

Contents

Part I

1	A General Perspective on the Historical Development of International Law	3
1.1	Prologue	3
1.2	Some Basic Principles	5
1.3	What Is the Meaning of International Law?	5
1.4	Some Issues Relating to the Nature of International Law: Is International Law Really Law?	8
1.5	Antiquity and Some Historical Facts of Value/International Law in the Distant Past: Ancient Egypt, Phoenicians and Ancient Greece (Transmission of Civilization)	12
1.6	Development Out of Medieval Natural Law/ <i>Jus Gentium</i>	14
1.7	The Treaty of Westphalia: 1648	19
1.8	A General Perspective on the Origin and the Development of International Law	20
1.9	Clearing the Unbeaten Path	21
1.10	The Division of the Development of International Law Into Three Periods	22
1.11	Commentary on Some Aspects of the Development of International Law: Sources of Natural Law	23
1.12	From the Law of Nations to the Name International Law	24
1.13	Private International Law and Public International Law	25
1.14	The Coming of Age of Modern International Law	27
1.14.1	A Look at the Third Period	27
1.14.2	Europe and the First World War	27
1.14.3	Some Aspects of Post-World War Two Guiding Principles of International Law	29
	References	31

2	The Origins of Absolute Immunity of States	33
2.1	Source Analysis and the Origins of <i>Par in Parem non Habet Imperium</i>	34
2.2	Jean Bodin’s Philosophy on Sovereignty	38
2.3	Thomas Hobbes	41
2.4	The Influence of the Philosophy of Thomas Hobbes	43
2.5	Claims and Counter Claims	46
2.6	Final Remarks	48
	References	49
3	The Development of Sovereign Immunity	53
3.1	France Before American Courts and Its After Effects	53
3.2	Justice Marshall and His Groundbreaking Rule	54
3.3	Analysis of Chief Justice Marshall’s Thesis	55
3.4	The Influence of Chief Justice Marshall’s Decision	62
3.5	Influence of Marshall’s Judgment on English Courts: English Courts and the Sovereign Immunity Question	63
3.6	Civil Law Countries and Sovereign Immunity	66
3.7	Russia and the Sovereign Immunity Question	68
3.8	Sovereign Immunity an International Custom? A Controversy	68
3.9	Schooner Exchange v McFaddon; Judgment Summary	72
	References	73
4	The Privileges and Immunities of States	75
4.1	General Observations	75
4.2	The Rational Foundation of State Immunity	79
4.2.1	Argument: The Supremacy of the Local Sovereign	80
4.3	Diplomatic Immunities and State Sovereignty	82
4.4	Comity of Nations, Reciprocity and Coexistence	83
4.5	Equality of States in the Sphere of International Law	85
4.6	Beneficiaries of State Immunities	88
4.6.1	Practice in the Matter of Sovereign Immunity	91
4.6.2	State Immunity in American Courts	102
4.6.3	State Immunity Issues and the Mixed Courts of Egypt	105
4.6.4	State Immunity Before South African Courts	107
4.6.5	State Immunity in British Commonwealth States	110
	References	112
5	Restrictive Immunity in U.S. and U.K. Courts	115
5.1	A Move Towards a New Rule	115
5.2	Background	115
5.3	Early Practice in Belgium and Italian Courts	116
5.4	A Move Toward Restrictive Immunity	118
5.5	Restrictive Immunity and Its Implications	120

5.6	The Change of Heart in American Practice	123
5.7	Sovereign Immunity Act of 1976: Current U.S. Law	124
5.8	Jurisdiction of the Federal Courts	125
5.9	Issues with Respect to Commencement of Action	126
5.10	Commercial Activity under FSIA	126
5.11	Contacts and Direct Effect Approach	128
5.12	Arbitration Clauses	129
5.12.1	Expropriation Claims	130
5.12.2	Non-Commercial Torts	130
5.12.3	Counterclaims	131
5.12.4	Attachment and Execution	132
5.13	The Change of Heart in British Practice	133
5.13.1	The State Immunity Act of the United Kingdom (1978)	134
5.13.2	Exceptions to Immunity Under the 1978 Act	135
5.13.3	Indirect Impleading	137
5.13.4	Waivers of Immunity and Counterclaims	138
5.13.5	Execution	138
5.13.6	Miscellaneous Considerations	140
5.14	Difficulties in Applying Restrictive Immunity	142
5.14.1	Difficulties Associated with Political Acts of States	144
5.14.2	Thoughts on Nationalization and Restrictive Immunity	145
	References	148
6	Private Suits Against African States in Foreign Courts	149
6.1	Preliminary Observations	149
6.2	Evidence of Resistance to the Restrictive Rule: Nigeria Before English, American and German Courts	153
6.3	Nigeria Before English Courts	153
6.3.1	Trendtex Trading Corporation v Central Bank of Nigeria	153
6.3.2	Nigeria Before German Courts	158
6.3.3	Nigeria Before American Courts: Part One	160
6.3.4	Nigeria before American Courts: Part Two	162
6.4	Uganda Before English Courts	163
6.5	Egypt Before Indian Courts	165
6.6	United Arab Republic Before American Courts	166
6.7	Tunisia Before United States Courts	167
6.8	Zaire Before English Courts	168
6.9	Somali Democratic Republic Before American Courts	169
6.10	Libya Before American Courts	170
6.11	People's Republic of Congo Before Canadian Courts	171

6.12	Arbitration, Default Judgment and Enforcement	172
6.12.1	Nigeria Before Switzerland and American Courts . . .	172
6.12.2	Tanzania Before American Courts	174
6.12.3	The Republic of Guinea Before American Courts . . .	176
6.12.4	Recent Developments—A Look at the DRC Before Hong Kong Courts and Other Cases: Part II	178
6.12.5	The Republic of Namibia Before US Courts: USAA Casualty Insurance Company v Permanent Mission of the Republic of Namibia	190
6.12.6	Is Resistance by African States Legally Justified? . . .	193
	References	196
7	African States and the Practice of State Immunity	199
7.1	Is It Still State Immunity or Restrictive Immunity?	199
7.2	Pre-Colonial Africa and Early African Dynasties	199
7.2.1	Some Concrete Examples of Personal Sovereigns . . .	200
7.3	The Colonial Era	203
7.3.1	The Pattern of Balkanization of Africa According to Colonial Power Boundaries	204
7.4	English Sovereign Immunity Law in African States	206
7.5	French Sovereign Immunity Law in African States	212
7.6	Africa, Self-Determination and International Law	214
7.7	Reflections on State Practice and Its Implications	217
7.7.1	What Do We Mean by State Practice?	218
7.7.2	Municipal Courts and Legal Arguments of Defendant States	220
7.7.3	Summary of Rules	223
7.8	Custom and the Concept of Persistent Objector	227
7.8.1	Are African States Bound by Restrictive Immunity?	227
7.9	Thoughts on the Persistent Objector Rule	232
7.10	The Position of African States on State Immunity	238
7.11	Preceding Observations and Conclusions	242
7.12	Conclusion	244
	References	244
8	The ILC Report On Jurisdictional Immunities of States	247
8.1	Composition of the International Law Commission	248
8.2	Preliminary Observations	249
8.3	Specific Exceptions to Immunity of States: Commercial Elements and Jurisdictional Competence	250
8.4	Principles of State Immunity Under the Draft Articles	253
8.5	Execution Against a Foreign State	255
8.6	Personal Injury or Damage to Property	256
8.7	Effects of Draft Article 2.2 on Restrictive Immunity	260

8.8	Third World Influence on the ILC Deliberations	261
8.9	Disagreement Over the Draft Articles: The Sixth Committee and the Draft Articles on Jurisdictional Immunities of States and Their Property	265
8.10	The Uncertainty of State Practice	275
	References	281
9	State Immunity and Certain Unresolved Problems	283
9.1	Some Lingering Problems	283
9.2	The Problems of Territorial Nexus or Connection	284
9.3	Problems of the Nature and Purpose Tests	289
9.4	Cuba Before the House of Lords	299
9.4.1	Mixed Activities of States Involving Private Traders	299
9.4.2	Nicaragua Before US Courts	304
9.5	The Continuing Problems of Arbitration	305
9.6	Central Banks and Certain Unsettled Problems	309
9.7	Some Problems Relating to the Act of State Doctrine	316
9.7.1	National Courts and Foreign Acts of States	316
9.8	The Overlap of Act of State	319
9.8.1	The Law of State Immunity and the Act of State Doctrine: Charges of Extraordinary Rendition False Imprisonment Against Jack Straw and Others	325
9.8.2	Commentary on the Law: Act of State Doctrine and Actions of State Officials	327
9.8.3	Commentary on State Immunity: The Application of State Immunity and Claims Against State Officials	331
9.8.4	National Privileges and Immunities Law	336
9.8.5	The U.K. Supreme Court and the Plea for State immunity and the Act of State Doctrine: Belhaj and Another (Respondent) v Straw and Others Appellants [2017] UKSC 3 and Rahmatullah (No. 1) (Respondent) v Ministry of Defence and Another (Appellants) [2017] UKSC 3.	337
9.9	Final Remarks	340
	References	340
10	State Immunity and Violation of International Law	343
10.1	Preliminary Matters	343
10.2	Private Suits Against States for Violating Human Rights	344
10.3	The State, Recognition and Juridical Equality	345
10.3.1	Immunities of Heads of States and Senior State Officials	347

10.4	Recent Case Law on International Law Crimes	349
10.4.1	General Pinochet Before English Courts	349
10.4.2	Ex-President Habre Before the Courts of Senegal and France	354
10.4.3	Colonel Qaddafi Before the Courts of France	355
10.4.4	President Robert Mugabe Before American Courts	357
10.4.5	A Brief Study of <i>Jus Cogens</i> , Obligations <i>Erga</i> <i>Omnes</i> and <i>Actio Popularis</i>	358
10.4.6	A Brief Historical Perspective	360
10.4.7	A Quest to Redefine <i>Jus Cogens</i> by the ILC	362
10.4.8	Modern Character of <i>Jus Cogens</i>	363
10.4.9	Commentary on <i>Jus Cogens</i> , Obligations <i>Erga</i> <i>Omnes</i> and <i>Actio Popularis</i>	365
10.4.10	Some Basic Features and the Application of <i>Jus</i> <i>Cogens</i>	368
10.4.11	An Example of a National Court Embracing <i>Jus</i> <i>Cogens</i>	371
10.5	UK and Ireland Before the European Court of Human Rights	372
10.6	State Immunity and World War II Damage Claims	373
10.6.1	Germany Before Greek Courts	374
10.6.2	Japan Before American Courts	376
10.7	Some Salient Legal Issues Before the ICJ: The Legality of Use of Force Before the ICJ	376
10.7.1	Congo v the Kingdom of Belgium: The Immunity of a Foreign Minister in International Law	382
10.7.2	The Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Preliminary Objections and Merits)	383
10.8	Immunity, International Crimes and American Courts	391
10.8.1	USSR Before American Courts	392
10.8.2	Hugo Princz v Germany, Before American Courts	393
10.9	Amendments to US FSIA of 1976	397
10.10	Samantar Before the US Supreme Court: Is the Judgment Consistent with International Law?	399
10.11	Is the Judgment in Samantar Consistent with General International Law?	404
10.12	Final Remarks	407
	References	413
11	UN Draft Convention on State Immunity	417
11.1	Acceptance of the Proposed Draft Convention	417
11.2	The Concept of the State for Purpose of Immunity	418
11.3	State Enterprise and Commercial Transactions	419
11.4	Commercial Character of a Contract or Transaction	421

11.5	Contracts of Employment	423
11.6	Measures of Constraint Against the State	424
11.7	A Perspective Sketch of Possible Future Problems	428
11.8	Conclusion	430
	References	431
12	The Current Law of State Immunity	433
12.1	Some Thoughts on the Law	433
12.2	The Current State of the Law	434
12.3	The Changing Scope of Sovereign Immunity	435
12.4	A Look at Current State Practice	440
12.5	Some Evidence of European State Practice	442
12.6	Asian–African Legal Consultative Committee Report	445
12.7	Further Reflections on the State of the Law: Some Salient Issues	452
12.8	Embassy Bank Accounts and Foreign Reserves	456
12.9	Employment Contracts and Restrictive Immunity	459
12.9.1	Recent Developments in Employment Contracts and State Immunity in Europe: A Commentary on Benkharbouche/Janah v Sudan Embassy and Libyan Embassy Case	468
12.9.2	A Commentary on State Immunity and Employment Claims of Ms. Benkarbouche and Ms. Janah: Did the Court Get It Right?	469
12.10	The Future of the Law of Sovereign Immunity	478
	References	481
13	New Horizons in the Law of State Immunity	483
13.1	Deciphering the Controversy and Conflicting Claims	483
13.2	State Immunity and Restrictive Immunity	483
13.2.1	Has Restrictive Immunity Attained the Status of Customary International Law?	483
13.2.2	State Immunity Versus Human Rights Law: Is There a Move from Absolute Immunity to Individual Criminal Accountability?	493
13.2.3	The Quest to Protect Human Rights Law	494
13.3	Is State Immunity Still Beneficial to the World? Basic Principles, Claims and Counter Claims	500
	References	504
14	State Immunity and Vulture Funds	507
14.1	A Perspective on the Problem of Greed and the Need for Equity and Balance	507
14.2	What Is the Meaning of Vulture Funds?	508
14.3	A Historical Overview of the Problem	509

14.4	The Chronicle of Vulture Funds Litigation: Can State Immunity Be an Effective Shield?	510
14.5	Vulture Funds and African States: A Look at Some Salient Issues	516
14.6	NML Capital v Argentina Before Ghanain Courts: Frigate Libertad, a Prey of Vulture Funds Rapacious Tactics	521
14.7	Argentina and Ghana Before the Law of the Sea Tribunal and the Quest to Have the Libertad Released: A Request for Provisional Measures by Argentina	523
14.8	A Commentary on the Legal Status of War Ships and Military Property: Some Thoughts on the Dispute	524
14.9	Warships and Military Property: The Legal Position of the Libertad	526
14.10	Law of State Responsibility and the Detention of the Frigate Libertad by Ghana	529
14.11	Final Remarks	533
	References	534
15	Concluding Statement of Part I	537
15.1	A Proposal for Resolving the Controversy	537

Part II

16	The Immunity of Heads of State and Senior Government Officials Before Foreign Courts and International Tribunals	549
16.1	Preliminary Thoughts on the Subject and the Way Forward	550
16.2	Heads of State Immunity and Some Salient Issues: The Theory of Divine Right of Kings	551
16.3	A Note on the Position of the Sovereign, Pope and the Ambassador	559
16.4	Immunity of Heads of State and International Criminal Justice: Indictment and Prosecution of Heads of State and Senior Government Officials	563
16.5	The African Union v the ICC and the Immunity Issue	566
16.6	The Rome Statute and the Need for Treaty Interpretation	567
16.7	Final Remarks: Stating the Law <i>De Lege Lata</i>	575
	References	578
17	Invoking State Immunity Before the ICJ, International Tribunals and Foreign Courts	581
17.1	Legitimacy and the Profile of International Tribunals	581
17.2	The ICJ and the Law of State Immunity: An Outline	585
17.3	The Consent of States and the Law of State Immunity	592
17.4	Foreign Criminal Jurisdiction and the Immunity of Heads of State and Senior Government Officials	592
17.5	Pinochet No 3 and Immunity <i>Ratione Materiae</i> Revisited	596

17.6	Is There <i>Usus</i> to Support an Exception to Immunity <i>Ratione Materiae</i> ?	601
17.7	Special Mission and Its Legal Implications: The Case of Khurts Bat Before English Courts	606
17.8	Immunity <i>Ratione Materiae</i> and Other Legal Issues	609
	References	612
18	The ICC and the Immunity Question	613
18.1	Commentary on Some Aspects of International Criminal Justice	613
18.2	The Indictment of President Al Bashir of Sudan by the ICC: Articles 27 & 98 and Immunity <i>Ratione Personae</i>	615
18.3	The AU's Position on the Immunity of Sitting Heads of State	623
18.4	The Withdrawal of Three African States from the ICC Statute: A Blind Fury or Legally Justified?	625
18.5	The Non-cooperation of the Democratic Republic of Congo and the Pronouncements of Pre-trial Chamber II of the ICC	627
18.6	A Look at Some New Trends in Preventing Impunity, Aspects of the Law	631
18.7	Commentary on Some Aspects of Criminal Law and the Rome Statute of 1998	633
18.8	Problems in Arresting Ex-presidents and Sitting Presidents: Is There <i>Usus</i> to Support Such Actions?	634
	18.8.1 General Noriega Before American Courts	634
	18.8.2 The Indictment of President Taylor	635
	18.8.3 The Indictment of Milosevic and Gbagbo	635
18.9	The Arresting Process and the Need for International Public Order	637
	References	643
19	The Normative Hierarchy Theory: Does <i>Jus Cogens</i> Conflict with State Immunity?	645
19.1	A Brief Explanation of the Normative Hierarch Theory	645
19.2	The Hierarchical Relationship Between International Rules: Preliminary Considerations and a Historical Background	647
19.3	Commentary on Voluntarist and Universalist Thinking on the Law	650
19.4	The Horizontal Legal Structure and Consent Based Rights of States Versus Normative Hierarchy Theory (Vertical Order)	654
19.5	<i>Jus Cogens</i> and State Immunity; Do These Legal Concepts Converge or Conflict? An Argument	660
	References	663
20	Case Study: Can a Sitting President Be Prosecuted by an International Tribunal?	665
20.1	Prosecutor v Charles Taylor-Case Number SCSL-2003-01-01: Background	665

20.2	The Preliminary Motion by the Defence on the Immunity Issue	666
20.3	Prosecution's Response	667
20.4	The Appeal Process	668
20.5	Appeal Chamber's Decision	669
20.6	Charles Taylor's Immunity Before the SCSL, Holding Heads of State Accountable: Did the Court Get It Right?	669
20.7	Accountability of Heads of State: Is this a Trend or a Well-grounded Practice or <i>Usus</i> ?	671
20.8	The Profile of Treaties and International Tribunals	674
20.9	Immunity <i>Ratione Personae</i> and the Special Sierra Leonean Court (SCSL)	676
20.10	The SCSL's Unconvincing Reasoning on Personal Immunity	684
20.11	The Prosecutor v Charles Ghankay Taylor: Judgment and Commitment	689
20.12	An Outline of the Sources of International Criminal Law	696
20.13	A Look at Nuremberg Case Law and Recent Case Law: Is the Law in a State of Flux?	698
	References	703
21	The Overlap of Immunity <i>Ratione Personae</i> and Immunity <i>Ratione Materiae</i>	707
21.1	A Hypothetical Problem on the Immunity of Heads of State Before an International Tribunal	709
21.2	How to Defend Heads of State, Heads of Government and Senior Government Officials	712
21.2.1	Defending an Indicted Leader	712
21.2.2	Customary International Law Implications	713
21.2.3	Evaluating the Rules of the Court	714
21.2.4	Credible Collection of Evidence	714
21.2.5	Superior Orders Defence Strategy	714
21.2.6	Necessity and Duress Defences	715
21.2.7	Mistake of Fact/ <i>Ignorantia Facti Juris Excusant</i>	715
21.2.8	The Principle of <i>Ignorantia Juris non Excusant</i> : Ignorance of the Law Is Not an Excuse	715
21.2.9	Double Jeopardy Defence	715
21.2.10	Credible and Expert Witnesses	716
21.3	Epilogue of Part II	716
	References	724
	Appendix	727
	The Schooner Exchange Decision by Chief Justice Marshall	727
	Judge Weiss' Concept of Restrictive Immunity (1922)	734
	The Tate Letter	735

European Convention on State Immunity	738
1972	738
US: Foreign Sovereign Immunities Act of 1976	751
28 US CODE 97 Chapter 27	751
UK: State Immunity Act of 1978	760
Chapter 33	760
The Singapore State Immunity Act 1979	772
The Pakistani State Immunity Ordinance 1981	780
South African Foreign States Immunities Act 1981	787
The ILA Montreal Draft Convention	794
1982	794
AUSTRALIAN	799
1985	799
CANADIAN	821
1985	821
ILC Draft Articles on Jurisdictional Immunities	827
1986	827
United Nations Convention on Jurisdictional Immunities of States and Their Property	838
2004	838
Statutes	853
Treaties	855
Sources	857
Table of Cases	859
Articles and Comments	869
Index	875