

OXFORD

# THE LAW OF STATE IMMUNITY

THIRD EDITION

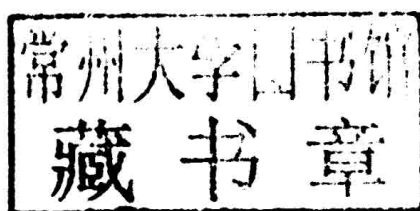
HAZEL FOX CMG QC AND PHILIPPA WEBB

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# The Law of State Immunity

Third Edition

HAZEL FOX CMG QC  
PHILIPPA WEBB



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*General editor:* SIR FRANK BERMAN KCMG QC

This series features works on substantial topics in international law which provide authoritative statements of the chosen areas. Taken together they map out the whole of international law in a set of scholarly reference works and treatises intended to be of use to scholars, practitioners, and students.

## Foreword

This, the third edition of a work which in just a decade has received renown throughout the world of international lawyers and beyond, presents a clash between two principles and attempts to show how that clash can be resolved. On the one side is the sovereign authority of the forum State in which a legal proceeding is being brought to decide the case through its Courts. Running with that sovereign authority, as a manifestation of territorial sovereignty, is the right, now well recognized, of the individual to have access to the courts to enforce their rights against the alleged wrongdoer. On the other side, if that alleged wrongdoer is a foreign state, it claims the benefit of its sovereign equality: it is juridically equal to all other States including the forum State.

In the common law, that second absolute view for long prevailed, although with limited exceptions, for instance, in respect of litigation concerning real property in the forum State. But, particularly as the functions of the State broadened and it came to be seen not only as a Prince but also as a trader in the marketplace, that absolute position came increasingly under attack. That attack, notably in respect of commercial activities, gave rise to litigation in many countries and to real challenges for national judges (cases from 18 jurisdictions are mentioned in the recent judgment of the International Court of Justice in *Germany v Italy*), to national legislation (11 enactments are mentioned in that case), the preparation of which also presents challenges to national law makers; to two multilateral treaties (the UN Convention on State Immunity and the European Convention; along with draft Inter-American Convention); to resolutions of the Institut de Droit International; and to much commentary including the two earlier editions of this splendid work.

The preparation of this new edition is more than justified by the volume of new material and by continuing uncertainties in, and debates about, basic issues such as the essence and extent of the commercial exception and the local tort exception, and the significance of the jurisdictional character of the immunity, especially where the allegedly unlawful act is a breach of a peremptory norm.

This book once again has wider values. It provides an excellent account of the law in development over two or more centuries and especially over the last half century. That account also highlights the interactions in this area of law between the sources of international law already mentioned. That is to say, although the book is essential for the specialists or those who have to address this area of law as counsel, judges, advisers, or national law-makers, it also provides much of interest and value to international lawyers generally. I must say that the careful and compelling arguments of Hazel Fox QC, now joined by Philippa Webb, an excellent young scholar and practitioner, make this judge, thinking also of his earlier national judging role, pause and reconsider. That is one of the things good scholarship should do.

Kenneth Keith  
*International Court of Justice*

## Preface and Acknowledgments

The objectives of this work are to provide a guide to relevant material, to set out a general balanced view of the present state of the law and to put government lawyers and policy-makers in a position to make appropriate decisions as to its future direction.

The book is divided into five parts: structure and general concepts; sources; the current international law; other immunities; conclusions. Some readers, particularly those seeking an answer to a specific application of immunity, may prefer first to consult Part III which sets out article by article the provisions of the UN Convention on Jurisdictional Immunities of States and their Property (UNCIS) and discusses their application by reference to existing State practice, particularly English and US law. For them, having identified the particular problem, reference to Part I may help to place it in perspective with regard to the general concepts which govern the subject.

This third edition of *The Law of State Immunity* seeks not only to address recent developments at the national and international levels, but also to try to explain the evolution in the law. Thus, the previous edition's chapter on 'The Concept of the State: Theory and the Justification for State Immunity' has been replaced in this edition by Chapter 2: 'The Three Models of the Concept of State Immunity'. Our analysis of the third model, Immunity as a Procedural Plea, has been inspired in large part by the 2012 *Jurisdictional Immunities* Judgment of the ICJ. In the light of that judgment, we use the three models throughout the book to identify and explain trends in the development of the law.

As regards the substantive law on State immunity, we have identified areas that have undergone major developments and deserve closer attention. An increasing proportion of claims made in national courts relating to State immunity concern labour disputes involving a foreign State or an international organization. We have introduced a new Chapter 14: 'Immunity from Adjudication: The Employment Exception in respect of (1) A Foreign State and (2) An International Organization' that explores this aspect of the law of State immunity, including the influence of European human rights law. Secondly, we have introduced a separate chapter on the 'Territorial Tort Exception' (Chapter 15); the legality validity of this exception has been challenged by the *Jurisdictional Immunities* Judgment. Thirdly, Chapters 16 and 17 on 'State Immunity from Enforcement' has been elaborated in more detail as to the nature of the property and the relationship between immunity from adjudication and immunity from enforcement. In Part IV there is an expanded discussion of developments as regards other immunities: the immunities of individuals acting on behalf of the State (Chapter 18) and the immunities of international organizations and those covered by so-called special regimes (Chapter 19).

Since the publication of the second edition, UNCIS has gained further ratifications, though it has yet to enter into force. Its provisions have nonetheless been cited by national and international courts as evidence of customary international law. We have expanded Chapter 9 to address the legislative and judicial implementation of UNCIS by a number of the States Parties; the advisability of UK ratification is discussed in Chapter 7.

Chapter 4 (Jurisdiction), Chapter 10 (The Definition of the Foreign State) and Chapter 8 (US law) have been substantially revised and updated. At the time of writing, the *Jones v UK* and *Mitchell & Ors v UK* cases were still pending before the European Court of Human Rights.

In researching and writing Part IV and the related sections in the chapters on UK law and US law, we have been struck by an increasingly disaggregated or fragmented view of immunity (see Chapter 20).

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In this edition Hazel Fox, the sole author of the previous two editions has been joined by Philippa Webb. With an LLB from the University of New South Wales, Australia, an LLM and JSD from Yale, legal practice with Baker & Mackenzie, the UN Secretariat and the ICC Prosecutor's Office, and service as the legal officer and special assistant for three years to Rosalyn Higgins DBE, QC when President of the ICJ, Philippa was amply qualified to share the considerable labour in revising and accommodating the changes in law required in this new edition. Although only five years having passed since the publication of the second edition, there has been extensive activity—judicial, legislative, and academic—on the law of State immunity, not least in taking due account of the major decision of the International Court of Justice in the 2012 *Jurisdictional Immunities* case. Whilst it is for the reader to judge its quality, we confidently assert that the editorial partnership derived from Philippa's wide experience, Hazel's accumulated knowledge from teaching and practice of State immunity from the UK State Immunity Act 1978 onwards, and the intellectual stimulus and deeper legal analysis resulting from our joint activity provides greater clarity, thoroughness, and readability in this latest edition.

This Preface sets out what is new in this third edition. We are indebted to a number of people who have helped and encouraged us in updating, amending, and reshaping this book. We thank John Louth and Sir Frank Berman for early conversations on the purpose of the new edition and for their encouragement throughout the drafting process. We are grateful to Merel Alstein for her professional assistance and good advice at every stage. Professors Chimène Keitner and David P Stewart provided invaluable assistance with revising the chapter on US law; their contributions have been precise, insightful, and always timely. Alison Macdonald of Matrix Chambers has kindly updated and revised the section on procedure in the chapter on UK law. Peter Quayle of the European Bank for Reconstruction and Development provided (in his personal capacity) excellent comments on the new chapter on the employment exception, especially as it relates to international organizations. Thanks are also due to those who provided comments and information on specific sections of the book: Professor Andrea Biondi, Dr M Baldegger, Professor Lori Damrosch, Professor Carlos Espósito, Professor Keith Ewing, Dr Filippo Fontanelli, Christopher Keith Hall, Katerina Kappos, Professor Mizushima, Dr Roger O'Keefe, Sam Wordsworth, and Nout van Woudenberg. We are grateful for the editorial assistance of Katarzyna Lasinska, whose work was funded by a grant from the Centre for European Law at King's College London. Finally, we express our sincere gratitude to Judge Sir Kenneth Keith ONZ KBE QC for writing the Foreword to this edition.

Hazel Fox and Philippa Webb

April 2013



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## *List of Abbreviations*

AALCO	Asian-African Legal Consultative Organization
ACJFS	Japanese Act on Civil Jurisdiction over Foreign States 2010
AEDPA	Anti-Terrorism and Effective Death Penalty Act 1996
AFP	Australian Federal Police
ASI	Agreement on Succession Issues
ATS	Alien Tort Statute 1789
CAVV	Dutch Advisory Committee on Issues of Public International Law
CFA	Court of Final Appeal
CJJA	Civil Jurisdiction and Judgments Act 1982
COE	Council of Europe
CPIUN	Convention on Privileges and Immunities of the United Nations
CPR	Civil Procedure Rules 1998
DARIO	ILC Draft Articles on the Responsibility of International Organizations
DPP	Director of Public Prosecutions
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECSI	European Convention on State Immunity
ELDO	European Launcher Development OrganiZation
EMBL	European Molecular Biology Laboratory
ESA	European Space Agency
ESDP	European Security and Defence Policy
ESRO	European Space Research Organization
FCO	Foreign and Commonwealth Office
FRY	Former Republic of Yugoslavia
FSIA	Foreign Sovereign Immunities Act 1976
HKSAR	Hong Kong Special Administrative Region
HRA	Human Rights Act 1998
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
ILC	International Law Commission
ILOAT	Administrative Tribunal of the International Labour Organization
IOIA	International Organizations Immunities Act 1945
ITC	International Tin Council
ITLOS	UN International Tribunal for the Law of the Sea
NTC	National Transitional Council
NYC	New York Convention 1958
PRC	People's Republic of China
PLO	Palestine Liberation Organization
RICO	Racketeer Influenced and Corrupt Organizations Act
SAR	Special Administrative Region
SFRY	States to the former Socialist Republic of Yugoslavia
SIA	State Immunity Act 1978
SCSL	Special Court for Sierra Leone
SOI	suggestion of interest
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement

TRIA	Terrorism Risk Insurance Act 2002
TRNC	Turkish Republic of North Cyprus
TVPA	Torture Victim Protection Act 1991
UNCLOS	UN Convention on the Law of the Sea
UNMEE	UN Mission in Ethiopia and Eritrea
UNSCI	UN Convention on Jurisdictional Immunities of States and their Property
VCCR	Vienna Convention on Consular Relations 1964
VCDR	Vienna Convention on Diplomatic Relations

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