Introduction

The aim of this book is to delineate how the law of State immunity has come to be what it is, and what it is that it has become. Before turning grandiloquent with legalese so as to lend this book some measure of respectability, I wish to confess to the reader that the study of the law of State immunity is far from an exact science and that they are well advised in particular to take all the technical terms used in this book not as terms of art but as terms of convenience, for these denote nothing more than just common factors that run through the myriad legal systems and their varied approaches to the subject of State immunity.

State immunity is a principle of customary international law. Barring a satisfactory explanation as to the meaning of 'State' and 'immunity', which would generate still more questions, this statement encompasses two propositions: first, that State immunity is a principle of international, as opposed to national or municipal, law; and secondly, that the relevant rules, insofar as can be reasonably demonstrated, are customary in nature; that is, they have come into existence without the aid of international treaties of relatively universal applicability.

State immunity has both a broad and a narrow meaning. In its broad sense, State immunity is capable of covering every situation in which a State (together with its various emanations) enjoys exemption from or non-amenability to any outside authority, be it national or international, and whether legislative, administrative or judicial. Thus, generally speaking, in the absence of its consent a State cannot be made accountable for its actions within its own borders before an international body, or before a foreign court or administrative authority; and, unless it submits to the local jurisdiction, a State is normally exempt from the proceedings of foreign national courts and tribunals, even for the acts performed

within the territory of the forum State, the immunity of diplomatic and consular missions or other types of envoys being an obvious example. Naturally, if we move our gaze onto the internal constitutional arrangements of a State, we shall find that under certain circumstances a State is even exempt from legal proceedings from its own courts or tribunals. Indeed, to the extent that the existence of individual States must pre-date that of international intercourse among them, there is good reason, though this can at best be regarded as academic, to believe that the international law principle of State immunity owes its origin to the notion of immunity in domestic law.

Over the years immunity in its broad sense has been further compartmentalized into various branches of international law. The law of international organizations addresses the dynamics between such organizations and their member States (and, in the case of the United Nations, non-member States as well – see, for example, Article 2(6) of the Charter of the United Nations). The accountability of States for their actions in their own territory is dealt with either by international treaties (such as those for the protection of human rights, which would contain a mechanism of reporting and monitoring, including the lodging of complaints and the conduct of investigations) or by such rules as the 'act of State' doctrine (as with the US courts) or 'non-justiciability' (as in the UK). In this connection, it must be noted that the issue of accountability of a State for its actions in its own territory before a foreign judicial authority, so far as international law is concerned, remains fraught with uncertainties and confusions. Needless to say, the immunity of diplomatic and consular missions and other types of envoys of a similar status is now the subject of an entirely separate body of legal rules. Moreover, an attempt to bring a State to account for its actions in its own territory before a foreign administrative authority, though logically possible, has not yet been made.

It must be pointed out from the outset that, in using words such as 'accountable', 'amenable' and their derivatives, or even such simple phrases as 'brought before a foreign court', we are using them, in the context of State immunity, as terms shorn of all substantive connotations and overtones. They indicate purely procedural rules governing the forum where a dispute is to be settled, and by no means address either the merits of the dispute or any issue of liability or substantive responsibility.

Then, 'State immunity', as currently understood to be a distinct branch of international law and as used in this book, means what it does in its narrow sense: immunity from, or non-amenability to, foreign

judicial proceedings; that is, a State cannot be sued without its consent before a foreign national court or tribunal. In saying this we normally exclude diplomatic and consular missions unless they are sued as representatives of their sending States (such as in the cases concerning contracts of employment). However, it must be borne in mind that this is too simplistic a statement; for we ought to attach different qualifications depending on what timeframe we have in mind. During the nineteenth century, the predominant position, dubbed as the 'absolute immunity' doctrine, was that a State could not be brought before a foreign domestic court under *any* circumstance; the twentieth century, especially the latter half of it, saw the emergence of a 'restrictive or relative immunity' doctrine, which made significant inroads into the absolutist position. As a consequence, when discussing the rule of State immunity during the twentieth century, one should always describe the situation in terms of two opposing practices: some courts would grant absolute immunity to foreign States whereas others would limit that immunity to a greater or lesser degree.

All this, however, is now a thing of the past. The law of State immunity now allows only limited, restrictive or relative immunity. The antagonism or antinomy between the doctrine of absolute immunity and that of restrictive immunity has long ceased to exist, thanks to a rapid dwindling of the number of States adhering to the absolute doctrine, especially following the collapse of the Soviet Union and the regimes under its tutelage. Some isolated States may or may not still stick to the traditional absolutist position but their views are largely irrelevant, either because they have hardly more than minimum contact with and presence in foreign States (such as North Korea), or because they are regularly sued in foreign courts anyway (such as Cuba in the US courts). Apart from this, no State of any international standing and whose position is known advocates absolute immunity. After all, it is the national courts that determine the theory and practice of State immunity; and at present it is their unanimous position that foreign States only enjoy limited or restricted immunity. What is under debate is only the extent to which that immunity ought to be restricted. That is, a State enjoys immunity from legal proceedings before foreign national courts in some cases but not in others; what matters now is not *whether* State immunity should be limited, but *when* and *how*.

A distinctive characteristic of the law of State immunity is its astonishing diversity and variedness – and the concomitant fragmentation – a consequence of the vagaries of the times and the idiosyncrasies of the

judges. It is chiefly judge-made law, argued before and decided by numerous national courts that are above all limited by the territoriality of their jurisdiction. These courts are bound by all manner of domestic procedural rules. They constantly refer to foreign cases; and indeed such references constitute a persistent feature in cases of State immunity, so numerous are they as to render any referential list unnecessary. This will mean that the rules deducible from State practice are replete with complexities and subtleties of various national laws. Considering the present source of rules in this field, a historical and comparative approach is both necessary and inevitable. It is the only sensible way of gaining a full appreciation of the scope and content of the law of State immunity. Only an exhaustive study of relevant national legislation and decisions of national courts as well as treaty provisions can lead to sound and reliable conclusions in this field and give an appropriate indication of the direction in which the law will evolve. What is more, in stating any rule of a purportedly general character, one should be well-advised to remain confined to those 'lowest common denominators' of the multitude of approaches developed by national courts, marked by nuances peculiar to individual national judicial systems.

These features of the law itself determine the structure of this book, which will consist of a brief history of the law; a statement of general principles and a comparative study of State practice regarding such exceptions to immunity as commercial transactions, contracts of employment, tortious liability, separate entities, enforcement of judgments and other measures of constraint, waiver of immunity; and, last but not least, an assessment of the 2004 UN Convention on State Immunity.

The historical development has been well documented by previous writers. Partly because of this and partly because of my resolve not to rest contented simply with repeating or summarizing what others have said, I have set out to delve deeper into past materials, including those cases which have been well discussed by my predecessors. This involves, in particular, going through the field already trodden by others, and hence extra time, but it has yielded extremely rewarding results. I have had a number of exciting revelations and discoveries, and these have led to conclusions that so far have eluded commentators (including myself). My wish is to present these conclusions in as convincing a manner as possible. In order to achieve this, I have endeavoured, so far as humanly possible, to provide a preponderance of evidence, gathered from a large number of cases. Also, in stating anything now considered as established

position, my idea is to tell the reader, as accurately as I possibly can, where and when this position *first* appeared. And for this I have been constantly checking and cross-checking historical sources. I have not done this merely to satisfy an antiquarian curiosity of mine; for I wish to show that, traced to its very source, the received wisdom appears largely a result of repetition only, rather than of any mysterious principles. Moreover, each re-reading of a case would lead to some new discoveries and insights, and would prompt me to look at the case in a fresh light, and that would lead to further adjustments in doctrinal reasoning. Despite the extraordinary amount of time and energy devoted to this exercise, I believe that the result can prove it worthwhile; and I shall now lay before the reader the result of my enquiries.

1 The history of State immunity

The history of the law of State immunity is the history of the triumph of the doctrine of restrictive immunity over that of absolute immunity. The accomplishment of that triumph, on the plane of international law, has been a slow, gradual and incremental process and has taken more than a century. This history is also one of specialization and particularization. The current law of State immunity has developed predominantly as a result of cases decided by national courts in legal proceedings against foreign States. Courts across the world have started with very little in their aid and have over the years developed a fully grown branch of the law, with diverse yet often detailed and elaborate principles and rules regarding various restrictions to be placed on the immunity enjoyed by foreign States from judicial proceedings; and around this vast body of case law has evolved an increasingly sophisticated academic discourse. As a matter of historical fact, judicial decisions have played a pivotal role in the evolution of the law, while doctrinal debates among the scholars are of much later occurrence and are generally of an exegetical nature in relation to the case law. That is to say, the literature in this field consists largely of comments on decided cases. However, one important contribution of academic disputation has been the refinement of the techniques adopted by the courts in characterizing and categorizing the functions and activities of the State, and in pigeonholing any particular act of a State for the purposes of granting or denying immunity; and with this refinement came the maturation of the necessary language for describing such a process. The practice concerning State immunity, comprising numerous otherwise disparate decisions by judicial and other authorities of various countries, has been endowed with necessary order and inner logic, and can now be assessed, analysed and debated within a generally accepted frame of reference. Simply put, the study of

State immunity, thanks to the efforts of generations of great legal minds, has now become a worthy discipline. This has also facilitated the process of cross-fertilization, a defining feature of the law of State immunity, for the shared, common theoretical framework has truly transcended the differences of legal system and judicial culture, and judges across the world now find it not only possible, but also imperative, to refer to the judicial decisions of other countries in order to deduce applicable rules, to derive guidance, or simply to shed light on the case at hand.

The point of departure for an examination of the history of development of the doctrine and practice of State immunity, both logically and in the sequence of time, is absolute immunity.

1. The age of absolute immunity

Basically, 'absolute immunity' means that States enjoyed immunity before foreign courts with regard to any subject matter; that is to say, in the past, a State could not without its consent be made a defendant before a foreign court. One can see at once from this statement that there could not have been, as there has never been, a truly 'absolute' immunity; for it could have been and has always been possible for a State to *consent* to be sued. Whereas it has always been agreed that a State should enjoy immunity for activities in the exercise of sovereign authority – and this indeed remains the core of the principle of immunity during the periods of both absolute and restrictive immunity – the controversy has revolved around whether immunity could be claimed with regard to non-sovereign or commercial activities as well. Generally speaking, absolute immunity was the prevailing position of international law during the nineteenth century. It means that a sovereign or sovereign State was absolutely immune from legal proceedings in foreign national courts, whatever the character of the legal relationship involved, and whatever the type and nature of the legal proceedings. That is to say, States enjoyed immunity even in respect of commercial or other private law dealings, and their property, even if used exclusively for commercial purposes, was not subject to judicial enforcement measures. This may sound outrageous in today's globalized world, where States and their entities and enterprises routinely engage in commercial, trading, and other private law activities, and commonly own, possess or dispose of commercial property, in foreign countries. However, at a time when State trading activities were rare and State presence in

foreign countries limited to a few diplomatic or military missions, that was a natural response in view of the fact that a State would normally be engaged in nothing but public or governmental activity in the territory of another State. Besides, absolute immunity was never truly absolute: it could be waived by the defendant State, and courts regularly did assume jurisdiction in cases involving local immovable property pursuant to the ancient principle of *lex rei sitae*.

Absolute immunity was granted in an age when the distinction between sovereign and non-sovereign activities was less manifest, given that State functions were at that time confined to the traditional spheres of, say, legislation, administration, national defence, and the conduct of State-to-State political relations and that, as a result, it was possible and natural to regard 'State' activities as synonymous with 'sovereign' activities. The growing participation of States in international economic activities fundamentally transformed the functions of State and that transformation resulted in a vastly different conception of the State. With the steadily increasing volume of commercial and other dealings between States and foreign private persons on an equal footing, came the gradually diminishing justifiability of a State's assertion of immunity vis-à-vis a valid claim based on such dealings in a foreign court. In this sense, the evolution of the doctrine of restrictive immunity has witnessed and to a significant extent contributed to a redefinition of sovereign activities and therefore of sovereignty, and has ultimately even led to an encroachment of the area traditionally regarded as typically sovereign.

The early history and evolution of State immunity are well documented.[1] The first case on State immunity is universally agreed to be *The Schooner Exchange*, in which Chief Justice Marshall of the US Supreme Court upheld immunity as claimed by the French emperor in an action for repossession of a ship which had been captured and converted into a man-of-war by the French Navy.[2]

However, because *The Schooner Exchange* involved a foreign warship, that is to say, because it impinged on something that is quintessentially sovereign, it cannot furnish conclusive evidence that Chief Justice Marshall was holding foreign States immune from all claims, regardless of whether such claims involved the foreign States' public or private/commercial dealings.[3] In this sense, *The Schooner Exchange* has been rightly perceived as ambiguous, since one would wonder what Justice Marshall might have decided if the ship had been a merchant vessel,[4] just as the members of the English Privy Council wondered how the previous cases

that followed the reasoning of *The Schooner Exchange* would have been decided if relationships of a more private law nature had been involved.[5] In any case, such a hypothetical reasoning is at best an ingenious way around an otherwise solid jurisprudence which was accustomed to state the principle of immunity in absolute and the broadest terms, without bothering about a purported public/private distinction.[6] In *The Cristina*, the leading UK case on absolute immunity, Lord Atkin referred to:

> two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to *both*.[7]

This leaves little room for imagining that the judges would *not* have granted immunity with respect to commercial activities. In the case of the US, such a reinterpretation of past jurisprudence was clearly foreclosed by *The Pesaro*, where the Supreme Court declared unequivocally that:

> The decision in *The Exchange* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships.[8]

Any remaining doubt should have been dispelled by *The Navemar*, in which the Supreme Court again declared:

> Admittedly a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit.[9]

Although early cases might contain much that can be converted into material in support of a restrictive immunity doctrine, the public/private dichotomy seems nonetheless to be a treacherous guide, if only because the word 'public' can be construed to cover virtually anything

and everything that a State does.[10] Thus, recasting past decisions as ambiguous in respect of immunity for commercial activities is nothing but a rationalization of a new doctrine by reference to an alleged *absence* of rules directly to the contrary. Such rationalization, otherwise ahistorical, was made possible, and indeed compelling, only when changes previously unknown – and therefore unaddressed by courts – took place, whereby the forms and nature of State activity had undergone a fundamental transformation, making it harder, and then impossible, for the defendant foreign State still to claim an immunity that distinctly belonged to the past. Before dwelling on that transformation, it is necessary briefly to address the limited exceptions to immunity in the era of absolutism.

2. Exceptions to absolute immunity

'Absolute immunity' has never been truly 'absolute'. It has actually been subject to certain exceptions from the very beginning. First, it has always been possible for a State to submit to the local jurisdiction or otherwise to waive its immunity, either by invoking the jurisdiction of the court as a plaintiff,[11] or by simply waiving it in a prior agreement or appearing as a defendant without objection.[12] It was also stated that a State could not be made a defendant unless it voluntarily submitted to the jurisdiction.[13] The correlative rule is that once a State itself brings an action then it cannot claim immunity from a counterclaim directly related to the principal claim.[14] Secondly, immovable property has always been regarded as forming an integral part of the territory of the forum State and therefore is subject to no other law than that of the territory where it is situated (*lex rei sitae*). For this reason, territorial jurisdiction has been asserted over immovable property without interruption during the whole history of State immunity;[15] and the immovable property exception to immunity has been preserved in current law on State immunity.[16] Thirdly, there might also have been other instances in which a foreign State could not claim immunity.[17] On the whole, immovable property and submission/waiver have been two main exceptions to absolute immunity from the start.[18] While there have been debates as to the true meaning, scope and significance of submission and/or waiver (such as whether the conduct of commercial activity constituted a waiver, properly so called[19]), cases involving immovable/real property have been accepted by proponents of both the absolute and the restrictive doctrine to give rise to a valid exception