IMMUNITIES IN THE AGE OF GLOBAL CONSTITUTIONALISM

Edited by

Anne Peters
Evelyne Lagrange
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Christian Tomuschat

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Foreword

This volume collects the contributions to a colloquium which is the eighth edition of a biennial event of which Professor Christian Tomuschat had taken the initiative several years ago. Moreover, it is the first time that a Swiss-German-French conference of this type took place. The colloquium was organized by Professor Anne Peters from the University of Basel, seconded by Professors Evelyne Lagrange (Paris 1) and Stefan Oeter (Hamburg). Bearing upon "Immunities in the Age of Global Constitutionalism" it offered an excellent occasion for outstanding scholars and practitioners coming from the three countries (and from elsewhere: two eminent participants were from Poland) to exchange views, to deepen reflections and to explore new tracks of this multifaceted and virtually endless topic.

It is not the purpose of this preface to reveal the rich content of this volume—and one page could not possibly give account of it, even partially. All the least so that both the regime and the very notion of immunities still spark passionate debates, and the Basel colloquium did not fail to respect the tradition. Ardours from the protagonists had even been revived by the recently given ICJ Judgment in the case concerning *Jurisdictional Immunities of the State* between *Germany* and *Italy*, of which some participants took vigorously the defence, while others fiercely attacked it.

We have no intention to take side in these skirmishes. Suffice it to remark that, like the Aesopian tongue, state immunities can be seen as the best or the worst thing. It preserves the capacity of the state to effectively fulfil its functions as the trustee of the public interest; it also permits it to escape its responsibility, even, maybe, in cases of averred abomination. This is probably the crucial question; but indeed not the only one and the readers will find in the proceedings of this most stimulating colloquium a lot of food for thought on the most "existential" questions to the most technical ones, on the most theoretical points of view as well as on the most practical considerations. These *regards croisés* contribute to the richness of this volume.

We have full confidence that our timely debates will inspire interesting further discussions on this very challenging subject. And we, in advance wish "*bonne chance*!" to the next *Colloque franco-allemand* which, following the remarkable "decentralized precedent" of the Basel meeting will take place in Louvain (Belgium) in 2014.

Alain Pellet and Daniel Thürer

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Contents

CHAPTER 1

Immune against Constitutionalisation?

Anne Peters

1 Immunities and Global Constitutionalism

Immunities are a messy affair. They oscillate between law, politics, and comity. Throughout history, immunities have often been treated as a matter of "mere grace, comity, or usage".[1] The view that conferring immunity is an act of international "comity" (*courtoisie*) is still popular in common law countries (UK and USA), countries which have (ironically) codified immunities in domestic statutes which often form the primary or even exclusive legal basis of those countries' court decisions.[2] In its 2012 judgment, the ICJ confirmed that respect for immunity is required by international law, by stressing "that, whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity."[3]

Immunity basically means to be exempt from the jurisdiction of a national court, and from measures of enforcement and execution by the organs of states. Immunity is granted to states, state officials including diplomats, and international organisations. With regard to these different actors, the rationales of immunity differ, and concomitantly, the scope and the possible exceptions to immunity vary.

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1 Lori Damrosch, "Changing International Law of Sovereign Immunity Through National Decisions," *Vanderbilt Journal of Transnational Law* 44 (2001): 1185–1200, 1186.

2 The US American judgment US S Ct, *Schooner Exchange v. McFaddon*, judgment of 24 February 1812, 11 US (7 Cranch) 116–147 is normally considered to be the first judicial decision on immunities worldwide. It granted immunity to a French public/national military vessel as "a matter of grace and comity" (US S Ct., *Verlinden BV v. Central Bank of Nigeria*, judgment of 23 May 1983, 461 US 480, 486). The judgment *Samantar v. Yousuf* did not even mention international law, but only the US American Foreign Sovereign Immunities Act and the "policy" of the State Department (US S Ct., *Mohamed Ali Samantar v. Bashe Abdi Yousuf et al.*, 1 June 2010, 560 US 305; 130 S.Ct. 2278, 2284).

3 ICJ, *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece Intervening*), judgment of 3 February 2012, ICJ Reports 2012, para. 56.

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Although these immunities are in principle anchored in international law,[4] their precise legal implications are often unclear. The reason is the diversity of domestic case-law as just mentioned, the diversity of the practice of other national branches of government, the constant interaction between international and domestic law which is needed to apply the law of immunity, and the lack of a comprehensive international codification. Overall, the case law of national and international courts and the work of the International Law Commission continuously interact, and make this field of international law dynamic, complex, and partly inconsistent.

The existence and extent of immunities, notably state immunity, are a reflection of the structure of the international legal order as a whole. Therefore, any "study of State immunity directs attention to the central issues of the international legal system", as the eminent authority on state immunity, Lady Hazel Fox, put it.[5] This book takes up a number of new trends and challenges in this highly intriguing legal field and notably seeks to assess those within the framework of global constitutionalism and multilevel governance.

Our book title, "Immunities in the Age of Global Constitutionalism" seeks to place the study in the middle of the tension that is created by the persistence of immunities (which are, after all, an outgrowth of the Westphalian interstate system based on coordination and cooperation among equal sovereigns) confronted with a trend of (or a least quest for) a constitutionalisation[6] of the international legal system—a process which notably implies that human rights protection (not state sovereignty) should function as the *Letztbegründung* of the international order.[7] By "global constitutionalism", we understand an intellectual movement which claims that constitutionalist principles, together with

4 More than 25 years ago, a study found that relative state immunity was a rule of international customary law arising from converging state practice and opinio iuris since the end of the 1970s. In contrast, the practice of absolute immunity did not amount to a customary rule. Isabelle Pingel-Lenuzza, *Les immunités des Etats en droit international* (Bruxelles: Bruylant 1997), 4, 11 and 377.

5 "Ultimately the extent to which international law requires, and municipal legislations and courts afford, immunity to a foreign State *depends on the underlying structure of the international community*". (Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford: OUP 3d ed 2013), 7, emphasis added).

6 "Constitutionalisation" is a process, a potential evolution from an international order based notably on that very organising principle of state sovereignty to an international legal order which acknowledges and has creatively appropriated and modified constitutionalist elements.

7 Anne Peters, "Humanity as the A and Ω of Sovereignty," *European Journal of International Law* 20 (2009): 513–544.

institutions and mechanisms securing and implementing those principles, do play a role and should play a role also in the international legal order. The welcome constitutionalist elements are notably the commitment to human rights, democracy, and the rule of law.[8]

The duality of the (partly competing) rights holders—states and humans—has in the context of immunities been most relentlessly highlighted by ICJ judge Cançado Trindade in his individual opinions in the *Jurisdictional Immunities* affair, writing about "Jus gentium in the twenty-first century: Rights of States and rights of individuals".[9] Cançado Trindade called that case "a case which has a direct bearing on the evolution of international law in our times. There is no reason for keeping on overworking the rights of States while at the same time overlooking the rights of individuals. One and the other are meant to develop *pari passu* in our days, attentive to superior common values."[10]

Suggestions to restrict the different types of immunity correspond to the "constitutionalist" agenda of international law of strengthening the international rule of law and protecting the most fundamental rights of individuals more effectively. However, the "conservative" tendencies regarding the immunities of states and of international organisations also seek to safeguard fundamental, even constitutional principles of the international legal order. Bearing this in mind, global constitutionalism does not only and not in an unreflected way propagate a human rights exception to immunities. A constitutionalist outlook is also wary of the constitutional principle of equality of states, and considers it a problem when (former) state officials of weak states are selectively prosecuted, while officials of allies or powerful states are left unprosecuted for reasons of foreign policy.[11]

Global constitutionalism places high value on the rule of law and equal protection of humans. From that perspective, it must be asked whether the closure of courts to plaintiffs solely because the respondent is a state infringes those plaintiffs' right to equal protection of citizens in the forum state.[12]

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8 Mattias Kumm and others have called this "the trinatarian mantra of the constitutionalist faith" (Mattias Kumm, Anthony Lang, James Tully, and Antje Wiener, "How large is the world of global constitutionalism?" *Global Constitutionalism* 3 (2014): 1–8, 3).

9 ICJ, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening), order of 4 July 2011, separate opinion of judge Cançado Trindade, heading before para. 9.

10 Ibid., para. 54.

11 Cf. Stefan Talmon, "Immunität von Staatsbediensteten," in *Berichte der Deutschen Gesellschaft für Völkerrecht* 46 (2014), 313–376, 372.

12 Sally El Sawah, *Les immunités de l'Etat et des organisations internationales: immunités et procès équitable* (Bruxelles: Larcier 2012), para. 1738.

The incoherencies in the immunity regime not only threaten to violate the right to access to a court, but more generally place the rule of law at risk.

On the other hand, a constitutionalist perspective, especially taking into account the multi-level character of global constitutionalism, facilitates the insight that any further curtailment of immunities (in order to secure victims' rights to remedy and reparation) is pre-conditioned on an effective guarantee of due process and fair trial (for impugned office-holders) before the courts of the world. Both (constitutional) elements are inevitably linked: You cannot have one without the other.

A constitutionalist outlook also pays attention to the political undercurrents of the law of immunities, because after all, constitutional law is the law facilitating and organising political processes. The granting of immunity by one state to another state or its organs is replete with considerations of opportuneness and foreign politics. But the sensitivity of the issue, especially when bringing a sovereign state before a national court, is being concealed by " a—partially false—appearance of technicality".[13] It is often "behind the screen of [procedural] law", that a politisation of the law suit takes place, and that judicial proceedings will be subject to pressure by the government.[14] The "increasingly legalistic discourse" on the concrete details of granting or withholding immunity in a particular case, stands in contrast to its overall context of high politics.[15]

Finally, the constitutionalist perspective should not overlook that immunities are not only a hybrid between law and politics, and between international and domestic law, but also between public and private law. They display features of private international law or of a choice-of-law regime,[16] because they result from the multiple domestic courts' application of their proper (national) rules and principles on the scope of their jurisdiction and on the admissibility of complaints, resembling in their outcome the application of familiar private law principles such as *forum non conveniens* or *ordre public*.

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13 Xiadong Yang, *State Immunity in International Law* (Cambridge: CUP 2012), 461.

14 Horatia Muir Watt, "Une perspective 'internationaliste-privatiste' ", in Joe Verhoeven, ed., *Le droit international des immunités: consolidation ou contestation?* (Paris: LGDJ 2004), 267.

15 Yang, *State Immunity* (n. 13), 461.

16 Jean-Flavien Lalive, "L' immunité des Etats et des organisations internationales," *Recueil des Cours* 1953-III (84): 210: The matter "est à la limite du droit international privé." See also Sadie Blanchard, case note on a Ghanaian court decision, *American Journal of International Law* 108 (2014): 73–79, 79.

Against this foil, the underlying basic question of this book is whether the international or rather trans-national law of immunities has undergone modifications which might be interpreted as a manifestation of global constitutionalism. In the concluding Chapter 21 Stefan Oeter will return to that question.[17]

2 National Practice, the Comparative Approach, and the Role of Courts

To the extent that immunities do pertain to the legal realm, they are co-constituted by national law in its interplay with international law, or as an "application and interpretation of national law in the name of international law."[18] "[T]he law of state immunity is a mix of international and municipal law. This interaction complicates the law relating to State immunity and creates considerable tensions."[19] On account of this mix, the identification of a truly international legal corpus of rules on immunities requires a comparative approach,[20] analysing national practice (*Part One* of the book). Importantly, we need not only compare the various domestic solutions in a "horizontal" manner, but also look "vertically" at domestic law and international law.[21]

For scholarly observers, it is an open question whether such comparison should be best conducted in an "inductive" fashion, starting from the inchoate court practice and seeking to isolate the lowest common denominator,[22] or whether it should—inversely—"deduce" rules from more abstract principles (such as the primacy of human rights protection acknowledged in the international legal system). Probably a combined approach, both bottom up and top down, i.e. an examination of state (court) practice guided by principles in the style of a "better law" approach is warranted in order to identify and

17 Stefan Oeter, "The Law of Immunities as a Focal Point of the Evolution of International Law," Chapter 21 in this volume.

18 Yang, *State Immunity* (n. 13), 464.

19 Fox and Webb, *State Immunity* (n. 5), 1.

20 Lalive, "L' immunité" (n. 16), 210: "Autrement dit, la technique du droit comparé se révèle ici indispensable."

21 Cf. Aleksandar Momirov and Andria Naudé Fourié, "Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law," *Erasmus Law Review* 2 (2009): 291–309.

22 See in that sense Yang, *State Immunity* (n. 13), 4. "[T]he received wisdom appears largely a result of repetition only, rather than of any mysterious principles." (ibid., 5).

develop the law of immunities.[23] This approach is particularly incumbent on legal scholars who are in any case not law-makers but at best act as midwifes for the development of new and potentially better rules.

A striking feature of the law of immunities is that it is driven by courts, not by the governments (the executive branch) of states. NGOs are often crucial actors in motivating victims to sue, and supporting them as counsels, but these complaints still address courts. In the end, any legal evolution will therefore still be determined by state institutions, not by the non-state actors themselves.[24]

The relevant decisions have traditionally been rendered by national courts, not by international ones.[25] Only in the recent years, a case-law of the ECtHR developed, and the 2012 ICJ judgment on state immunity has effectively stunned the prior attempts to limit state immunity in proceedings concerning international crimes. The dialogue among those various international and domestic courts manifests the both "horizontal" and "vertical" interaction in this field of the law. For example, the ICJ in the mentioned judgment heavily relied on numerous states' judicial pronouncements,[26] and also on two judgments of the ECtHR.[27] The ECtHR in turn recently cited "as authoritative" the ICJ.[28] Inversely, the case law of the ECtH, especially on the immunity of international organisations in employment disputes,[29] has been overwhelmingly received by national courts all over Europe, even beyond the member states of

23 Cf. Lalive, "L' immunité" (n. 16), 387, asking for "une synthèse des solutions jurisprudentielles les plus progressistes en la matière".

24 Heike Krieger, "Immunität: Entwicklung und Aktualität als Rechtsinstitut," in *Berichte der Deutschen Gesellschaft für Völkerrecht* 46 (2014), 233–259, 233.

25 60 years ago, an eminent scholar noted that there existed no pronouncement of an international court or tribunal on the matter of immunities. Lalive, "L' immunité" (n. 16), 205–389 (209). (Lalive mentioned as the sole exception the sentence of a tribunal mixte gréco-allemand, *Greek Government v. Vulkan Werke*, interlocutory decision of 12 Aug 1925, in *League of Nations Official Journal* Oct. 1927, 1342–1347, but this tribunal did not directly rely on immunity to declare itself incompetent).

26 ICJ, *Jurisdictional Immunities* (n. 3), para. 85.

27 ECtHR, *Al-Adsani v. United Kingdom* (Grand Chamber), application No. 35763/97, judgment of 21 November 2001, ECHR Reports 2001-XI, p. 101, and *Kalogeropoulou and Others v. Greece and Germany*, Application No. 59021/00, decision of 12 December 2002, ECHR Reports 2002-X, p. 417 (quoted in ICJ, *Jurisdictional Immunities* (n.3), para. 90).

28 ECtHR, *Case of Jones and others v. UK*, appl. nos. 34356/06 and 40528/06, judgment of 14 Jan. 2014, para. 197: The judgment of the ICJ in *Germany v. Italy* "must be considered by this Court as authoritative as regards the content of customary international law".

29 ECtHR, *Waite and Kennedy*, Appl. No. 26083/94, judgment of 18 February 1999.

the ECHR.[30] In the field of state immunity, national courts constantly refer to foreign cases; indeed "such references constitute a persistent feature in cases of State immunity".[31] In contrast, the conversation entertained among national courts on questions of the immunity of international organisations is more laconic: A recent serious comparative study of that domestic case-law found that the expected judicial dialogue among domestic courts on this question "hardly takes place".[32]

The peculiar role and function of national courts in identifying or possibly developing international law seems unique in the field of immunities. The reason is of course that immunities by definition come into play when an issue is brought before a domestic court. From the perspective of the meta-law on international legal sources, national court decisions may be relevant for the formation of international law in three different ways.[33] First, such court decisions might be constitutive of international customary law, as instances of state practice and/or as pronouncements of an *opinio iuris*. Second, national court decisions might constitute "subsequent practice" for the interpretation of treaty law (in the sense of Art. 31(3)(b) VCLT), and arguably concomitantly for the "interpretation" of international customary rules. Third, "judicial decisions" by national courts are a "subsidiary means for the determination of rules of law" in the sense of Art. 38(1)(d) ICJ-Statute. In reality, national court decisions play not only a supplementary, but even a primordial role in the area of immunities,[34] as all contributions to this volume show. The unusual and to some extent controversial role that domestic judicial pronouncements play in international law thrusts into the limelight the shortcomings of international law's fixation on "the state" as a black box. In reality, the attribution of one uniform legal "opinion" to the state is a legal fiction. And this fiction is becoming increasingly problematic in a global order that promotes the rule of law at

30 August Reinisch and Ralph RA Janik, "The Personality, Privileges, and Immunities of International Organizations before National Courts," in August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford: Oxford University Press 2013), 329–337 (332–335 with further references).

31 Yang, *State Immunity* (n. 13), 4.

32 Reinisch and Janik, "International Organizations" (n. 30), 329–337, 330.

33 See also Anthea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law," *International and Comparative Law Quarterly* 60 (2011): 57–92, 62–63.

34 Scholarly treatment of the law of immunities has been dubbed as amounting to not much more than commentaries on the case-law (Yang, *State Immunity* (n. 13), 6).