CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

State Immunity in International Law

The immunity or exemption enjoyed by States from legal proceedings before foreign national courts is a crucial area of international law. On the basis of an exhaustive analysis of judicial decisions, international treaties, national legislation, government statements, deliberations in international organizations as well as scholarly opinion, Xiaodong Yang traces the historical development of the relevant doctrine and practice, critically analyses the rationale for restrictive immunity and closely inspects such important exceptions to immunity as commercial transactions, contracts of employment, tortious liability, separate entities, enforcement of judgments, waiver of immunity, and the interplay between State immunity and human rights. The book draws a full picture of the law of State immunity as it currently stands, and endeavours to provide useful information and guidance for practitioners, academics and students alike.

XIAODONG YANG was a lecturer in law at the University of Aberdeen when he wrote this book. He now works as a legal officer for the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization in Vienna.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW

Established in 1946, this series produces high quality scholarship in the fields of public and private international law and comparative law. Although these are distinct legal sub-disciplines, developments since 1946 confirm their interrelations.

Comparative law is increasingly used as a tool in the making of law at national, regional and international levels. Private international law is now often affected by international conventions, and the issues faced by classical conflicts rules are frequently dealt with by substantive harmonization of law under international auspices. Mixed international arbitrations, especially those involving State economic activity, raise mixed questions of public and private international law, while in many fields (such as the protection of human rights and democratic standards, investment guarantees and international criminal law) international and national systems interact. National constitutional arrangements relating to 'foreign affairs', and to the implementation of international norms, are a focus of attention.

The Series welcomes works of a theoretical or interdisciplinary character, and those focusing on the new approaches to international or comparative law or conflicts of law. Studies of particular institutions or problems are equally welcome, as are translations of the best work published in other languages.

General Editors

James Crawford SC FBA
Whewell Professor of International Law, Faculty of Law, University of Cambridge

John S. Bell FBA
Professor of Law, Faculty of Law, University of Cambridge

A list of books in the series can be found at the end of this volume.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

State Immunity in International Law

Xiaodong Yang

CAMBRIDGE
UNIVERSITY PRESS

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521844017

© Xiaodong Yang 2012

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 2012

Printed in the United Kingdom by the MPG Books Group

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging-in-Publication Data

Yang, Xiaodong, 1965–
State immunity in international law / Xiaodong Yang.
p. cm. – (Cambridge studies in international and comparative law)
ISBN 978-0-521-84401-7 (Hardback)
1. Immunities of foreign states. 2. Government liability (International law) I. Title.
KZ4012.Y36 2012
342.08′8–dc23

2011041596

ISBN 978-0-521-84401-7 Hardback

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party internet websites referred to
in this publication, and does not guarantee that any content on such
websites is, or will remain, accurate or appropriate.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

To my brothers and their families
For everything

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

Contents

Foreword by Professor James Crawford *page* xvi
Preface and acknowledgements xix
Abbreviations xxiii
Table of cases xxx
Legal instruments and codification documents cliii

Introduction 1

1 The history of State immunity 6
1. The age of absolute immunity 7
2. Exceptions to absolute immunity 10
3. The emergence of the doctrine of restrictive immunity 11
4. The descent of the State 19
5. The irrelevance of ideologies 23
6. The defendant States 25
7. The sources of the law of State immunity 26
8. Cross-fertilization 27
9. Terminology 29
Conclusion 31

2 General principles 33
1. A general statement of principles 34
2. State immunity as a principle of customary international law 34
3. The presumption of immunity 37
4. Immunity and municipal law 42
5. The legal basis for immunity 44

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

5.1. 'Sovereignty' and the affiliated concepts 46
5.2. *Par in parem non habet imperium*? 51
5.3. What is the basis of immunity? 55
6. The legal basis for denying immunity 58
6.1. The 'private person' test 59
6.2. The principle of territorial jurisdiction 64
6.3. Private act plus territoriality – *Binnenbeziehung* 68
Conclusion 73

3 Commercial activity 75
1. What is a commercial activity? 76
2. What is a non-commercial activity? 79
3. Nature or purpose? 85
3.1. The 'nature' approach 86
3.2. The difficulties with the 'nature' approach 87
3.3. The 'purpose' approach 98
3.4. The 'context' approach 103
3.5. A summary 108
4. The jurisdictional nexus requirement under the US FSIA 108
4.1. The first clause of section 1605(a)(2) 110
4.1.1. 'Based upon a commercial activity' 110
4.1.2. 'Substantial contact' 112
4.2. The second clause of section 1605(a)(2) 113
4.3. The third clause of section 1605(a)(2) 115
4.3.1. The 'act' 116
4.3.2. The 'direct effect' 124
4.3.3. 'An immediate consequence' 125
4.3.4. The 'place of performance' test 127
4.3.5. The 'legally significant act' test 129
Conclusion 129

4 Contracts of employment 132
1. Terminology 134
2. The peculiar features of employment cases 136
2.1. Specialized tribunals 136
2.2. The inadequacy of the nature/private person test 137
3. Two models 143
4. The UK Model 144

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

4.1. The European Convention 144
4.1.1. The plaintiff 145
4.1.2. The place of performance 147
4.1.3. The choice of law 147
4.2. The UK SIA 148
4.2.1. Contracts of employment as a separate category 149
4.2.2. The plaintiff 149
4.2.3. The choice of law 149
4.3. The Australia FSIA 150
4.4. Other instruments 152
4.5. The importance of having a contract 154
5. The US Model 157
5.1. The US FSIA 157
5.2. The plaintiff 162
5.2.1. Individuals: their nationality 162
5.2.2. Trade unions 162
6. Diverse approaches 164
6.1. The employment relationship 165
6.2. The duties and functions of the employee 166
6.3. The status of the employer 170
6.4. The acts of the employer 171
6.5. The status of the employee 172
6.6. The nature of the particular activity 173
6.7. The territorial connection 173
6.8. The choice of law clause 174
6.9. The remedies sought 175
7. The savings regime 179
7.1. Diplomatic and consular missions 179
7.1.1. Proceedings against the foreign State 181
7.1.2. 'Institutional aims' 185
7.1.3. Proceedings against the diplomat personally 191
7.2. Foreign armed forces 193
7.3. Other public institutions 194
8. Diversity and lack of uniform rules 194
Conclusion 196

5 Non-commercial torts 199
1. Terminology 199
2. The targeted torts 200

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

2.1. Physical injury and tangible property 200
2.2. 'Insurable risks'? 201
2.3. 'Discretionary function' 203
3. The *jure imperii* / *jure gestionis* distinction? 207
4. The territorial connection 215
4.1. Tortious act/omission only 216
4.2. Injury/damage only 218
4.3. Both tortious act/omission and injury/damage 221
4.4. A direct effect? 223
4.5. States without immunity legislation 224
5. Attribution 224
6. The terrorism exception in US law: a departure 225
Conclusion 228

6 Separate entities 230
1. Terminology 231
2. Diverse approaches 232
2.1. The UK Model 232
2.2. The US Model 242
2.2.1. The presumption of immunity 244
2.2.2. A question of status 244
2.2.3. 'A separate legal person' 247
2.2.4. 'An organ of a foreign State' 249
2.2.5. 'Pooling' 259
2.2.6. 'Tiering' 264
2.2.7. The question of timing 273
2.2.8. Other uses of the instrumentality status 273
2.2.9. The Canadian law 274
2.3. Comparison and summary 277
2.4. Somewhere in-between: the Australian law and others 280
2.5. The practice of the States without immunity statutes 283
3. Piercing the corporate veil? 287
Conclusion 296

7 Expropriation 298
1. The general principle: immunity 299
2. Legality and immunity 301
3. The ILC's aborted provision 303

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

4. The 'expropriation' provision in the US FSIA 303
4.1. 'Rights in property' 305
4.2. 'Taken in violation of international law' 307
4.3. The territorial nexus requirement 311
5. The Helms-Burton Act 313
Conclusion 315

8 Waiver of immunity 316
1. The US practice 317
1.1. Who can waive immunity? 317
1.2. Explicit or express waiver 319
1.3. How explicit must an explicit waiver be? 322
1.4. Implicit or implied waiver 324
1.4.1. Arbitration 325
1.4.2. The governing law of a contract 327
1.4.3. Participation or involvement in litigation 329
1.5. Implicit waiver as explicit waiver 333
1.6. The specificity of waiver 333
1.7. Counterclaims 334
2. The UK practice 335
3. The practice of other States 340
4. Does a violation of human rights constitute an implied waiver? 340
Conclusion 342

9 Measures of constraint 343
1. Terminology 344
2. Two distinct immunities: immunity from suit and immunity from execution 347
2.1. The judicial power of the court 348
2.2. The universal distinction between the two immunities 350
2.2.1. The treaties 351
2.2.2. The US FSIA 353
2.2.3. The UK SIA and other national statutes 356
2.2.4. The practice of other States 358
2.2.5. Two distinct immunities: a universal rule 361
3. The resurfacing of the 'purpose' test 362
3.1. The treaties 363
3.2. The US FSIA 363

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

3.3. The UK SIA and other national statutes 367
3.4. The practice of the States without immunity legislation 369
4. Prejudgment measures 373
4.1. Immunity as a preliminary issue 374
4.2. The conditions for prejudgment measures 378
4.2.1. Under the same conditions as execution 378
4.2.2. Under more liberal conditions 383
4.2.3. Under stricter conditions 383
5. The conditions for measures of constraint 390
5.1. Waiver 390
5.2. The 'purpose' test 392
5.3. Separate entity ownership 394
5.3.1. Legal instruments 394
5.3.2. The practice of the States without immunity legislation 398
5.4. The 'connection' requirement 399
5.4.1. Subject-matter connection 399
5.4.2. Territorial connection – *Binnenbeziehung* 399
5.4.3. The entity connection 401
5.5. The territorial presence requirement 402
5.6. Executive oversight or authorization 404
6. Categories of property under special protection 404
6.1. Diplomatic property 404
6.1.1. Diplomatic premises 405
6.1.2. Embassy bank accounts 407
6.2. Central bank property 410
6.2.1. The US FSIA 410
6.2.2. The UK SIA 414
6.2.3. The Australia FSIA 416
6.3. Military property 417
6.4. Other types of public property 418
7. Mixed accounts and accounts without definite destination 418
7.1. Mixed accounts 418
7.2. Accounts without definite destination 421
Conclusion 421

10 State immunity and human rights violations 423
1. Territorial jurisdiction 424
2. State immunity and criminal proceedings 426

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

3. State immunity and *jus cogens* 428
4. The assertion of extraterritorial jurisdiction 431
5. The State and its officials 432
6. The *Pinochet* case: a dissection 436
7. Immunity and legality 438
Conclusion 440

11 The genesis of the UN Convention 441
1. Early efforts at codification 441
2. The work of the International Law Commission 446
3. The debate in the General Assembly Sixth Committee 447
4. Universal support for the UN Convention 454
5. What the UN Convention enshrines 455
6. What the UN Convention avoids 456
Conclusion 457

General conclusions 459
Notes 466
Bibliography 706
Index 747

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

Foreword

State immunity is a rule of international law aimed at facilitating the performance of State functions by preventing the State from being sued in foreign courts. Aimed as it is at the conduct, specifically the abstention, of those courts, it depends substantially on their law and procedural rules conforming with international requirements. Correspondingly the law of State immunity developed primarily through domestic case law and legislation, with limited treaty practice. Only on 2 December 2004 did the General Assembly adopt the UN Convention on Jurisdictional Immunities of States and Their Property, based on the International Law Commission's lengthy work on the topic.[1] Xiaodong Yang underscores the importance of the Convention, referring to it as 'an epoch-making document' marking 'the final establishment of restrictive immunity as the prevailing doctrine in international law'.

The book presents a comprehensive overview of the development of the law and doctrine of State immunity, trying to 'delineate how the law of State immunity has come to be what it is, and what it is that it has become'. This is done through a systematic examination of over 2,000 cases decided over two centuries, combined with an analysis of treaties, national legislation, government statements, discussions in international organizations, and writings of scholars. The strength of the work is very much in the detailed analysis of the extensive caselaw, as well as of the literature, which he does with great vigour and capacity for legal analysis.

The book explores two principal themes – a critical analysis of the proposed rationales for State immunity and the gradual change to the restriction of the formerly monolithic principle of absolute

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

immunity. In a systematic analysis of the different theories of State immunity Dr Yang demonstrates that it might not be possible to pin down an exact rationale for State immunity as between the various grounds currently advanced: sovereignty, independence, equality, dignity, comity, and the Latin maxim *par in parem non habet imperium*. He highlights the lack of reference to the legal basis of immunity in the practice of courts. With regard to restrictions on the principle of absolute immunity, Dr Yang correctly shows that '[w]hat is under debate is only the extent to which that immunity ought to be restricted'. He emphasizes that the true cause of the replacement of absolute immunity by restrictive immunity was not any theoretical breakthrough in the doctrine of international law, but the changed reality of international economic life: the dramatic increase of State trading and commercial activities in foreign territories.

As Dr Yang points out in this lucid work, State immunity 'is chiefly judge-made law, argued before and decided by numerous national courts that are above all limited by the territoriality of their jurisdiction'. He demonstrates how this leads to the rules deduced from State practice being replete with complexities and subtleties of various national laws. This he uses as a justification for the historical and comparative approach he adopts in conducting the study of State immunity. He aims to distill sound and reliable conclusions in this field and give an appropriate indication of the direction in which the law will evolve. Dr Yang observes two essentially opposing trends: *unification* in general principles and *fragmentation* in technical rules – while the courts have come to be increasingly unanimous on the general principles concerning the grant and denial of immunity, the law itself continues to differentiate, particularize and specialize, with progressively more refined domestic rules concerning the conditions for the grant of immunity.

Dr Yang provides new insight into the 'nature' and 'purpose' tests, showing how the so-called 'nature' test has repeatedly proved to be inadequate, especially in respect of contracts of employment, and how the 'purpose test', discredited in many courts at the adjudicative stage, re-emerges at the enforcement stage to be a determinative factor. He demonstrates how current case law suggests that courts often have to resort to a multifactor analysis, considering all the relevant factors of a case, including the purpose of the act in question.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

Overall, the book is a vigorous, clear and detailed account of a subject–matter which will continue to play an important role in international life. Despite the extensive literature on this topic, this book manages to add original insights and its comprehensiveness has a value of its own.

James Crawford
Whewell Professor of International Law
Lauterpacht Centre for International Law
University of Cambridge

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

Preface and acknowledgements

This book grows out of part of my thesis submitted for the degree of Doctor of Philosophy at the Faculty of Law, University of Cambridge, in 2002. Unlike in the Ph.D. thesis, I have now, for the publication of the book, concentrated on the more 'traditional' aspects of State immunity, such as commercial transactions, non-commercial torts, contracts of employment and the enforcement of judgments, while giving issues of, say, the interplay of State immunity and human rights, and related subjects, no more than some very general remarks. I have considerably expanded my Ph.D. thesis and have thoroughly researched the whole area of State immunity, with a time span of two centuries.

The aim of the book is to state and expound the subject of State immunity in current international law, tracing its evolution and critically analysing various doctrinal intricacies and practical concerns. I have endeavoured to make my book three things at once: an interesting exposition of the subject for academics in the quiet of the study, a useful practical reference text for lawyers in the courtroom, and a friendly and accessible research guide for students in the classroom. To what extent I have succeeded I leave to the judgment of the reader; but I nonetheless wish to appeal to their favourable opinion by pointing out some of the delicate balancing acts that I have had to perform: being thorough without weighing down the narrative with tedious detail; providing necessary historical insights without burdening the reader with antiquated cases that are of limited value in today's court; and drawing general propositions that would serve as meaningful points of reference without making them too reductive and removed from reality. I cannot pretend to be completely exhaustive: new cases keep coming out even as I am putting the final punctuation mark to this book. Nor can I say that I have left no stone unturned; but what I can indeed say is that I have

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

turned every known stone more than once. As far as possible, I have tried my best to bring the book up to date with the judicial practice. Insofar as the notion should apply to Public International Law at all, this book hopes to state the law as at 1 December 2011.

I am greatly and profoundly indebted to my supervisor, Professor Christine Gray at St John's College, University of Cambridge. She has been a most strict and responsible supervisor and a most considerate friend. She gave me meticulous advice at every stage and on every aspect of my research, never missing even the minutest of details, unfailingly encouraged me in my time of difficulty, and showed the kindest care for my career and my future. Without her guidance and support this book would not exist. I have always regarded and will continue to regard myself as a most fortunate student who has learned and has become confident in his trade under the ever-watchful eyes of a great teacher. More than that, for me her friendship has been a source of enduring inspiration, strength and hope. To her I owe an everlasting gratitude.

I am deeply grateful to my examiners, Professor James Crawford at Jesus College, University of Cambridge, and Professor Sir Christopher Greenwood at the London School of Economics, now Judge of the International Court of Justice at The Hague, who kindly approved my thesis without reservation, and whose good humour and graciousness made my viva a delightful and memorable experience.

I came to know Professor Crawford in 1995, when I first worked at the annual session of the UN International Law Commission as assistant to the Chinese member, the late Professor He Qizhi. Since then Professor Crawford has kindly helped me on many occasions. One of the earliest and most renowned authorities on State immunity, and originator and drafter of the Australian Foreign States Immunities Act of 1985, he has been most generous in sharing with me his expertise, insights and experience, for which I am wholeheartedly grateful. As General Editor of the Cambridge Studies in International and Comparative Law, of which my book is to form a part, he made the crucial suggestion that I concentrate on the traditional aspects of State immunity in my book, a suggestion the perceptiveness of which I came more and more to appreciate and admire the further I proceeded with the preparation for the publication of the book.

I should now record my blessings over the years across two careers when I have had the immense fortune and honour to be inspired, guided and helped by a great many people. Thus I owe an enormous debt of gratitude to Professor Li Peiying, for her unwavering confidence in me throughout all these years and for her tender care for myself and

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

my family; to the late Professor Gong Xiangrui, for his teachings and friendship; to Professor Gong Renren, who first introduced me to the subject of State immunity while I was a student at the School of Law, Beijing University, and who has set me a shining example over these years with his deep sense of social responsibility; to Dr Zhang Kening, for helping me get my job with the Foreign Ministry and for his lasting friendship; to Judge Liu Daqun, for his care, help and mentoring when I first started my diplomatic career, and for his unstinting support at crucial junctures of my life; to Judge Xue Hanqin, for her friendship and advice; to the late Professor He Qizhi, for his good humour and teachings; to Dr Odette Jankowitsch-Prevor, for her enduring friendship, care and encouragement throughout all these years and for her continued support for my career aspirations; to Professor Akbar S. Ahmed, who encouraged me and gave me crucial help whenever I needed it, and who continues to inspire me with his vision, profound knowledge, penetrating insights, untiring spirit and deep sense of justice; to Mr Timothy J. Winter, whose encouragement and help came to me at each critical moment, and whose erudition, perspicacity and sense of humour demonstrate to me the possibility of living serenely in a hectic age; to Professor Paul Beaumont, who as Head of the School of Law, University of Aberdeen, kindly offered me the lectureship which gave me the time and resources to complete my research; to Professor Francis Lyall, for his invaluable guidance during my first years as a lecturer, and for his friendship, encouragement and help; to Professor Anthony Carty, who has been for me a critical teacher and a caring friend, and has given me invaluable advice and guidance in my work; to Professor Anthony Aust, who has introduced me to the wider community of international lawyers, has encouraged and supported me and has shared with me his vast experience and insights; to Sir Franklin Berman for his friendship and help; to the late Dr Geoffrey Marston of Sidney Sussex College, Cambridge, for supervising and guiding me during Professor Gray's sabbatical; to Professor Elihu Lauterpacht for his kind and timely help when I was a student at Cambridge; to Professor Bryan MacGregor, former Head of the College of Arts and Social Sciences, for his help at Aberdeen University; and to Ms Lisa Tabassi, for her friendship and advice, and her kind encouragement and support when I finally prepared the typescript for publication.

I am truly grateful to my editors at Cambridge University Press, Ms Finola O'Sullivan, Mr Richard Woodham, Ms Nienke van Schaverbeke, and Mr Ed W. Robinson, who have been most gracious and indulgent in allowing me the time to complete the book, and who have seen through

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

its publication with dedication and professionalism. I am also most grateful to Ms Cheryl Prophett, whose careful reading of the typescript has yielded numerous refinements; and to Mr John Jeffries, for preparing a fine index for the book.

The British Council funded my studies for the Diploma in International Law at Cambridge in the academic year 1998–1999. That was the single most important opportunity I have ever had in my life. My special thanks to this great organization that has changed the lives of so many like me.

My special thanks also go to the staff at the Squire Law Library, Cambridge, and at the Taylor Library, Aberdeen, who are the most pleasant, helpful and competent librarians I have ever met.

I also wish to thank the editors of the *British Year Book of International Law* and of the *International Company and Commercial Law Review*, for their kind permission to use portions of my articles published in these journals.

I now wish to record my profound gratitude to the people to whom I owe my new life. Words fail me when I come to mention my brothers, to whom this book is gratefully dedicated. They loved me and trusted me, gave me hope and courage, and financially supported me through my PhD years at Cambridge and thus helped me realize a dream, which would otherwise have remained a dream, long lost and forgotten. Food in the desert, just as Moses and his people were given: such is the immensity of the debt I owe them, a debt which it will never be in my poor power to repay. I shall pray for them and for their families as long as I live.

This book then bears testimony to the most humbling experience in my life. I therefore attribute every single merit that may be found in this book to the guidance, encouragement, help, and support of these extraordinary people whom I have had the honour and privilege to call my friends and colleagues, and I reserve for myself the sole responsibility for all the defects and errors. E. M. Forster once said that the reason why he wrote was to win the respect of people whom he respected. For me with my humble abilities I would be quite content if my teachers and my friends could say that their trust and confidence in me has not been altogether misplaced.

Finally I wish to thank my wife Mina and my daughters Salwa and Sarah, and my extended families on both sides, for their love, trust and care, and for their patient forbearance of my unavoidable and yet unforgivable neglect.

Xiaodong Yang
Vienna

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

Abbreviations

AALCO	Asian-African Legal Consultative Organization
AALR	*Anglo-American Law Review*
ABA	American Bar Association
AD	Annual Digest of Public International Law Cases
AEDPA	Antiterrorism and Effective Death Penalty Act of 1996
AFDI	*Annuaire français de droit international*
African JICL	*African Journal of International and Comparative Law*
AI	*Arbitration International*
AIDI	*Annuaire de l'Institut de Droit international*
AJIL	*American Journal of International Law*
ALI	American Law Institute
ALRC	Australian Law Reform Commission
APLD	*All Pakistan Legal Decisions (Journal)*
Arizona LR	*Arizona Law Review*
ASDI	*Annuaire suisse de droit international*
Asian YIL	*Asian Yearbook of International Law*
ASIL Proceedings	*American Society of International Law Proceedings*
ATF	Arrêts du Tribunal Fédéral Suisse
AUILR	*American University International Law Review*
AUJILP	*American University Journal of International Law and Policy*
Australia FSIA	Australia Foreign States Immunities Act of 1985
Austrian JPIL	*Austrian Journal of Public and International Law*
Austrian RIEL	*Austrian Review of International and European Law*
AYIL	*Australian Yearbook of International Law*
Baltic YIL	*Baltic Yearbook of International Law*
BCICLR	*Boston College International and Comparative Law Review*
BCTWLJ	*Boston College Third World Law Journal*
Berkeley JIL	*Berkeley Journal of International Law*

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

BGE	Bundesgerichtsentscheide or Entscheidungen des Schweizerischen Bundesgerichts
Brooklyn JIL	*Brooklyn Journal of International Law*
BUILJ	*Boston University International Law Journal*
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BYBIL	*British Year Book of International Law*
BYULR	*Brigham Young University Law Review*
California LR	*California Law Review*
California WILJ	*California Western International Law Journal*
Cambridge YELS	*Cambridge Yearbook of European Legal Studies*
Canada SIA	Canada State Immunity Act of 1982
Cardozo LR	*Cardozo Law Review*
Chicago JIL	*Chicago Journal of International Law*
CJIL	*Chinese Journal of International Law*
CLF	*Criminal Law Forum*
CLJ	*Cambridge Law Journal*
Columbia JLA	*Columbia Journal of Law and the Arts*
Columbia JTL	*Columbia Journal of Transnational Law*
Columbia LR	*Columbia Law Review*
Connecticut JIL	*Connecticut Journal of International Law*
Cornell ILJ	*Cornell International Law Journal*
Creighton LR	*Creighton Law Review*
Criminal LR	*Criminal Law Review*
CWRLR	*Case Western Reserve Law Review*
CYIL	*Canadian Yearbook of International Law*
Dalloz	Jurisprudence Générale: Répertoire Méthodique et Alphabétique de Législation, de Doctrine et de Jurisprudence
Denver JILP	*Denver Journal of International Law and Policy*
DePaul LR	*DePaul Law Review*
Dickinson JIL	*Dickinson Journal of International Law*
DPCI	*Droit et pratique du commerce international*
Duke JCIL	*Duke Journal of Comparative and International Law*
Duke LJ	*Duke Law Journal*
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EHRLR	*European Human Rights Law Review*
EJIL	*European Journal of International Law*
Emory ILR	*Emory International Law Review*
Emory JIDR	*Emory Journal of International Dispute Resolution*

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

Emory LJ	*Emory Law Journal*
Finnish YIL	*Finnish Yearbook of International Law*
Florida JIL	*Florida Journal of International Law*
Fordham ILJ	*Fordham International Law Journal*
Fordham LR	*Fordham Law Review*
GAOR	(United Nations) General Assembly Official Records
Georgetown LJ	*Georgetown Law Journal*
Georgia JICL	*Georgia Journal of International and Comparative Law*
Georgia LJ	*Georgia Law Journal*
Georgia LR	*Georgia Law Review*
German LJ	*German Law Journal*
German YIL	*German Yearbook of International Law*
GMULR	*George Mason University Law Review*
GWILR	*George Washington International Law Review*
GWJILE	*George Washington Journal of International Law and Economics*
GWLR	*George Washington Law Review*
Harvard HRJ	*Harvard Human Rights Journal*
Harvard ILCJ	*Harvard International Law Club Journal*
Harvard ILJ	*Harvard International Law Journal*
Harvard LR	*Harvard Law Review*
Hastings ICLR	*Hastings International and Comparative Law Review*
Hastings LJ	*Hastings Law Journal*
Hofstra LR	*Hofstra Law Review*
Houston JIL	*Houston Journal of International Law*
Houston LR	*Houston Law Review*
HRLR	*Human Rights Law Review*
HYIL	*Hague Yearbook of International Law*
IALR	*International Arbitration Law Review*
IBLJ	*International Business Law Journal*
ICCLR	*International Company and Commercial Law Review*
ICJ	International Court of Justice
ICLQ	*International and Comparative Law Quarterly*
ICSID	International Centre for the Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
IDI	Institut de Droit International
IL	*International Lawyer*
ILA	International Law Association

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

ILC	(United Nations) International Law Commission
ILF	*International Law Forum*
ILM	International Legal Materials
ILR	International Law Reports
ILSA JICL	*ILSA Journal of International and Comparative Law*
ILT	*International Legal Theory*
Israel LR	*Israel Law Review*
Italian YIL	*Italian Yearbook of International Law*
ITBL	*International Tax and Business Lawyer*
ITLR	*International Trade Law & Regulation*
JAIL	*Japanese Annual of International Law*
JALC	*Journal of Air Law and Commerce*
JCL	*Journal of Chinese Law*
JCSL	*Journal of Conflict & Security Law*
JDI	*Journal du droit international*
JDIP	*Journal du droit international privé*
JIA	*Journal of International Arbitration*
JIBLR	*Journal of International Banking Law and Regulation*
JICJ	*Journal of International Criminal Justice*
JMLC	*Journal of Maritime Law and Commerce*
John Marshall LR	*John Marshall Law Review*
JTLP	*Journal of Transnational Law and Policy*
JWTL	*Journal of World Trade Law*
JYIL	*Japanese Yearbook of International Law*
LCP	*Law and Contemporary Problems*
LJIL	*Leiden Journal of International Law*
LNTS	League of Nations Treaty Series
Louisiana LR	*Louisiana Law Review*
Loyola LAICLJ	*Loyola of Los Angeles International and Comparative Law Journal*
Loyola LAICLR	*Loyola of Los Angeles International and Comparative Law Review*
LPIB	*Law and Policy in International Business*
LQR	*Law Quarterly Review*
LS	*Legal Studies*
Marquette LR	*Marquette Law Review*
Maryland JILT	*Maryland Journal of International Law and Trade*
McGill LJ	*McGill Law Journal*
Melbourne JIL	*Melbourne Journal of International Law*
Melbourne ULR	*Melbourne University Law Review*

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

Michigan JIL	*Michigan Journal of International Law*
Michigan LR	*Michigan Law Review*
Michigan YILS	*Michigan Yearbook of International Legal Studies*
Minnesota JGT	*Minnesota Journal of Global Trade*
Minnesota LR	*Minnesota Law Review*
MLR	*Modern Law Review*
Monash ULR	*Monash University Law Review*
MSJIL	*Michigan State Journal of International Law*
NATO	North Atlantic Treaty Organization
NDAA	National Defense Authorization Act for Fiscal Year of 2008
New England LR	*New England Law Review*
New York ILR	*New York International Law Review*
NILR	*Netherlands International Law Review*
Nordic JIL	*Nordic Journal of International Law*
North Car JILCR	*North Carolina Journal of International Law and Commercial Regulation*
Northwestern JILB	*Northwestern Journal of International Law and Business*
NYIL	*Netherlands Yearbook of International Law*
NYLSJICL	*New York Law School Journal of International and Comparative Law*
NYU JILP	*New York University Journal of International Law and Politics*
NYU JLPP	*New York University Journal of Legislation and Public Policy*
NYULR	*New York University Law Review*
NZYIL	*New Zealand Yearbook of International Law*
OAS	Organization of American States
OJLS	*Oxford Journal of Legal Studies*
Oregon LR	*Oregon Law Review*
Pakistan SIO	Pakistan State Immunity Ordinance of 1981
Polish YIL	*Polish Yearbook of International Law*
PSLR	*Penn State Law Review*
RBDI	*Revue belge de droit international*
RC	*Recueil des Cours: Collected Courses of the Hague Academy of International Law*
RCDIP	*Revue critique de droit international privé*
RDI	*Rivista di diritto internazionale*
RDILC	*Revue de droit international et de législation comparée*
RGDIP	*Revue générale de droit international public*
RHDI	*Revue hellénique de droit international*
RIAA	Reports of International Arbitral Awards

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

RSDIE	*Revue suisse de droit international et de droit européen*
Rutgers LR	*Rutgers Law Review*
SAJHR	*South African Journal on Human Rights*
San Diego LR	*San Diego Law Review*
SAYIL	*South African Yearbook of International Law*
SI	(United Kingdom legislation) Statutory Instrument
Singapore SIA	Singapore State Immunity Act of 1979
South Africa FSIA	South Africa Foreign States Immunities Act of 1981
Southwestern JLTA	*Southwestern Journal of Law and Trade in the Americas*
Spanish YIL	*Spanish Yearbook of International Law*
Sri Lanka JIL	*Sri Lanka Journal of International Law*
SRSC	Summary Record of the (United Nations General Assembly) Sixth Committee
Stanford JIL	*Stanford Journal of International Law*
Temple ICLJ	*Temple International and Comparative Law Journal*
Texas ILJ	*Texas International Law Journal*
Texas LR	*Texas Law Review*
TJLR	*Thomas Jefferson Law Review*
TLCP	*Transnational Law and Contemporary Problems*
TMCLR	*Thomas M. Coolie Law Review*
Tulane JICL	*Tulane Journal of International and Comparative Law*
Tulane LR	*Tulane Law Review*
Tulane MLJ	*Tulane Maritime Law Journal*
Tulsa JCIL	*Tulsa Journal of Comparative and International Law*
TWLS	*Third World Legal Studies*
UCD JILP	*University of California Davis Journal of International Law and Policy*
UChLF	*University of Chicago Legal Forum*
UChLR	*University of Chicago Law Review*
UCinLR	*University of Cincinnati Law Review*
UCLA JILFA	*UCLA Journal of International Law and Foreign Affairs*
UILR	*University of Illinois Law Review*
UK SIA	United Kingdom State Immunity Act of 1978
UMiaIALR	*University of Miami Inter-American Law Review*
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
UPennJIBL	*University of Pennsylvania Journal of International Business Law*

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

UPennLR	*University of Pennsylvania Law Review*
US FSIA	United States Foreign Sovereign Immunities Act of 1976
Valparaiso ULR	*Valparaiso University Law Review*
Vanderbilt JTL	*Vanderbilt Journal of Transnational Law*
Vanderbilt LR	*Vanderbilt Law Review*
Villanova LR	*Villanova Law Review*
Virginia JIL	*Virginia Journal of International Law*
Virginia LR	*Virginia Law Review*
VUWLR	*Victoria University Wellington Law Review*
Whittier LR	*Whittier Law Review*
Willamette JILDR	*Willamette Journal of International Law and Dispute Resolution*
Wisconsin ILJ	*Wisconsin International Law Journal*
WLLR	*Washington and Lee Law Review*
WMLR	*William and Mary Law Review*
Yale JIL	*Yale Journal of International Law*
Yale LJ	*Yale Law Journal*
YCA	*Yearbook of Commercial Arbitration*
YILC	*Yearbook of the International Law Commission*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-84401-7 - State Immunity in International Law
Xiaodong Yang
Frontmatter
More information

Table of cases

Decisions of International Courts and Tribunals

International Court of Justice

Armed Activities (Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) (Request for the Indication of Provisional Measures)), International Court of Justice (ICJ), Order of 10 July 2002, *ICJ Reports* 2002, p. 219 430

Armed Activities (Case concerning Armed Activities on the Territory of the Congo: Jurisdiction of the Court and Admissibility of the Application (Democratic Republic of the Congo v. Rwanda)), ICJ, Judgment of 3 February 2006, *ICJ Reports* 2006, p. 6 430, 431

Arrest Warrant (Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)), ICJ, Judgment of 14 February 2002, *ICJ Reports* 2002, p. 3; 128 ILR 1 30, 35, 51, 54, 425, 429, 434, 436, 437

Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase), ICJ, Judgment of 5 February 1970, *ICJ Reports* 1970, p. 3 430

East Timor (Portugal v. Australia), ICJ, Judgment of 30 June 1995, *ICJ Reports* 1995, p. 90 425, 430, 431

Genocide Convention (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Preliminary Objections)), ICJ, Judgment of 11 July 1996, *ICJ Reports* 1996, p. 595 430

Genocide Convention (Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)) (Merits), ICJ, Judgment of 26 February 2007, *ICJ Reports* 2007, p. 43 427

© in this web service Cambridge University Press www.cambridge.org