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Introduction – International Immunities in a State of Flux?

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I BACKGROUND

Few topics of international law speak to the imagination of law students, and of the audience at large, as much as international immunities. Cases such as those instituted against the United Nations by the Mothers of Srebrenica,[4] or in relation to the Haiti Cholera scandal,[5] the United Kingdom House of Lords ruling in the *Pinochet* case,[6] or the South African refusal to arrest Sudanese President Al Bashir in spite of an outstanding arrest warrant issued by the International Criminal Court (ICC),[7] have all attracted widespread public attention – and, at times, deep indignation.

Questions pertaining to immunity from jurisdiction or execution under international law surface on a frequent basis before national courts, including at the highest levels of the judicial branch, and are of considerable importance for legal practitioners in a wide range of national jurisdictions. By way of illustration, only days before this chapter was finalised, the United Kingdom Court of Appeal rendered its judgment in the *Freedom and Justice Party* case, relating to the immunity from criminal jurisdiction of members of special missions visiting the UK with the approval of the Foreign & Commonwealth Office.[8] Only a few weeks earlier, in late May 2018, the United States Supreme Court granted *certiori* in *Jam v. International Finance Corporation* to determine whether the scope of immunity from jurisdiction of international organisations under the US International Organizations Immunities Act (US IOIA) must be

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[4] ECtHR, *Stichting Mothers of Srebrenica and others v. the Netherlands*, Decision, App. No. 65542/12, 11 June 2013; The Netherlands, Court of Appeal (The Hague), *Stichting Mothers of Srebrenica and others v. the State of the Netherlands and the United Nations*, Case No. C/09/295247/HA ZA 07-2973, 16 July 2014, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748.
[5] United States, Court of Appeals, *Georges v. UN*, 18 August 2016, 834 F.3d 88 (2d Cir. 2016).
[6] United Kingdom, House of Lords, *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)*, 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147.
[7] See, e.g., South Africa, Supreme Court of Appeal, *The Minister of Justice and Constitutional Development v. The Southern African Litigation Centre*, Case No. 867/15, 15 March 2016, www.saflii.org/za/cases/ZASCA/2016/17.pdf.
[8] United Kingdom, Court of Appeal, *R (on the application of The Freedom and Justice Party and others) v. Secretary of State for Foreign and Commonwealth Affairs*, Case No. C1/2016/3648, 19 July 2018, [2018] EWCA Civ 1719 (note: the case was originally brought by NGOs Amnesty International and Redress).

curtailed parallel to the restrictive approach to State immunity in the US Foreign Sovereign Immunities Act (US FSIA).[9] A few months before that, in October 2017, the UK Supreme Court rendered its *Benkharbouche* judgment on (the limits to) State immunity in employment matters.[10] As far as immunity from execution is concerned, reference can be made to the string of proceedings before national courts with the aim of enforcing the 2014 $50 billion *Yukos* arbitral award against the Russian Federation,[11] or the $2.5 billion ruling obtained by NML Capital against the Republic of Argentina before the US courts (raising delicate questions pertaining to waivers of sovereign immunity[12]) – proceedings which worked their way up to the highest courts of the UK,[13] Belgium,[14] France[15] and Ghana.[16] Significantly, the *Oxford Reports on International Law in Domestic Courts* (ILDC) database – which does not in any way claim exhaustivity – contains no less than 476 entries relating to 'immunities', accounting for almost a quarter of the domestic court cases included in the database at the time of writing.

Immunity questions equally surface before international courts or tribunals. For instance, the litigation by NML Capital gave rise to parallel proceedings before the International Tribunal for the Law of the Sea (ITLOS) following the detention by the Ghanaian authorities of an Argentinian frigate in 2012.[17] The European Court of Human Rights (ECtHR) for its part has on several occasions addressed the compatibility with human rights law, in particular with the right of access to court, of domestic court decisions consecrating the international immunity of States, State officials and international organisations (IOs).[18] The ICC has struggled with claims of some States to the extent that the immunity and inviolability of acting heads of State allows them to ignore an arrest warrant from the ICC in respect of the head of State of a non-State Party to the Rome Statute, notwithstanding the general obligation to cooperate under Part 9 of the Statute.[19] Last but not least, six years after the International

[9] United States, Supreme Court, *Jam v. International Finance Corp.*, Docket No. 17-1911, 21 May 2018, www.supremecourt.gov/docket/docketfiles/html/qp/17-01011qp.pdf.

[10] United Kingdom, Supreme Court, *Benkharbouche v. Embassy of Sudan*, 18 October 2017, [2017] UKSC 62.

[11] In the meantime, the award was set aside by the Hague District Court in a ruling dated 20 April 2016. See: The Netherlands, District Court (The Hague), *De Russische Federatie v. Veteran Petroleum Ltd, Yukos Universal Ltd, Hulley Enterprises Ltd*, Case No. C/09/477160/HA ZA 15-1, 20 April 2016, uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4229.

[12] E.g., United States, Supreme Court, *Republic of Argentina v. NML Capital Ltd*, 16 June 2014, 134 S.Ct. 2250 (2014).

[13] United Kingdom, Supreme Court, *NML Capital v. Republic of Argentina*, 6 July 2011, [2011] UKSC 31.

[14] Belgium, Court of Cassation, *Argentina v. NML Capital Ltd*, Case No. C.11.0688.F, 12 December 2012, ILDC 2055 (BE 2012).

[15] France, Court of Cassation, *Société NML Capital v. Argentina and Total Austral*, Case No. 10-25.938, 28 March 2013, 2013 Bulletin I No. 62; France, Court of Cassation, *Société NML Capital v. Argentina*, Case No. 11-10.450, 28 March 2013, 2013 Bulletin I No. 63; France, Court of Cassation, *Société NML Capital v. Argentina and Air France*, Case No. 11-13.323, 28 March 2013, 2013 Bulletin I No. 64.

[16] Ghana, Supreme Court, *Republic v. High Court (Comm. Div.) Accra*, Case No. J5/10/2013, 20 June 2013, https://pcacases.com/web/sendAttach/431.

[17] ITLOS, *The 'ARA Libertad' case (Argentina v. Ghana)*, Provisional Measures, Case No. 20, 15 December 2012.

[18] ECtHR, *Waite and Kennedy v. Germany*, Judgment, App. No. 26083/94, 18 February 1999; ECtHR, *Beer and Regan v.* Germany, Judgment, App. No. 28934/95, 18 February 1999; ECtHR, *Al-Adsani v. The United Kingdom*, Judgment, App. No. 35763/97, 21 November 2001; *Stichting Mothers of Srebrenica and others v. the Netherlands*, Decision (n. 4); ECtHR, *Jones and others v. the United Kingdom*, Judgment, App. Nos. 34356/06 and 40528/06, 14 January 2014.

[19] See in particular ICC, PTC I, *Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (Prosecutor v. Al Bashir)*, ICC-02/05-01/09-139, 13 December 2011; ICC, PTC I, *Décision rendue en application de l'article 87-7 du Statut de Rome concernant le refus de la République du Tchad d'accéder aux*

Court of Justice (ICJ) rendered its hotly debated landmark judgment in *Germany v. Italy*,[20] two high-profile cases pertaining to immunity of State officials and diplomatic immunity and inviolability, on the one hand,[21] and State immunity from jurisdiction and execution,[22] on the other hand, remain pending before the Hague Court at the time of writing.

Aside from their enormous practical importance, immunity questions are highly challenging for practitioners and scholars alike. While a number of immunity regimes, such as those pertaining to diplomatic and consular personnel,[23] have been codified in widely accepted multilateral conventions, other multilateral treaty initiatives have been less successful. Uncertainty persists, for instance, on the extent to which the Special Missions Convention[24] – which entered into force in 1985, but has failed to attract widespread support – reflects customary international law. *A fortiori*, the same is true for the various provisions of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI) – which has yet to enter into force.[25] With regard to other immunity regimes, no codification convention exists as of yet, rendering it necessary to derive the relevant customary rules from an analysis of State practice and *opinio juris*. In 2007 the UN International Law Commission (ILC) embarked on a project to codify and/or progressively develop the legal regime pertaining to the immunity from criminal jurisdiction of foreign officials. Ten years later, a first set of draft articles was provisionally adopted by majority vote within the ILC.[26] Whether the project will ultimately be successful, and whether it will engender broad support across the international community, remains to be seen. With regard to IOs, while a stable 'immunity acquis' has developed since the 1920s and 1930s[27] and has been integrated into a large number of specific treaty instruments, occasionally the question pops up whether IO immunity is also part and parcel of customary international law. Furthermore, it is clear that immunity law lies at the intersection between international law and national law.[28] This makes it imperative to examine how the international legal framework is further refined and implemented at the level of national legislation and case law. At times, head-on collisions may occur between a State's obligations at the international level and

demandes de coopération délivrées par la Cour concernant l'arrestation et la remise d'Omar Hassan Ahmad Al Bashir (Prosecutor v. Al Bashir), ICC-02/05-01/09-140, 13 December 2011; ICC, PTC II, *Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (Prosecutor v. Al Bashir)*, ICC-02/05-01/09, 9 April 2014; ICC, PTC II, *Decision under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request for the Arrest and Surrender of Omar Al-Bashir (Prosecutor v. Al Bashir)*, ICC-02/05-01/09, 6 July 2017.

[20] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits) [2012] ICJ Rep 99.

[21] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (Application Instituting Proceedings) [2016] www.icj-cij.org/en/case/163/institution-proceedings; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (Preliminary Objections) [2018], www.icj-cij.org/files/case-related/163/163-20180606-JUD-01-00-EN.pdf.

[22] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (Application Instituting Proceedings) [2016] www.icj-cij.org/en/case/164/institution-proceedings.

[23] Vienna Convention on Diplomatic Relations (VCDR), 18 April 1961, in force 24 April 1964, 500 UNTS 95; Vienna Convention on Consular Relations (VCCR), 24 April 1963, in force 19 March 1967, 596 UNTS 261.

[24] Convention on Special Missions, 8 December 1969, in force 21 June 1985, 1400 UNTS 231.

[25] United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI), 2 December 2004, not yet in force, UN Doc. A/RES/59/38, 16 December 2004.

[26] International Law Commission, 'Report of the 69th Session (1 May–2 June and 3 July–4 August 2017)', UN Doc. A/72/10, 163 (see in particular 164–5, para. 74).

[27] See Chapter 10 on 'Jurisdictional Immunities of International Organisations – Origins, Fundamentals and Challenges' by Niels Blokker.

[28] See Chapter 3 on 'The Sources of Immunity Law – Between International and Domestic Law' by Lori Fisler Damrosch.

its national legal order, as illustrated by the annulment by the Italian Constitutional Court of a law giving effect to the condemnation of Italy by the ICJ judgment in the *Jurisdictional Immunities* case.[29]

Along the same lines, while some immunity regimes have remained relatively stable over time, others have been subject to considerable changes over the past years and decades, and continue to be – as the Strasbourg Court put it in *Jones v. UK* – in a 'state of flux'.[30] What is more, evolutions sometimes seem to be pulling immunity law in different, if not opposite, directions.

On the one hand, as States have become increasingly active beyond their traditional prerogatives *de jure imperii*, there has been an important trend towards a more 'restrictive' reading of State immunity, which does not extend to their commercial activities (and other activities *de jure gestionis*). This restrictive approach was, for instance, included in three major enactments produced in the 1970s, namely the US FSIA, the UK State Immunity Act (UK SIA) and the European Convention on State Immunity (ECSI).[31] It was also embraced in the 2004 UNCSI. The 'constitutionalisation' of the international legal order and the advance of human rights law and international criminal law have also been accompanied by attempts to curtail various immunity regimes. As is illustrated by the above-mentioned *Pinochet* case and, more recently, the Senegalese judgment against former Chadian President Hissène Habré,[32] certain international crimes, such as torture, are sometimes deemed to be removed from the scope of material immunity from criminal jurisdiction of (former) foreign officials, either because such crimes cannot be regarded as acts performed 'in an official capacity' or because the material immunity of foreign officials is subject to exceptions. Importantly, in 2017 the ILC provisionally adopted a draft article asserting that such immunity does not apply in respect of crimes of genocide, crimes against humanity, war crimes, the crime of *apartheid*, torture and enforced disappearance.[33] In light of the threat posed by State-sponsored terrorism, and notwithstanding the lack of a universal definition of (international) 'terrorism', the United States and Canada have moreover enacted a controversial 'terrorism exception' to State immunity. In the United States in particular, claimants invoking the terrorism exception to the FSIA have succeeded in having the Islamic Republic of Iran condemned for providing support to terrorist groups in a series of procedures, with the awards of punitive damages totalling ca. $50 billion.[34] Some other States have seemingly begun adopting a reciprocity approach to State immunity, adjusting the degree of immunity granted to foreign States in light of these respective States' own domestic approaches. Finally, the right to access to court has been used – albeit cautiously – to carve out exceptions to the immunity of international organizations (e.g., in employment disputes), building on the jurisprudence of the ECtHR on the compatibility of international immunities with the European Convention on Human Rights (ECHR), in particular the right of access to court.[35]

[29] Italy, Constitutional Court, *Judgment*, Case No. 238/2014, 22 October 2014, www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf.

[30] *Jones and others v. the United Kingdom* (n. 18), para. 213.

[31] See Chapter 2 on 'The Restrictive Rule of State Immunity – The 1970s Enactment and Its Contemporary Status' by Hazel Fox.

[32] Senegal, Chambre Africaine Extraordinaire d'Assises, *Ministère Public v. Hissein Habré*, 30 May 2016, http://forumchambresafricaines.org/docs/JugementCAEd%27Assises_Penal&Civil_.pdf.

[33] ILC Report (n. 26), 163ff.

[34] Ca. $2 billion worth of Iranian assets are currently blocked by the US authorities. Further: see in particular Chapter 33 on 'Immunity and Terrorism' by David P. Stewart.

[35] See *Waite and Kennedy v. Germany* (n. 18).

On the other hand, the trend has not been unequivocal. Thus, while there is a clear move towards a restrictive approach to State immunity, a number of (important) States, such as China, occasionally continue to profess allegiance to the old absolute doctrine.[36] In addition, some uncertainty persists with regard to the distinction between *acta jure imperii* and *acta jure gestionis*, or with regard to the scope of the non-commercial tort exception. This in turn raises questions whether the restrictive rule has attained customary status. In light of divergences in State practice and *opinio juris*, some even have gone as far as to suggest that there is no obligation whatsoever under existing customary law to grant immunity to foreign States.[37] Against calls for a more human rights-oriented, rather than State-centric approach, the ICJ in its landmark judgment in *Germany v. Italy* reaffirmed a broad and conservative interpretation of State immunity from jurisdiction, dismissing arguments that it be set aside in case of grave breaches of the law of armed conflict, or in case of breaches of *jus cogens*.[38] And in *Jones v. UK*, the ECtHR upheld the immunity of State officials from civil jurisdiction for torture.[39] Even if the Court left open the possibility of future evolution of the legal framework, as Webb observes, the ECtHR's interpretation '[put] the brakes on the independent evolution of the immunity of State officials by re-integrating or re-aligning that immunity with that of the State'.[40] Domestic judges have moreover been reluctant to set aside IO immunity from jurisdiction on account of the absence of an alternative dispute settlement forum,[41] and recent cases have reaffirmed the *de facto* absolute immunity of the United Nations.[42] Finally, countries such as France and Belgium have recently introduced new legislation limiting the possibility to seize the assets of foreign States and/or IOs present on their soil.[43]

And so immunity regimes continue to be forged by competing forces, including, on the one hand, the deference to State sovereignty, the desire for stability in international relations or the need to protect the independent functioning of IOs, and, on the other hand, the advance of human rights and the fight against impunity, as well as the principle comprehensive nature of States' territorial jurisdiction.

II OBJECT AND PURPOSE OF THE BOOK

Against this background, the present volume seeks to shed light on the current state of immunities in international law by mapping important evolutions, as well as by engaging with the main outstanding challenges in this field. The book seeks to do so in a comprehensive manner.

[36] See in particular Chapter 4 on 'Divergent Views on State Immunity in the International Community' by Wenhua Shan and Peng Wang.

[37] See also Chapter 6 on 'Jurisdictional Immunity of States and General International Law – Explaining the *Jus Gestionis* v. *Jus Imperii* Divide' by Alexander Orakhelashvili.

[38] *Jurisdictional Immunities* case (n. 20), paras. 81–97.

[39] *Jones and others v. the United Kingdom* (n. 18), para. 215.

[40] P. Webb, 'Jones v. UK: The Re-integration of State and Official Immunity?', EJIL: *Talk!*, 14 January 2014, www.ejiltalk.org/jones-v-uk-the-re-integration-of-state-and-official-immunity/.

[41] See, e.g., United Kingdom, High Court of Justice (Queen's Bench Division), *Entico Corp Ltd v. United Nations Educational Scientific & Cultural Association (UNESCO)*, Case No. 2006 Folio 867, 18 March 2008, [2008] EWHC 531. But also see, for instance, the more progressive case law of the Belgian Court of Cassation in *Union de l'Europe Occidentale v. Siedler (S.M.)*, Case No. S.04.0129.F, 21 December 2009; *Secrétariat du Groupe ACP v. Lutchmaya (L. M.)*, Case No. C.03.0328.F, 21 December 2009; *Secrétariat du Groupe ACP v. B.D.*, Case No. C.07.0407.F, 21 December 2009; all published in (2011) Revue Critique de Jurisprudence Belge, 226.

[42] See notes 4 and 5.

[43] See, e.g., Belgium, Loi du 23 Août 2015 insérant dans le Code Judiciaire un Article 1412quinquies Régissant la Saisie de Biens Appartenant à une Puissance Étrangère ou à une Organization Supranationale ou Internationale de Droit Public (2015), Belgian *Official Gazette*, 3 September 2015, 56011.

It tackles questions pertaining to immunity from jurisdiction as well as issues relating to immunity from execution. What is more, whereas various excellent works exist that deal with specific immunity regimes,[44] what is unique about the present work is its ambition to cover the full range of immunity regimes, including, e.g., the immunities of diplomatic and consular personnel, those of visiting forces, or the immunities of 'special missions'. To the editors' knowledge, no such work presently exists, whether in the form of a monograph – which would be nigh impossible for a single author to produce, in light of the specificities of the various immunity regimes and the wealth of national case law and legislation that would need to be covered – nor in the form of an edited volume.[45] Apart from exploring the substance of the various immunity regimes, the book also tackles a number of related issues that are at times overlooked in international legal doctrine, but which are nonetheless of considerable practical importance. Thus, individual chapters address, for instance, the question of what constitutes an exercise of 'jurisdiction' for immunity purposes (e.g., does recognition of a foreign judgment rendered against another State imply an exercise of jurisdiction – and, if so, against whom?; When can a State be said to be indirectly impleaded?);[46] what type of measures may trigger immunity from execution (is a nexus to (quasi-)judicial proceedings required or not?; Can targeted sanctions breach immunity rules?);[47] or the domestic procedural rules pertaining to discovery measures or subjecting attachment of foreign State property to preventive control mechanisms.[48] In addition, the book also deals with a range of cross-cutting issues, including

[44] Thus, reference can be made to several excellent monographs on the law of State immunity, in particular H. Fox and P. Webb, *The Law of State Immunity*, 3rd edn. (Oxford University Press, 2013) and X. Yang, *State Immunity in International Law* (Cambridge University Press, 2012), as well as works devoted to specific aspects of State immunity, such as N. van Woudenberg, *State Immunity and Cultural Objects on Loan* (Brill, 2012), J. Pullen, *Die Immunität von Staatsunternehmen im zivilrechtlichen Erkenntnis- under Vollstrekunsverfahren* (Peter Lang, 2012), D. Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May, 2007). Other works focus specifically on the immunities of foreign officials (e.g., R. Pedretti, *Immunity of Heads of States and State Officials for International Crimes* (Brill Nijhoff, 2015), R. van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (Oxford University Press, 2008)), on the immunities of international organisations (e.g., N. Blokker (ed.), *Immunity of International Organizations* (Brill Nijhoff, 2015), A. Reinisch (ed.), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press, 2013)), or on the tension between immunities and human rights law, in particular the right of access to courts (e.g., S. El Sawah, *Les Immunités des États et des Organizations Internationales: Immunités et Procès Équitable* (Larcier, 2012); A. Bellal, *Immunités et Violations Graves de Droits Humains: Vers une Évolution Structurelle de l'Ordre Juridique International?* (Larcier, 2011); M. Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (Martinus Nijhoff, 2006)). Reference can also be made to two commentaries dealing with specific treaty instruments: A. Reinisch and P. Bachmayer (eds.), *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary* (Oxford University Press, 2016) and R. O'Keefe, C. Tams and A. Tzanakopoulos (eds.), *The United Nations Convention on Jurisdictional Immunities of States and their Property: A Commentary* (Oxford University Press, 2013).

[45] While two recent edited volumes are worth mentioning, neither purports to provide a comprehensive overview of the various immunity regimes in international law. See A. Orakhelashvili, *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar, 2015) and A. Peters, E. Lagrange, S. Oeter and C. Tomuschat, *Immunities in the Age of Global Constitutionalism* (Martinus Nijhoff, 2015).

[46] See Chapter 5 on 'Immunity and the Exercise of Jurisdiction – Indirect Impleading and *Exequatur*' by Nicolas Angelet.

[47] See in particular Chapter 13 on 'The Material Scope of State Immunity from Execution' by Jean-Marc Thouvenin and Victor Grandaubert, and Chapter 34 on 'Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions' by Tom Ruys.

[48] See Chapter 19 on 'Immunity from Execution and Domestic Procedural Rules – Preventive Control, Burden of Proof and Discovery' by Mathias Audit, Nicolas Angelet and Maria-Clara Van den Bossche.

the relationship between immunity law and human rights law,[49] or the impact of immunities on the activities of the ICC.[50]

This book project is a spin-off of an international conference held at Ghent University in December 2016. Approximately half of the chapters stem from presentations by the respective authors in the context of the conference. In order to fill remaining gaps and ensure the desired comprehensiveness of the volume, additional topics were identified for inclusion and additional authors contacted. The result is a combination of 34 chapters written by a variety of authors with relevant expertise in the immunity domain, including eminent scholars as well as experienced practitioners active in different national jurisdictions (including Belgium, Egypt, France, the United Kingdom and the United States). Several authors have extensive experience as legal advisers, in particular to the UK Foreign & Commonwealth Office or the US State Department.

It is our hope and conviction that this *Cambridge Handbook of Immunities and International Law* brings added value to existing legal literature, and that it will serve as a useful work of reference for a wide range of readers, including scholars, legal practitioners and civil servants at the national or international level.

III STRUCTURE OF THE BOOK

A particular challenge that arose when preparing the present volume concerned the book's structure. Indeed, in light of the commonalities but also divergences between the various immunity regimes, the question arose whether the book should be structured by identifying separate chapters for each of the persons or entities protected by (some form of) immunity; by distinguishing between immunities enjoyed by abstract entities such as States and IOs, and those enjoyed by specific (groups of) individuals; or rather by juxtaposing immunity from jurisdiction and immunity from execution. In the end, a combination of the above approaches appeared most suitable. The result is a fivefold structure, encompassing (1) a series of introductory chapters adopting a bird's-eye view with respect to the history of immunity law, its sources and the divergence of attitudes within the international community, followed by sections devoted to (2) the jurisdictional immunity of States and international organisations, (3) the immunity from execution of States and international organisations and (4) the immunities of specific groups of individuals under international law. A fifth and final part (5) tackles a range of cross-cutting issues. It is clear that this choice of structure entails certain advantages and disadvantages. Thus, some degree of overlap and repetition is inevitable, if only because certain precedents carry repercussions for multiple immunity regimes. On the other hand, it is hoped that the approach has contributed to minimising potential gaps in the analysis.

The book opens with a set of three introductory chapters (Part I), the first of which, by **Hazel Fox**, provides a brief historical introduction to the immunity of the State as a legal person, while also tackling the contemporary status of the restrictive doctrine. Starting from the birth of the modern State post-1648, and the emergence of State immunity as a means to preserve the equality of States, Fox explains how States' increasing engagement in business and finance catalysed the emergence of the restrictive doctrine, and sketches the threefold enactment of the restrictive rule in the 1970s in the ECSI (1972), the US FSIA (1976) and the UK SIA (1978). While emphasising the continuing utility of the restrictive doctrine and identifying the UNCSI

[49] See, for instance, Chapter 29 on 'Between a Rock and a Hard Place – Immunities of the United Nations and Human Rights' by Rosa Freedman and Nicolas Lemay-Hébert.

[50] See Chapter 30 on 'Immunities and the International Criminal Court' by Harmen van der Wilt.

as a basis on which to build, Fox acknowledges that greater elaboration and specification is required, for instance with respect to the officials of the State protected by the restrictive rule, or with regard to the areas of security, administration and political direction coming within the rule. The author moreover offers a range of suggestions to meet several remaining challenges and uncertainties, and to assist the wider acceptance of the UNCSI.

Lori Fisler Damrosch subsequently turns to the sources of immunities of States, organisations and individuals, which include various sorts of executive, judicial and legislative practice, and which lie 'between' or at the connecting points of international and domestic law. While many of the sources have remained stable over a considerable length of time or have contributed in a relatively brief span towards stabilisation of expectations, Damrosch notes how many controversial aspects of immunity law remain to be settled. This could be done through the progressive development of rules of international law, though it may well be 'elusive', for instance, to believe that the topic of foreign official immunity from criminal jurisdiction lends itself to such endeavour. Alternatively, controversies remain to be settled in the context of concrete cases. Noting the growing possibilities for international tribunals to rule on the international law of immunities, Damrosch observes how this may result in conflicts between sources of national and international law. Admittedly, in most cases national courts have been able to give effect to international obligations as enunciated by international tribunals. In at least one case, however, an impasse has emerged in the conflicting rules of the ICJ and a State's highest national court – a situation that could well recur elsewhere in the near future.

A third and last introductory chapter, by **Wenhua Shan** and **Peng Wang**, focuses on the divergence of views on State immunity within the international community. In particular, although the authors acknowledge that the restrictive doctrine of State immunity has become the general 'trend' in recent years, they argue that it has yet to become a general rule of international law, as States remain divided on the foundation and scope of exceptions to State immunity, and as issues of reciprocity further diminish legal certainty. By way of illustration, the authors briefly tackle a number of issues where divergences persist, notably the commercial exception, the tort exception, including, more specifically, the terrorism exception, and the waiver of State immunity. In so doing, the authors raise the question of whether the regime of State immunity is flexible enough to accommodate and address new issues beyond the commercial exception.

The introductory chapters of Part I are followed by eight chapters dealing with the immunity from jurisdiction of States and international organisations (Part II).

The opening chapter of Part II by co-editor **Nicolas Angelet** explores an issue that is oftentimes overlooked in literature. It seeks to determine what constitutes an 'exercise of jurisdiction' that triggers immunity from jurisdiction. It does so by analysing immunity in case of 'indirect impleading' and in proceedings on the recognition of judgments (*exequatur*). Regarding 'indirect impleading', immunity is generally not triggered by a bare judicial finding vis-à-vis a State that is not a party to the proceedings. But it is triggered when the forum State exercises some kind of *imperium*, for instance when the judgment sought would dispose of the foreign State's property rights. According to the author, *imperium* may, however, come into balance with the principles underlying immunity and the forum State's interest in exercising its jurisdiction in a given case. Turning to the recognition of judgments, the relevance of *imperium* is confirmed by the ICJ's finding in the *Jurisdictional Immunities* case that *exequatur* proceedings – an exercise of jurisdiction without adjudication of the merits – trigger the jurisdictional immunity of the State against which the judgment was rendered. Angelet observes, however, that this leads to granting the debtor State de facto absolute immunity from enforcement in the State where recognition is

sought. Preference should therefore be given to the alternative view that *exequatur* proceedings are directed to the judgment rather than to the State, whose immunity is thus not at stake.

Next, **Alexander Orakhelashvili** takes a closer look at the *jus gestionis* v. *jus imperii* divide that is at the heart of the restrictive approach to State immunity. In order to determine whether an act is 'sovereign' under the restrictive doctrine, the author notes that the key question to ask is whether international law regards that particular act to be an exercise of States' sovereign authority. Thus, the category of acts *jure imperii* encompasses only acts that are uniquely sovereign and that can be performed by States and their officials only. Taking a critical look at relevant judicial decisions that sometimes fail to distinguish between particular acts and the broader process and context within which they are performed, the author goes on to draw parallels with the construction of 'sovereign authority' in other fields of international law, such as international investment law. Orakhelashvili concludes by observing that the replacement of the absolute doctrine by the restrictive doctrine has led to a situation where there is no general rule of immunity in customary international law. Indeed, in light of the low ratification status of the UNCSI and the persistence of defiant State practice, it is argued that States are not presently under any legal obligation to grant immunity to foreign States.

In her chapter, **Yas Banifatemi** delves into what constitutes the main exception to States' jurisdictional immunity: commercial transactions. As far as these activities are concerned, the State arguably acts more as a private actor rather than a sovereign actor, necessitating a carve-out from the jurisdictional immunity scope. This is reflected by both the United Nations and European Conventions on State Immunity. However, the devil is in the detail and the question of how to distinguish between private and sovereign acts, including in the case of commercial transactions, has long since troubled domestic courts. Banifatemi helpfully distinguishes between different approaches of those courts, construing (at least) three, focusing on (1) the nature of the act (e.g., the United States), (2) its purpose (e.g., Italy) or, more pragmatically, (3) its whole context (e.g., the United Kingdom) or both its nature and purpose (e.g., France). Providing many practical examples, the author concludes that focusing primarily on the (objective) nature of the act is more protective of third parties but can lead to arbitrary outcomes. On the other hand, reliance on the (subjective) purpose of a transaction is generally favourable to States as 'virtually any transaction can … arguably serve a sovereign purpose'. Perhaps, then, the more pragmatic approaches allow greater discretion for national judges to rule on a case-by-case basis and provide the optimal way forward.

Sally El Sawah's chapter focuses on the non-commercial tort exception, which potentially encompasses a panoply of acts and omissions ranging from mere traffic or work accidents to much graver violations such as war crimes and terrorist attacks. A first part of the chapter describes the traditional understanding of the non-commercial tort exception, as being applicable to civil proceedings giving rise to pecuniary compensation only, and limited to acts that have taken place within the territory of the forum State. The author then explains how some of the 'grey zones' pertaining to the exception's scope are deemed to have been clarified by recent case law of the ECtHR and the ICJ. The second part of the chapter adopts a more critical approach by identifying disparities in State practice with regard to the material and territorial scope of application of the tort exception. Additionally, it raises doubts with regard to the methodological approach and findings of the ECtHR and the ICJ, while criticising both courts for having adopted a formalistic and State-centric approach that sits uneasily with the move towards a more human rights-oriented approach and efforts of the United Nations to promote the Rule of Law.

Catherine Amirfar then discusses waivers of State immunity from jurisdiction. She argues that while sovereign immunity can be limited by consent, national courts and laws vary in

their understanding of waivers of jurisdictional immunity. The manner and procedure by which forum States give effect to immunity, or, conversely, recognise a waiver, is tied to the forum State's sovereignty and territorial jurisdiction. This is evidenced by diverging approaches regarding express consent (either solely before the court or also through prior conduct or in a prior written agreement), implicit waivers through conduct in proceedings or through choice of law clauses, waivers by and for counterclaims and waivers through arbitration agreements. After having discussed varying practices in all these fields, Amirfar addresses the issue of authority to waive and the irrevocability of consent to jurisdiction.

The next three chapters turn to the immunity from jurisdiction of international organisations. First, **Niels Blokker** sketches the origins, fundamentals and challenges of the IO immunities regime. The author explains how the existing 'immunity acquis' was developed in the 1920s and 1930s and was subsequently codified in the 1940s for the United Nations and the specialised agencies. This acquis has remained unchanged over time and has been more or less copied when new organisations have been created ever since. While existing law and practice support the existence of a 'default rule', the author is more cautious when it comes to the customary status of IO immunity – albeit that he deems it 'too categorical to conclude that international organisations never enjoy immunity under customary international law'. While acknowledging the expanded activities of IOs and the increased scepticism against the creation of new IOs in the current zeitgeist, Blokker emphasises the continuing need to preserve the existing standard immunity rules. It is not so much the rules themselves, but rather their implementation that sometimes should be improved, the author finds – in particular where the activities of IOs may directly harm human rights.

Second, **Kristen E. Boon** discusses the immunities of the UN and the UN Specialized Agencies. In particular, the author proposes five foundational principles of IO immunity, makes reference to the sources of that immunity and discusses the general categories of cases that arise, including contract and employment disputes, human rights challenges and torts cases. Observing that the UN and its specialised agencies are under an obligation to provide a forum for dispute settlement for private disputes,[51] Boon observes how confusion remains about the border between public and private law claims. Noting that the UN has recently attempted to narrow the scope of private law claims in the context of the Haiti cholera saga, the author asserts that whether the organisation has the competence to autonomously determine the legal nature of claims brought against it is open to dispute. Like Blokker, Boon concludes by emphasising that the time has come to focus on better implementation of organisational immunity. The author goes a step further, however, by warning that if no such improvement materialises, the time may have arrived to revise the presumption of absolute immunity altogether.

The triptych of contributions on IO immunity from jurisdiction concludes with a chapter by **Ramses A. Wessel** on regional organisations. The contribution, arguably the first of its kind, provides a detailed overview of the immunities of a considerable number of regional organisations (primarily those with a more general competence) in Africa and the Middle East, the Americas, Asia and the Pacific, and Europe. The underlying question the chapter seeks to answer is to what extent the enormous diversity in the nature and competences of these organisations is also reflected in their respective immunities. Wessel effectively finds considerable divergence as to

[51] Article VIII, Section 29 of the United Nations Convention on the Privileges and Immunities of the United Nations (CPIUN), 13 February 1946, in force 17 September 1946, 1 UNTS 15; Article IX, Section 31 of the United Nations Convention on the Privileges and Immunities of the Specialized Agencies (CPISA), 21 November 1947, in force 2 December 1948, 33 UNTS 261.