supreme Court, *Sosa v Alvarez-Machain,* brief of *amicus curiae* of the European Commission in support of neither party, 23 January 2004, pp 5, 14, 26–7.

[25] At para 48. But see the Canadian Justice for Victims of Terrorism Act 2012 which amends the Canadian SIA to remove the immunity of a foreign State that has been listed by the Government in Council as a 'sponsor of terrorism' and creates a civil cause of action in Canada for damage or loss related to a terrorist act if the plaintiff is a Canadian citizen or permanent resident or there is a 'real and substantial connection' to Canada.

[26] See Arts 22 and 49 of ILC Articles on State Responsibility.

[27] CR 2011/18, Palchetti (47–50) and Dupuy (50–6).

[28] Tomuschat, CR 2011/21, para 27 (calling this 'the very strange new theory of countermeasures').

[29] In any event, it seems that Italy did not fulfil several of the requirements relating to resort to countermeasures set out in Art 52 of the ILC Articles, including notifying Germany of its decision to take countermeasures.

[30] *Jurisdictional Immunities*, para 101. Tomuschat, CR 2011/21, paras 26–7 (also referring to Italy's waiver of Italy of claims on its own behalf and on behalf of Italian nationals in the Peace Treaty of 1947).

The role of national law

During the twentieth century, national legislation, national decisions, and the reaction (or inaction) of States to a forum State's refusal of immunity potentially constituted evidence of the customary international law relating to State immunity. Further, by reason of the subject-matter, and by the exercise or refusal of jurisdiction over a party to a proceeding in a national court, its reasoning and conclusion may be said to contribute to the formulation of the law relating to State immunity; as such, a national court may both create the law as well as implement an existing international rule. Chapter 5 on Sources discusses the justifications for this law creation by national legislation and national courts and further discusses their role as a source of the customary international law of State immunity. As more particularly described in that chapter, recent international conventions and decisions of international tribunals addressing aspects of State immunity—UNCSI and the ICC Statute and three judgments of the ICJ in the last decade—make probable a reduction in any recourse to the proceedings of national courts for a first articulation of the relevant rule of international law. For issues of civil jurisdiction, UNCSI, however ambiguous in its terms, will provide parameters for the interpretation of the relevant international law of State immunity: in consequence national courts' role may now be less one of novel law creation but rather of interpretation, a reformulation of the relevant international rule as it applies to the particular facts in the national proceeding. For the exercise of criminal jurisdiction and the prosecution of international crimes committed by State officials, national courts' role alongside international criminal tribunals may continue to be one more of experimentation and tentative rulings. But whatever the nature of the issue, civil or criminal, the lasting impact of all national courts' decisions will be dependent on their imitation or rejection in the practice of other States and by the wider international community.

The requirements of the plea of immunity are governed by international law, but, given its lack of particularity, the individual national law of the State before whose court a claim against another State is made (the forum law) determines the precise extent and manner of application. As the phases of the development of the rule of immunity show (see Chapter 2), there has been a steady elucidation of the details of the rule initially with considerable input from national law but throughout moderated by overriding considerations of respect for the independent status of the State. This process is shown in the solutions achieved with regard to the definition of the act of the foreign State entitled to immunity and to the extension of the concept of a foreign State to an entity enjoying independent legal personality.

When this question was addressed as early as 1891, in discussion on the applicable law of State immunity in the Institut de Droit International, several members queried whether the topic fell outside international law. This view was rejected by a large majority.[31] In its 1954 resolution the Institut declared that the law of the forum State is to be applied to identify the private/commercial nature of an act and its application to particular types of transaction, whilst international law defines acts in exercise of sovereign authority.[32]

The Institut's approach was confirmed and elaborated by the Constitutional Court of the Federal Republic of Germany in 1963 in the *Empire of Iran* case. The Court addressed the issue of the applicable law as follows: Accepting that the 'qualification of State activity as sovereign or non-sovereign must in principle be made by national (municipal) law, since international law, at least usually, contains no criteria for this distinction', the court found this

[31] ADI vol II (1885–91) 1166, 1186.

[32] 1954 Aix-en-Provence resolution on Immunity from adjudication and enforcement of foreign States, Art 3.

qualification by national law to be subject to 'international law restrictions': 'National law can only be employed to distinguish between a sovereign and non-sovereign activity of a foreign State insofar as it cannot exclude from the sovereign sphere, and thus from immunity, such State dealings as belong to its field of State authority in the narrow and proper sense, according to the predominantly held view of States'.[33]

On the facts of the case, a contract for the repair of embassy premises of Iran was held not to fall within the essential sphere of State authority and hence proceedings in respect of its breach were not barred by that State's immunity. The purpose of the function, the improvement of premises in order to carry out diplomatic functions which the State was pursuing, was held not to be relevant. The court accordingly concluded that: 'The distinction of sovereign functions according to the nature of the transaction and the qualification of the transaction according to national law, may not yet have found the comprehensive recognition which is indispensable for a general rule of international law; it is however so widespread that a grant of immunity going beyond it can no longer be seen as being required by international law'. Accordingly, the exercise of German jurisdiction over the dispute relating to the Iranian embassy was confirmed.

Less clarity has been achieved in respect of the entitlement of separately incorporated entities to State immunity. As the discussion in Chapter 10 on Definition of the Foreign State in Part III reveals, given the absence of any clear guidance in international law, national courts have differed on whether the inclusion of such 'State' entities within the immunity enjoyed by the foreign State is a matter for the determination of the law of the forum State or the consent of the foreign State or by its national law. The current solution adopted by UNCSI authorizes a reference to both forum State and foreign State law; in Article 2(2)(b)(iii) 'agencies or instrumentalities' come within the convention's definition of the State 'to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State' ie entitled to perform according to the law of the foreign State and actually performing according to the law of the forum State.

The setting out in treaty form of rules relating to State immunity in the 2004 UNCSI, particularly after its coming into force, will greatly strengthen the international law content of the rules of immunity and reduce the frequency of the determination of issues by reference to national law. It is to be hoped that the status of such rules will then be equated to those relating to the immunities of diplomats and consuls which are set out in the 1961 and 1963 Vienna Conventions on Diplomatic and Consular Relations and which have received almost universal recognition. It is significant that such codification in treaty form accelerated their recognition as general international law.

Outline of the plea of State immunity

The recognizable attributes of a plea of State immunity are:

(i) a plea;
(ii) proceedings brought in a court;
(iii) against a foreign State; and
(iv) which by law results in the refusal of the forum court to hear the case.

Each of these attributes may be considered in turn.

[33] *Empire of Iran* case, German Federal Constitutional Court, 30 April 1963; UN Legal Materials 282; 45 ILR 57 at 81.

Who may raise the plea?

The plea of immunity is only available to a defendant which is an independent and sovereign State under international law. In common law jurisdictions, a State is treated as a foreign State only where it is recognized as such by the forum State.[34] Common law courts will usually take judicial notice of the status of a State defendant but in case of doubt may seek advice from the forum State's executive. In the UK on the request of the parties to the Foreign Office, or sometimes at the instance of the court, the Secretary of State for Foreign Affairs will issue a certificate which under the SIA 1978 is conclusive as to the status of the State or its government. In other jurisdictions, proof of the essential attributes of a State—territory, population, government capacity to enter foreign relations—may be sufficient, though usually some recognition by diplomatic or treaty relation with the forum State will be present.[35] No specific guidance on this issue is provided by UNCSI, see further Chapter 10.

For the purposes of immunity the central government, its departments, and organs are treated as within the protected status of a foreign State; national courts may extend State immunity to other agencies established by the State dependent on their relationship or function. The acts of individuals performed on behalf of the State for whom they act as representatives may also be imputed to the State (see Chapter 10) so as to render the immunity which they enjoy co-extensive with the immunity of the State. Historically, so far as the immunities of heads of State and of the diplomatic agent and the diplomatic mission are concerned, the immunities of individuals acting on behalf of the State evolved independently of State immunity, particularly in respect of the immunity extending to private acts while they were in office. Immunities accorded to the visiting armed forces of a foreign State have also been treated as a separate regime in international law. Following the 2010 decision in *Samantar,* the US Supreme Court seems to favour a similar form of independent treatment as applicable to all State officials stating that 'the immunity of individual officials is governed not by the FSIA but by the common law of foreign official immunity as recognized by the Executive' (see further Chapter 8).[36] By reason of these differences, the immunities enjoyed by Heads of State and high ranking officials, diplomats, the visiting armed forces of a foreign State, and officials of international organizations are examined separately in Chapters 18 and 19 and are to be regarded broadly as a subject to be regulated, though with some considerable overlap, by regimes separate from that of State immunity.[37]

The personal nature of the plea and consent

In contrast to non-justiciability where nature of the subject-matter of the claim may render it non-justiciable in a national court,[38] the plea of immunity is a bar based on the status of

[34] In English law, foreign sovereigns and States recognized by the UK government have *locus standi* as a proper party to institute proceedings and hence to defend them when they consent and waive immunity. An unrecognized foreign State and any of its authorities cannot sue or be sued in the English court but it will have *locus standi* in the English court if it is a subordinate body set up by a recognized State to act on its behalf: *GUR Corpn v Trust Bank of Africa* [1987] 1 QB 599, [1986] 3 All ER 449, 75 ILR 675. In some countries a foreign State is not considered to have capacity to initiate litigation.

[35] *Clerget v Banque Commerciale pour l'Europe du Nord*, French Ct of Appeal, 7 June 1969, 52 ILR 310, Cour de Cassation, 2 November 1971, 65 ILR 54.

[36] Brief for the US as *Amicus Curiae* in Support of Affirmance, *Matar v Dichter*, No 07-2579-cv (19 December 2007).

[37] UNCSI Art 26 provides that nothing in the Convention shall affect the rights and obligations of States parties under existing international agreements which relate to matters dealt with in the Convention as between the parties to those agreements; and Art 3 provides that UNCSI is without prejudice to the privileges and immunities of diplomatic missions, Heads of State *ratione personae*, and aircraft or space objects owned or operated by a State.

[38] See Ch 3.

the defendant as a sovereign State and is hence described as immunity *ratione personae*. As the ICJ has commented, 'immunity [by reason of this personal status of a foreign State] may represent a departure from the principle of territorial sovereignty and the [territorial] jurisdiction which flows from it'.[39] But for immunity, that jurisdiction would be validly based on the presence of the foreign State and its agencies or its property or on the commission of acts on its part within the territory of the forum State. The plea of immunity acts as a personal bar. On this account as a beneficiary enjoying a personal immunity, the defendant State can consent to its removal. Such consent to the proceedings in the national court of another State may now be given prior to or after the initiation of proceedings, provided the foreign State's intention to accept the jurisdiction of the forum State's court is made clear.[40]

The plea as a bar to jurisdiction of the court

State immunity may act as a bar to proceedings before an international tribunal as well as a national court, but its main significance relates to its effect upon the jurisdiction of a national court.

Jurisdiction and immunity are two separate concepts. 'Jurisdiction relates to the power of a State to affect the rights of a person or persons by legislative, executive or judicial means, whereas immunity represents the independence and exemption from the jurisdiction or competence of the courts and tribunals of a foreign State and is an essential characteristic of a State.'[41] Logically the existence of jurisdiction precedes the question of immunity from such jurisdiction but the two are 'inextricably linked' (see Chapter 4).[42]

The plea concerns immunity from the judicial power of another State, although the enforcement of that power may also involve the executive power and the administrative authorities of the State. It does not relate to the legislative power of the State, its jurisdiction to prescribe which goes more to substantive liability (see Chapter 4).[43].

Such court proceedings include all manifestations of the judicial power within the forum State territory, and accordingly can be raised in any tribunal exercising judicial or quasi-judicial powers, whether in criminal, civil, family, or other matters. The plea is available to bar proceedings before administrative tribunals. The position as to arbitration tribunals is different. In so far as an arbitration tribunal derives its authority to determine a dispute from the consent of the parties, the foreign State's consent may constitute a waiver of any immunity; but in so far as the tribunal looks to the forum State and its courts to enforce the arbitral award, the plea of State immunity may have relevance (see Chapter 11).

Application of the forum State's choice of law rules relating to the alleged activity will usually result in the forum State's court applying its own law or the law of the place where the acts complained of took place, which may often be the same. In US cases the FSIA provides a basis for US federal court jurisdiction but substantive law will be determined by the law of the particular State in which the federal court has its seat.

[39] *Jurisdictional Immunities*, para 57. [40] See Ch 11.

[41] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo/Belgium)*, ICJ Reports 2002, Judge Koroma, Separate Opinion, para 5.

[42] *Arrest Warrant*, Judge Koroma, Separate Opinion, para 5, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, para 3.

[43] Privileges, though restricted by some authors to matters of comity relating to status, prestige, honour, protocol, or courtesy, may result from the exercise of such a jurisdiction to prescribe which may vary the substantive law in favour of the foreign State. A State may claim and enjoy other privileges and immunities from the forum State, such as immunity for its nationals from military conscription or the privilege of not paying import duties or having preferential rates on petroleum, fuel, or alcoholic drinks, but these are not the direct concern of the plea of State immunity before a court. Reinisch, *International Organisations before National Courts* (2000), 13–15.

A procedural plea not an exemption from liability

The plea of immunity is one of immunity from suit, not of exemption from law. This is shown clearly by the fact that immunity can be waived and then the case can be decided by the application of the law in the ordinary way.[44] The ICJ has held that

> [t]he rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another. … It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful.[45]

The underlying substantive law relating to private law liability or State responsibility of the defendant State is unaffected by the plea, as the ICJ noted in confirming Germany's entitlement to immunity.[46] The entitlement to immunity is in no way dependent upon the existence of alternative means of securing redress[47] although, as can be seen from recent challenges to the rule, a plea of immunity from suit may undoubtedly assist a foreign State in the avoidance of substantive liability.

Proceedings in court: criminal and civil

The degree to which immunity of the foreign State prevails against the exercise of local jurisdiction varies according to whether the proceedings relate to the exercise of the criminal or civil jurisdiction of the national court. The exercise of criminal jurisdiction of national courts relates to proceedings where the forum State prosecutes a private party for an offence prohibited by national penal codes, and the exercise of civil jurisdiction, whether of the courts of common law or civil law countries, relates to proceedings between two parties as applicant and defendant on an equal footing.

Immunity of a foreign State from criminal proceedings

A foreign State is not subject to the criminal proceedings of a national court of another State more by reason of substantive law than procedural immunity. In criminal proceedings the substantive penal code of the forum State defines acts constituting criminal offences and on conviction provides punishment by imposition of fines and other penalties including imprisonment. By reason of its independent status, the foreign State cannot be subjected to such prosecution by the forum State or its officials nor punished by way of fine, penalty, or imprisonment (see Chapter 4).

[44] This is well illustrated by the analogous case of diplomatic immunity where in *Dickinson v Del Solar* [1930] KB 376 the court held the company who insured the driver involved in a motor accident liable under the policy to pay damages for injuries caused, notwithstanding that the driver as secretary of the Peruvian delegation enjoyed diplomatic immunity.

[45] *Jurisdictional Immunities*, paras 58, 93.

[46] *Jurisdictional Immunities*, para 100. For a discussion of the relationship of attribution to immunity, see Fox, 'Imputability and Immunity as Separate Concepts: The Removal of Immunity from Civil Proceedings Relating to the Commission of an International Crime' in Kaikobad and Bohlander (eds), *Essays in Honour of Colin Warbrick* (2009), Ch IV.

[47] *Jurisdictional Immunities*, para 101.

Immunity of State officials from criminal proceedings

However, the recognition that there is no impunity by reason of official status for the commission of international crimes by individuals[48] and the prosecution of high-ranking State officials before international criminal tribunals for such crimes has led to pressure for the removal of the immunity enjoyed by such State officials in respect of criminal proceedings in national courts. In 1999 in *Pinochet (No 3)*[49] the Judicial Committee of the House of Lords declared that a former head of State present in England had no immunity from extradition proceedings, brought at the request of the State of the nationality of some of the victims, relating to the alleged offence of State torture under the 1984 UN Torture Convention, that is proceedings relating to an international crime involving violation of a fundamental human right, even though committed while in office and for the purposes of the State. This decision, which was followed by proceedings being initiated in the national courts of other countries against serving[50] as well as former heads of State,[51] marked a significant change by introducing an exception for international crimes including torture to the absolute rule of immunity in respect of the criminal prosecution of individuals who represent the State.

However, it is to be noted that the Lords in *Pinochet* expressly stated that the immunity of the State and a serving Head of State in respect of criminal proceedings remained absolute and was unchanged,[52] and in the *Arrest Warrant* case the ICJ ruled that a serving Minister for Foreign Affairs enjoys personal inviolability and immunity from criminal jurisdiction in respect of alleged crimes against humanity and found that the issuance and international circulation of an arrest warrant for international crimes against such a high ranking official when in office was a breach of international law.[53] The subordination in recent national legislation of the initiation of criminal prosecution in national courts of serving foreign high-ranking officials to the political decision of the forum State indicates State practice in support of this ruling of the Court.[54] Whether such a Minister when he vacates office loses immunity for heinous international crimes committed in the course of official functions, however, would seem undecided; the ICJ was of the view that immunity was retained even in respect of the commission of grave international crimes, but this opinion was strictly *obiter*.[55]

[48] See the Rome Statute of the International Criminal Court, Arts 27(1) and 98(1) and Ch 18.

[49] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening) (No 3)* [2000] AC 147, [1999] 2 All ER 97 (cited as *Pinochet (No 3)*); 119 ILR 135. See Fox, 'The Pinochet Case No. 3' (1999) 48 ICLQ 687.

[50] *Gaddafi, sub nom SOS Attentat and Castelnau d'Esnault v Khadafi, Head of State of the State of Libya*, France, Cour de Cassation, Crim Chamber, 13 March 2000, No 1414; 124 ILR 508; the court quashed a ruling of the Paris Court of Appeal that absolute criminal immunity of a serving head of State was subject to an exception in respect of a terrorist offence of use of explosives causing the destruction of an aircraft in flight and loss of life to French nationals.

[51] Habré, Senegal, Court of Appeal of Dakar, 4 July 2000; Cour de Cassation, Dakar, 20 March 2001; 125 ILR 569: the court annulled a prosecution initiated against the former President of the State of Chad for alleged complicity in acts of torture.

[52] The distinction between the immunity of the official and that of the State was emphasized by the ICJ in *Jurisdictional Immunities* when it stated '*Pinochet* concerned the immunity of a former Head of State from the criminal jurisdiction of another State, not the immunity of the State itself in proceedings designed to establish its liability to damages' para 89.

[53] ICJ Reports 2002.

[54] Langer 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes' (2011) 105 AJIL 1, 45–7. See UK Police Reform and Social Responsibility Act 2011, clause 153 (requiring private individuals to obtain the consent of the Director of Public Prosecutions before being granted a warrant for the arrest of anyone suspected of committing grave breaches of the Geneva conventions outside the UK).

[55] *Arrest Warrant*, ICJ Reports 2002, para 61; Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, paras 85, 89; *Zhang v Zemin* [2010] NSW CA 255, 141 ILR 542, former head of State of PRC immune from prosecution for torture; see Ch 17.

Immunity of a foreign State from civil proceedings

Adjudication jurisdiction relates to the court's inquiry into the claim and adjudication by means of a judgment or declaration of rights and obligations; it extends to interlocutory proceedings, appeal, and recognition (the grant of exequatur) of foreign judgments given against States. Enforcement jurisdiction relates to the making and execution of mandatory orders or injunctions against the State in respect of, for example, restitution, damages, penalties, production of documents or witnesses, and accounts. The UNCSI, national legislation and State practice observes this distinction between immunity from adjudication and immunity from enforcement (see further Chapters 9, 16 and 17).

Immunity from adjudication: exceptions

When first recognized by the common law, the plea of immunity was treated as a general bar to all types of civil claim.[56] Under the restrictive doctrine, however, immunity is given for acts performed in the exercise of sovereign power but withdrawn in respect of acts of a commercial or private law nature. This distinction between *acta de jure imperii*, acts in exercise of the public or sovereign powers of a State, and *acta de jure gestionis*, acts performed as a private person or trader, is crucial to the present law of State immunity; it is relevant to determining whether or not a State is entitled to immunity from the jurisdiction of another State's courts in respect of a particular act, and accordingly has, as the ICJ has stated, to be applied before that jurisdiction can be exercised. As such, it is to be contrasted with the legality of the act, which is to be determined only in the exercise of that jurisdiction.[57] Chapter 12 examines the general notion of commerciality upon which many of the exceptions to state immunity are based and in the following Chapter 13 the nature of each exception and the extent to which it permits proceedings against a foreign State are discussed.[58]

Immunity from enforcement

Immunity of the foreign State from adjudication jurisdiction and the delivery of judgments against a foreign State may properly be restricted by exceptions, whereas immunity from enforcement jurisdiction in respect of such proceedings remains largely absolute. The application of coercive measures to a State and its property involves different and more directly intrusive mechanisms than the ruling of a national court as to liability. In consequence, the bar against coercive measures against a foreign State remains largely absolute, subject at the present time to the State's consent. As the ICJ observed in *Jurisdictional Immunities*:

> . . . the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow *ipso*

[56] As regards both immunity from adjudication and enforcement, an exception to such civil jurisdiction was long accorded to claims such as property claims and succession which by reason of the location and immovable nature of the property within the territory of the forum State result in the inevitable exercise of the latter's jurisdiction. See Ch 13 property and succession claims.

[57] *Jurisdictional Immunities*, para 60.

[58] As a procedural plea, it is to be contrasted with the legality of the act, which is to be determined only on the exercise of the forum State's jurisdiction.