

**UNIVERSITY OF OXFORD**

**PUBLIC INTERNATIONAL LAW**

**JURISDICTION AND IMMUNITIES: (2) IMMUNITIES**

**A. Outline:**

IV. Immunities from jurisdiction

1. Meanings
2. Immunity and other concepts distinguished
  - a. Privileges
  - b. 'Act of State'
  - c. Non-justiciability
  - d. Forum non convenience
3. Different types of immunities from the jurisdiction of national courts
  - a. State immunity
  - b. Personal immunity of State representatives
    - (1) Heads of State
    - (2) High-ranking government officials
    - (3) Diplomatic agents
    - (4) Consular agents
    - (5) Members of special missions
    - (6) Members of the armed forces
  - c. Immunity of intergovernmental organizations and their officials
  - d. Immunity of international courts and their officials
4. State immunity
  - a. Sources
  - b. Historical development
  - c. Legal basis
  - d. Beneficiaries of State immunity
    - (1) The State, its organs and officials
    - (2) Subdivisions of the State
    - (3) State-owned/-controlled enterprises
  - e. Immunity from adjudication
    - (1) Scope of immunity
      - (a) The doctrine of restrictive immunity
      - (b) Distinguishing *acta jure imperii* and *acta jure gestionis*
      - (c) The approach of the SIA 1978 and the ECSI 1972
      - (d) Problematic exceptions to immunity
        - (i) Tortious conduct
        - (ii) Expropriation
        - (iii) Human rights violations
        - (iv) Acts of terrorism
    - (2) Effects of immunity from adjudication

- (a) Service of process
    - (b) Default proceedings
  - f. Immunity from execution
    - (1) Scope of immunity
    - (2) Conditions for execution
      - (a) Enforceable decision
      - (b) No immunity from adjudication
      - (c) Connection between property to be attached and claim
    - (3) Limits on objects of execution
      - (a) State officials
      - (b) Property serving sovereign purposes
        - (i) Property
        - (ii) Proof of use for sovereign purposes
      - (c) Special problems
        - (i) Mixed bank accounts
        - (ii) Property forming part of the State's cultural heritage
        - (iii) State interest in third party property
  - g. Waiver of immunity
    - (1) Mode of waiver
    - (2) Conditions
      - (a) By the State
      - (b) Unequivocal and certain
      - (c) Separate waiver for adjudication and execution
- 5. Immunity of public officials from jurisdiction of national courts
  - a. Public officials in office
  - b. Former public officials
    - (1) Scope of immunity
      - (a) Immunity *ratione personae*
      - (b) Immunity *ratione materiae*
    - (2) Limits to immunity *ratione materiae* from criminal jurisdiction
      - (a) Exclusion of acts violating *jus cogens*
      - (b) Waiver of immunity by treaty
        - (i) Express
        - (ii) Implied
- 6. Immunity of State officials from jurisdiction of international criminal courts
  - a. No immunity from the jurisdiction of the court
  - b. Respect for obligations under international law with respect to State or diplomatic immunity
  - c. Legality of the US "immunity agreements" with parties to the Rome Statute
- V. Obstacles to the exercise of adjudicative (criminal) jurisdiction
  - 1. The traditional rule: *Male captus, bene detentus*
  - 2. Possible obstacles to jurisdiction
    - a. Forcible abduction
    - b. Violation of an extradition treaty
    - c. Seizure from foreign vessel on high seas without flag State consent
    - d. Luring out of the country by means of trickery
  - 3. Legal basis for the obstacle

- a. National law
  - (1) Right of due process of law
  - (2) Rule of law
- b. Customary international law
  - (1) State (court) practice and opinio juris
  - (2) Determining factors of the rule
    - (a) Seriousness of the crime to be prosecuted
    - (b) Nature of the breach of international law
      - (i) Violation of a State's sovereignty
      - (ii) Violation of the accused's human rights
    - (c) Proportionality Test

## **B. Basic Reading:**

### **(a) Treaties and Other Documents**

#### **(i) Treaties and Documents Available in Blackstone's International Law Documents:**

- 1945 Charter of the United Nations, Art. 105
- 1972 European Convention on State Immunity and Additional Protocol
- 1978 UK State Immunity Act
- 1982 United Nations Convention on the Law of the Sea, Arts. 32, 236

#### **(ii) Other Relevant Documents**

- 1976 US Foreign Sovereign Immunities Act, 28 U.S.C. §§1602-1611 (available at: <http://uscode.house.gov/usc.htm>)
- 1991 ILC Draft Articles on Jurisdictional Immunities of States and Their Property (available at: <http://www.un.org/law/ilc/texts/jimm.htm>)

### **(b) Cases**

#### **(1) International Court of Justice**

- *Case Concerning Certain Criminal Proceedings in France ( Republic of the Congo v. France)*, Order of 17 June 2003: International Legal Materials 42 (2003), 852
- *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment of 14 February 2002: International Legal Materials 41 (2002), 536

#### **(2) International Criminal Tribunal for the Former Yugoslavia**

- *The Prosecutor v. Dragan Nikolic* – Case No. IT-94-2-AR73 (Decision on Interlocutory Appeal Concerning Legality of Arrest), Appeals Chamber, 5 June 2003: available at: <http://www.un.org/icty/Supplement/supp42-e/nikolic.htm> [summary]

### (3) European Court of Human Rights

- *Al-Adsani v. The United Kingdom*, Judgement of 21 November 2001, available at: <http://hudoc.echr.coe.int/Hudoc2doc2/HEJUD/200308/al-adsani.batj.doc>

### (3) National Courts

#### (i) Germany

- German Federal Constitutional Court, Order of 5 November 2003 (*Extradition to the United States of America*), available in English at: [http://www.bverfg.de/entscheidungen/frames/rs20031105\\_2bvr150603en](http://www.bverfg.de/entscheidungen/frames/rs20031105_2bvr150603en)

#### (ii) United Kingdom

- *Kuwait Airways Corporation v. Iraq Airways Co. (No. 1)*, House of Lords, 24 July 1995: [1995] 1 WLR 1147; [1995] 3 All ER 694
- *Al-Adsani v. Government of Kuwait*, Court of Appeal, 12 March 1996: 107 ILR 536
- *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte Amnesty International and others intervening (No 3)*, [2000] 1 AC 147; International Legal Materials 38 (1999), 581
- *Military Affairs Office of the Embassy of the State of Kuwait v. Caramba-Coker*, Employment Appeal Tribunal, 10 April 2003: available on Westlaw, 2003 WL 1610407
- *Jones v. Saudi Arabia*, High Court, Queen's Bench Division, 30 July 2003: available on Westlaw, 2003 WL 22187644

#### (iii) United States of America

- *US v. Alvarez-Machain*, 504 US 655 (1992)
- *Tachiona v. Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y. 2001)
- *US v. Best*, 172 F.Supp.2d 656 (DC Virgin Islands 2001)
- *Altmann v. Republic of Austria*, 317 F.3d 954 (CA 9<sup>th</sup> Cir. 2002) [case currently before the Supreme Court]

### (c) Literature

#### (i) General Textbooks

The following general textbooks contain suitable chapters on Jurisdiction:

Brownlie, Ian, *Principles of Public International Law* (6<sup>th</sup> edn., Oxford: Oxford University Press, 2003), 319-358

Evans, Malcolm D. (ed.), *International Law* (Oxford: Oxford University Press, 2003), 357-413

Jennings, Robert/Watts, Arthur (eds.), *Oppenheim's International Law* (9<sup>th</sup> edn., Harlow: Longman, 1992), 341-371

Shaw, Malcolm N., *International Law* (Cambridge: Cambridge University Press, 2003), 621-693

## **(ii) Cases and Materials**

Dixon, M./McCorquodale, R., *Cases and Materials on International Law* (4<sup>th</sup> edn., Oxford: Oxford University Press, 2003), 301-347

Harris, D.J., *Cases and Materials on International Law* (5<sup>th</sup> edn., London: Sweet & Maxwell, 1998), 306-367

## **C. Specialist Monographs and Articles:**

Bröhmer, Jürgen, Immunity of a Former Head of State: General Pinochet and the House of Lords, *Leiden Journal of International Law* 13 (2000), 229-237

Cassese, Antonio, When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, *European Journal of International Law* 13 (2002), 853-875

Dellapenna, Joseph W., *Suing Foreign Governments and Their Corporations* (2<sup>nd</sup> edn., Ardsley: Transnational Publishers, 2003)

Fox, Hazel, *The Law of State Immunity* (Oxford: OUP, 2002)

Lloyd Jones, David, Article 6 ECHR and Immunities arising in Public International Law, *International and Comparative Law Quarterly* 52 (2003), 463-472

Spinedi, Maria, State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur?, *European Journal of International Law* 13 (2002), 895-899

Talmon, Stefan, War Booty of 'Separate Entity' Protected by Sovereign Immunity, *Oxford Journal of Legal Studies* 15 (1995), 295-307

Voyiakis, Emmanuel, Access to Court v State Immunity, *International and Comparative Law Quarterly* 52 (2003), 297-332

Watts, Arthur, The Legal Position in International Law of Heads of State, Heads of Government and Foreign Ministers, *Recueil des Cours* 247 (1994-III), 9-130