Editors' Introduction: State Immunity and the Need for a Global Discussion

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States have always enjoyed the privilege of sovereign immunity before foreign courts. The rule of absolute immunity, based on the classic formula *par in parem non habet jurisdictionem*, reflected a state-centered approach that dominated the international legal order until recently. Suing foreign governments in national courts was not an option and the only remedy private parties could have hoped for was the diplomatic protection of their own State.

But that era of absolute sovereign immunity has progressively vanished in the twentieth century. The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property ('the UN Convention') eventually consolidated the rejection of an already old paradigm and served as a catalyst for subsequent changes. The UN Convention, the Council of Europe Convention on the Immunity of States, the case-law of the European Court of Human Rights, and the legislation of a significant number of states, have crystalized the recognition of a restrictive immunity rule.

Nevertheless, a closer look at the ongoing process of formation of the international customary law of State immunity reveals many contradictions and genuine tensions with some overarching objectives, principles or values. Suits against sovereigns before foreign courts often generate considerable political strains between affected states, and may give rise to new disputes in, for example, the International Court of Justice, the European Court of Human Rights, the European Court of

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justice. It is also worth mentioning that some powerful, non-Western countries (for instance, China) still adhere to the absolute immunity rule.

Furthermore, the rules on sovereign immunity are subject to rapid changes under the influence of evolving national legislation and the practice of national courts. Although not yet a reflection of a general practice, we are witnessing the formation of new domestic rules restricting sovereign immunity, such as a terrorism exception in the United States and Canada allowing victims of terrorism to sue foreign States and collect relevant compensation, and an expropriation exception granting jurisdiction to US courts in cases of property taken in violation of international law. Recent proposed exceptions to State immunity ranging from causing the COVID-19 pandemic to gaining unauthorized access to a computer in the United States are quite illustrative in this regard of this general trend of restricting sovereign immunity.

On the other hand, there is an opposite trend towards an expansion of State immunity from execution, by limiting the scope of seizable State property and by adding new procedural obstacles such as the requirement of prior judicial authorization for any measure of constraint targeting foreign State's property. This is the case for instance in France and Belgium where two new statutes on immunity from execution have been enacted recently.

The existing rules can also differ noticeably among different jurisdictions and be subject to different conditions, exceptions and reservations. Authors often emphasize the lack of a uniform understanding of basic elements of the restrictive immunity rule (including such concepts as acts *jure imperii* and *jure gestionis*, commercial transaction, implied or express waiver of immunity), and they diagnose an evolution of immunity law in different and sometimes, opposite directions. Another trend is the growing role of reciprocity principle (such as in Russia, China, Argentina, Brazil, Chile, Colombia, etc.) that subjects the granting of State immunity to reciprocal obligations of the foreign state concerned. It highlights serious concerns as to whether present and proposed revolutionary changes of the State immunity regime truly reflect a quest for justice and aim to ensure redress for victims, or rather serve as an instrument of lawfare and geopolitical domination that only works against 'enemy states' but never vice versa.

The rules of sovereign immunity are thus under serious pressure from various sides. They are criticized by human rights advocates for denying access to justice for victims of the most serious fundamental rights violations. But, although the International Court of Justice, in its 2012 judgment in *Jurisdictional Immunities of States*, rejected the argument that violations of *jus cogens* norms committed by armed forces can trump sovereign immunity, the discussion did not stop there and the dispute has shifted from an international to a domestic level, where national legislators and judges have attempted to find new solutions and balances based on their own constitutional values. This is the case, for example, with respect to the Italian Constitutional Court which, despite the aforementioned ICJ ruling, held in its judgment of 10 October 2014 that a foreign state committing war crimes cannot shield itself behind the screen of immunity. A similar issue was raised in Poland where one of the political parties questioned the validity of the renunciation of reparations made by the Polish communist government in 1953 and encouraged individual claims against Germany before Polish courts.

Concurrently, others have complained that existing restrictions on State immunity are interpreted too broadly by national courts and in a way that is abusive for foreign sovereigns, or that current approaches do not reflect, or do not sufficiently rely on positions and interests of non-western states. International financial and investment law may serve as another example where interests of investors collide with core interests of states. This conflict has triggered problems concerning the legal standards applied to waivers of immunity from jurisdiction or execution (should it be express or implied; should arbitration provision in bilateral investment treaties (BITs) per se constitute waiver from all kinds of State immunity); immunity from execution in disputes relating to sovereign defaults or the payment of arbitral awards and leading to the potential attachment of assets belonging to foreign Central banks, sovereign wealth funds or state-owned enterprises. The case of Russia denying jurisdiction of arbitral tribunals and resisting to enforce investment arbitration awards under the Energy Charter Treaty (the *Yukos* award of 50 billion USD), and recent 'Crimean cases' under the Ukraine-Russia BIT, are particularly illustrative. Another controversial issue is the lawfulness of the freezing foreign states' assets on such grounds as fight against terrorism or unilateral economic sanctions.

In the context of ongoing geopolitical power shifts and deepening multi-polarity, there is an overriding need for a global discussion on the most pressing issues on State immunity such as the difficulties in establishing the current state of international customary law in light of the divergent practice of states, policy implications of recent State immunity developments and main risks associated with it for international law, driving forces behind these developments and reactions of non-Western jurisdictions to ongoing erosion of the State immunity regime, and the role of international courts in the consolidation and interpretation of the law of jurisdictional immunities of states.

This volume explores three dimensions of the evolution of the State immunity regime: Part I looks at State immunity from a comparative perspective; Part II discusses more specifically the major trends relating to the interplay between State immunity and the protection of human rights as well as counter-terrorism; and Part III examines the various interplays between State immunity and the financial obligations of States.

Part I 'Sovereign Immunity from a Comparative Perspective: Weak v. Strong Immunity Regimes', deals with the diversity of existing regimes of State immunity at the national level. This part aims to explore different approaches of particular states to sovereign immunity, their general attitude to international law and attempts to understand why some States favour a weaker State immunity regime by multiplying exceptions or interpreting them broadly, while others continuously support a stronger one and sometimes rely on the doctrine of absolute immunity. Special attention is also paid to the application of the reciprocity principle that may trigger further fragmentation and disintegration of the global State immunity approach. This part includes an analysis of the national State immunity regimes of such players as the USA (see chapter by Chimène Keitner), Germany (by Stephan

Russia (by Vladislav Starzhenetskiy), China (by Peng Wang), and also regional perspectives including Latin America (by Facundo Pérez-Aznar) and Africa (by Appolin Koagne Zoupet). This part also focuses on the role of the International Court of Justice in shaping the international law of State immunity and, in this regard, Giulia Bernabei also assesses the interpretative trends of the World Court and envisages the role that international courts at large are called to perform in this field.

Part II 'International Customary Law of Sovereign Immunity, Human Rights and Counter-Terrorism' highlights how human rights and counter-terrorism have shaped the law and practice of sovereign immunity. We have indeed witnessed attempts to limit immunity in cases involving violations of international peremptory norms. Anna Wyrozumska explores the extent to which a human rights exception to State immunity is recognised by domestic courts of the United States, Canada, Greece and Italy, the latter adopting a stance opposite to the ICJ ruling in *Jurisdictional Immunities of the State*.

Another compelling issue addressed by Eliza Ruozzi is how to bridge the gap between jurisdictional immunity and victims' rights. In this light, she explores how the rise and development of victims' rights can contribute to a progressive shrinking of State immunities, especially with regard to of the consolidation of the right to individual compensation.

Giovanni Ardito engages in an in-depth study of the of the European Court of Human Rights case-law in embassy-employment disputes in light of Article 6 of the European Convention on Human Rights and shows the difficulties the Strasbourg Court has faced in finding the proper balance between State immunity and the protection of human rights while relying on international customary law.

Finally, Magdalena Matusiak-Frącczak and Rana M. Essawy both focus in their respective chapters on the efforts of some States (USA and Canada) to counter State-sponsored terrorism by introducing so called 'terrorism exceptions' into their legislation, which permits individuals to sue foreign States before national courts by creating a private right of action. The most vital question here is whether the new State immunity exception is compatible with current international law, and how introduction of this rule by the USA and Canada intends, or not, to influence or reshape the international law of State immunity.

Part III 'Sovereign Immunity of States and their Financial Obligations' contributes to on-going debates related to the mixed and complex nature of States' financial obligations, which most often cannot be qualified as purely private or public ones, highlighting the often blurred distinction between *jure imperii* and *jure gestionis* acts, a distinction which is nonetheless of critical importance for the law of State immunity. In the absence of forum selection clauses, jurisdictional immunities are granted only with respect to *acta jure gestionis* in such cases. Recent cases involving sovereign debt restructuring by Argentina and Greece, show a high level of legal uncertainty as illustrated by the different legal approaches used in the EU and continental law as well as in Anglo-Saxon jurisdictions. In this Part, authors elaborate on perceptions of the underlying public-private law divide, cross-influences in public and private international law, and their consequences for State immunity.

Stefano Dominelli tackles the relationship between sovereign debt and State immunity in the framework of EU international civil procedure regulations and stresses the need for coordination between international public law and EU private international law. Another contribution by Johannes Ungerer highlights the lack of international consensus as to whether immunity can be raised by the issuing state through a public act of State that unilaterally modifies or lifts the obligation of repayment and suggests that differing perceptions of the underlying public-private law divide can be seen as an explanation of the divergent views.

Another burning question concerning States' financial obligations relates to highly politically sensitive issue of immunity from execution. Pierluigi Salvati explores the issue of immunity of the assets of foreign central banks and highlights a trend toward strengthening the immunity granted to foreign central banks from post-judgment enforcement measures while underlining some divergent approaches. Finally, Régis Bismuth's study shows how diplomatic concerns as well as economic interests have been prevalent in the context of the adoption of the new French statute on immunity from execution which significantly reinforces the protection enjoyed by State property. His chapter also points out that while the original declared intent was to devise a new framework based on customary international law, it turns out that it significantly and purposefully deviates from it in many ways.

This book is the result of a joint research project on Sovereign Immunity in International Law conducted by the PluriCourts Centre (University of Oslo, Norway), the National Research University 'Higher Schools of Economics' Law School (Moscow, Russia) and Science Po Law School (Paris, France). The contributors participating in the project represent not only well-known Western academic centres (University of Oslo, PluriCourts, Science Po, University of Turin, University of California, University of Hamburg, University of Genoa, University of Oxford, etc.), but also include authors representing the leading universities in China, Egypt, Argentina, Russia and Poland. One of the main aims of this volume is thus to contribute to a global discussion on the above-mentioned topics, and to search for solutions reflecting the future of the international customary law of State immunity.

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Part I
Sovereign Immunity from a Comparative Perspective: Weak v. Strong Immunity Regimes