DOWNLOAD PDF LAW OF STATE IMMUNITY

Chapter 1 : State immunity - Wikipedia

The Law of State Immunity. Third Edition. Hazel Fox, QC and Philippa Webb Oxford International Law Library. A revised and updated third edition of this highly regarded and comprehensive guide, providing new analysis of recent developments in relation to state immunity.

The Supreme Court had interpreted the commerce clause power of Congress quite expansively; had rejected claims that federalism principles sometimes loosely but inaccurately labeled " tenth amendment principles" prevent Congress from imposing generally applicable regulations on states; and had rejected claims that eleventh amendment principles prevent Congress from enforcing those regulations by authorizing private suits against noncomplying states in federal court. In addition to reminding Congress in united states v. But in gregory v. The Court announced that it would interpret federal statutes not to apply to traditional government functions unless Congress made its intent to do so "unmistakably clear. The Court then extended this anticommandeering rule in Printz v. United States , holding that Congress may not conscript state executive officials to implement federal regulatory programs. In each of these three cases, the Court invoked the concept of "dual sovereignty" in justifying some limit on the authority of Congress to regulate the states directly, rather than merely to regulate persons and entities within the territorial boundaries of states. Ever since Hans v. Louisiana more than a century ago, the Court has interpreted the Eleventh Amendment to preclude federal courts from entertaining private suits that assert claims arising under federal law against unconsenting states. By the end of the s, the Court had conceded that Congress retained the authority to override this erstwhile Eleventh Amendment immunity pursuant either to its power under the fourteenth amendment, section 5to enforce the guarantees of that amendment, fitzpatrick v. In Seminole Tribe v. Florida , however, the Court overruled Union Gas and held that Congress could not authorize private enforcement actions against states in federal court pursuant to its Article I grants of power. The Court felt that such a broad congressional authority was incompatible with the Hans -based tradition of state sovereign immunity. Thus, even when Congress may impose generally applicable regulatory burdens pursuant to its Article I powers on both state and private actors alike, Congress must rely primarily on state courts to vindicate private federal causes of action against the state. And while the Court did not disturb its previous conclusion in Bitzer that Congress may override state sovereign immunity pursuant to its section 5 power to enforce the fourteenth amendment, the Court subsequently narrowed the substantive scope of this power in Boerne City of v. Flores , thus circumscribing the Bitzer exception. To be sure, since ex parte young the Court has qualified the scope of the Eleventh Amendment by allowing private plaintiffs to seek prospective relief against state officials to rectify ongoing violations of federal law. The fiction here is that such suits are really against the officials rather than "the state. Neither the regulatory nor judicial immunity doctrines are persuasively grounded in constitutional text; the regulatory immunity does not even purport to be text-based, and the Court has all but admitted that its broad interpretation of Eleventh Amendment immunity runs counter to the plain meaning of the words. At bottom, the Court grounds both doctrines in what it calls the structural principle of "dual sovereignty" asserted to underlie our constitutional framework. This principle suggests that states and the federal government are coequal sovereigns, implying that each sovereign should be immune from regulation by the other. But this claim of coequal status ignores the competing constitutional principle of federal supremacy. Neither principle can be considered in isolation: And yet the Court has failed to provide a careful discussion of the various federalism values either served or disserved by its immunity doctrines. These doctrines might plausibly be viewed as second-best methods of policing the general boundaries of the Article I regulatory authority of Congress. The Court has lamented the tremendous postâ€”new deal expansion of the power of Congress to regulate interstate commerce, but has simultaneously found it difficult to limit this power through defensible doctrinal lines. The immunity doctrines, while not directly tailored to the concerns about congressional omnicompetence, at least provide readily enforceable mediating principles that constrain Congress to some degree and proclaim a resounding symbolic victory for state sovereignty. Constitutional History, â€” ; Dual Federalism. Bibliography Caminker, Evan H. Columbia Law Review Supreme Court Review Yale Law

Journal Virginia Law Review Cite this article Pick a style below, and copy the text for your bibliography.

Chapter 2 : NAAG | State Sovereign Immunity

The legal definition of State Immunity is A principle of international law which exempts a State from prosecution or suit for the violation of the domestic laws of another state.

It can be confusing whether SOEs qualify for state immunity. The legal doctrine of sovereign immunity, or state immunity initially provided that a state is immune to the jurisdiction of foreign courts and the enforcement of court orders, even if the acts involved are commercial in nature, unless it chooses to waive such immunity. Not until the mid-twentieth century when governments became more active in commercial activities, was the doctrine condemned to be unfair to private companies. Actually, as of July , only 22 countries, out of which 14 are also signatories, have ratified, accepted, approved or accessed the UN Convention, which will not be in force until the number of ratification, acceptance, approval or accession reaches Therefore, it has taken no effect in unifying the international practice. Commercial activity exception is probably the most common exception from immunity under the doctrine of qualified immunity, though the definition of what constitutes commercial activities varies. Absolute immunity as the principle The CPG has consistently argued for absolute immunity in foreign courts. Later, it is observed that the CPG prefers extrajudicial and diplomatic means in conveying the absolutist position. For example, during the US case Morris v. Accordingly, the country itself enjoys sovereign immunity whereas SOEs as independent legal persons do not. Since the Fireworks case in and other judicial experience relating to state immunity in foreign courts, myriads of Chinese laws have been revised, creating further legal distinction between the state and an SOE. Therefore, if an SOE in fact possesses all these characteristics listed under Chinese laws, it will be seen as a separate entity from the state. Exceptions to the general principle that SOEs do not enjoy sovereign immunity Generally, if the activities of an SOE are commercial in essence and are not part of the activities of the state, then such SOE is usually not deemed as part of the state nor a body performing functions on behalf of the government. Under this situation, even if the SOE perform duties which are commercial in nature, it enjoys absolute immunity. Based on an aggregate effect of constitutional, administrative and judicial policies, it is recommended that courts would consider whether the governmental authorizer has the power to carry out the activity in concern as well as the power to authorize, and whether there is any record showing an effective authorization. Although the PRC has been opposing the doctrine of qualified immunity, their signing of the UN Convention may still suggest a potential future switch from absolute immunity to restrictive immunity. Moreover, by taking the position that SOEs are separated from the state and generally not immune from suit, arguably the PRC has in practice already adopted some version of qualified immunity. Also, from a practical perspective, a switch to qualified immunity may better accommodate the sharp increase of Chinese outbound investment and help create a level playing field for international trade. The situation will be quite special if the case involves a Chinese SOE claiming sovereign immunity in a Hong Kong court. However, the SOE in question can try to claim crown immunity, which allows the state to enjoy immunity from execution ordered and from being sued in its own courts. There are two ways to access this: The primary question is whether that SOE is able to exercise independent power on its own. The courts would take into account all circumstances. This is similar to absolute immunity â€” the nature of the activities is not in concern after it has been confirmed that the SOE is acting on behalf of the state. The nation adopts a broad interpretation of what it considers to be a state actor, which encompasses an SOE, but applies the doctrine of qualified immunity when determining whether a state actor is immune from suit. Accordingly, an SOE of a foreign country will be categorized as a foreign state, and thus the first hurdle of claiming sovereign immunity is overcome. Some general exceptions include property at issue being taken in violation of international law and money damages being sought against a foreign state for personal injury or death. Under this exception, the courts must decide whether the claims arise out of governmental activities de jure imperii or out of activities of commercial nature de jure gestionis. To determine its character, its nature instead of its purpose should be taken into account. However, the court held that the defendant was exercising its own authority instead of the sovereign authority of the state of Iraq, so the defendant did not enjoy the exception under section 14 of the SIA. There are 10

exceptions from immunity under the SIA and they include commercial transactions and contracts to be performed in the UK. It is essential to note that the commercial transaction exception under section 3 of the SIA can only be applied to state immunity from suit but not from enforcement of foreign judgments in the UK because by a majority three to two the Supreme Court held that proceedings for enforcement of a foreign judgments related only to that foreign judgment but not to the underlying commercial contract and the majority in reluctant to render section 3 of the SIA a wide interpretation. This is good news for private companies engaging in commercial transactions with SOEs. Nonetheless, the approach to sovereign immunity can vary substantially by jurisdiction. An unequivocal waiver of immunity clauses covering all assets in all transaction documents may mitigate the risk of a sovereign immunity defense. An express confirmation that the SOE is not acting in a sovereign capacity may also assist. The effectiveness of sovereign immunity waivers however can also vary by jurisdiction. Thus advice from local counsel where litigation or enforcement is anticipated may also be prudent.

Chapter 3 : Immunity from prosecution (international law) - Wikipedia

Immunity from prosecution is a doctrine of international law that allows an accused to avoid prosecution for criminal offences. Immunities are of two types. Immunities are of two types. The first is functional immunity, or immunity ratione materiae.

On August 29, , the United States submitted a suggestion of immunity of the sitting head of state of Rwanda, Paul Kagame, in the U. District Court for the Western District of Oklahoma. That letter is available at internet link state. The Constitution assigns to the U. President alone the responsibility to represent the Nation in its foreign relations. As an incident of that power, the Executive Branch has sole authority to determine the immunity from suit of sitting heads of state. The Legal Adviser of the U. Department of State has informed the Department of Justice that Rwanda has formally requested the Government of the United States to suggest the immunity of President Kagame from this lawsuit. As discussed below, this determination is controlling and is not subject to judicial review. The doctrine of head of state immunity is well established in customary international law. The Supreme Court has held that the courts of the United States are bound by suggestions of immunity submitted by the Executive Branch. See [Republic of Mexico v. More about the Issue 7. Thus, acts committed before a sitting head of state assumed that position are not excluded from the scope of his immunity while in office. In this case, because the Executive Branch has determined that President Kagame, as the sitting head of a foreign state, enjoys head of state immunity from the jurisdiction of U. The United States had filed a suggestion of immunity in the district court and an amicus brief in the court of appeals in See this world legal encyclopedia in relation to issues that took place in the year at The decision of the court of appeals is excerpted below. Developments On appeal, the plaintiffs urge us to reverse the judgment of the district court, contending that the sitting president of Sri Lanka is not immune from civil suit under the TVPA. Republic of Mexico v. Here, the defendant did request a suggestion of immunity, and the United States granted that request by submitting a suggestion of immunity to the court. Accordingly, as the district court recognized, it was without jurisdiction, see Saltany v. In fact, if anything the legislative history appears to indicate that Congress expected the common law of head of state immunity to apply in TVPA suits. Indeed, although the most analogous statute, 42 U. We likewise conclude that the common law of head of state immunity survived enactment of the TVPA. Accord Matar, F. Head of State Immunity In relation to the international law practice and head of state immunity in this world legal Encyclopedia, please see the following section: Privileges and Immunities Note: Head of State Immunity Embracing mainstream international law, this section on head of state immunity explores the context, history and effect of the area of the law covered here. Head of State Immunity In relation to the international law practice and Head of State Immunity in this world legal Encyclopedia, please see the following section:

Chapter 4 : Sovereign Immunity - International Law - Oxford Bibliographies

state immunity the general principle that one state does not impose civil or criminal liability on another. Thus the head of state or former head of state of a country is normally free from prosecution in another country.

Put in another way, a sovereign state is exempt from the jurisdiction of foreign national courts. Thus, the question of immunity is at the same time a question of jurisdiction: The current law of state immunity has developed predominantly as a result of cases decided by national courts in legal proceedings against foreign states. Doctrinal debates among the scholars are of much later occurrence and consist mainly of comments on decided cases. This feature of the law also shapes and determines the contours of a research guide on sovereign immunity. As far as possible, the leading cases in the field must be introduced first, so as to provide a firsthand view of the law and to place the relevant doctrinal debate in its proper context. General Overviews The convenient place to start, so far as the relatively modern developments are concerned, is Lauterpacht , which seeks to offer a doctrinal exploration in the light of judicial practice of a number of states during the early part of the 20th century. This set the pattern of the scholarly exposition throughout the history of the law of state immunity. Sucharitkul was the most important work to appear and argue decidedly in favor of restrictive immunity, at a crucial juncture where the absolutist and the restrictivist camps were of equal strength. The defense of restrictive immunity remained the central concern of the academic works published before the end of the s. Badr offers a typical justification for the transition from absolute to restrictive immunity. Starting from Schreuer , however, leading writers no longer find it necessary to engage in such a defense but instead concentrate on how restrictive immunity is or should be given effect in practice. Schreuer thus simply assumes restrictive immunity and discusses the question of immunity along the lines of the pressing issues facing the practitioners. Bankas discusses a selection of issues based on selection of cases. As a comprehensive summing-up of the developments so far, Fox gives a good indication of what issues and aspects of state immunity are now facing the student in this field. The book starts with the theoretical bases of state immunity and then conducts a detailed analysis of such practical issues as commercial activity and other exceptions to immunity, express and implied waiver of immunity, and immunity from execution. Finally, the book discusses the extension of state immunity to heads of state, diplomats, and armed forces. Gong follows a similar pattern and discuses both historical and current issues. A more theory-oriented, rather than case-based, work is Cosnard The central theme of the book is to demonstrate that state immunity is an entitlement under international law, derived from sovereign equality. The book sheds much light on the conceptualization of the notion of statehood and will be of considerable value to the academic researcher. An Analytical and Prognostic View. The Hague and Boston: Traces the evolution of the law and discusses the distinction between immune and nonimmune acts of foreign states. It then conducts an ingenious rereading of the case law and argues that even those apparently absolutist cases in fact support the restrictive doctrine. Berlin and Heidelberg, Germany: Of particular interest are two chapters chapters 5 and 6 on the position of African states on sovereign immunity. Views state immunity as an entitlement that is derived from sovereign equality and which protects every state against possible encroachments by the exercise of jurisdiction by foreign national courts. The Law of State Immunity. Oxford University Press, Beijing University Press This exhaustive, lucid and insightful book critically analyses, from a historical and comparative perspective, the core doctrinal and practical issues of state immunity, as well as the practice of China. The discussion on the historical evolution is particularly illuminating. First published in Of significance is that the conclusions are based on a survey of judicial practice in various states, gathered in a long appendix two-fifths of the article. The analysis is chiefly based on the then-up-to-date case law. The structure, centering on practical issues rather than theoretical controversy, is the most easily navigable. Users without a subscription are not able to see the full content on this page. Please subscribe or login. How to Subscribe Oxford Bibliographies Online is available by subscription and perpetual access to institutions. For more information or to contact an Oxford Sales Representative click here.

Chapter 5 : Oxford Public International Law: The Law of State Immunity

The doctrine and rules of state immunity concern the protection which a state is given from being sued in the courts of other states. The rules relate to legal proceedings in the courts of another state, not in a state's own courts.

Many academics and judges struggle to make sense of modern U. Supreme Court jurisprudence on sovereign immunity. As a result, in its own court, a state can invoke immunity even when sued under an otherwise valid federal law[4] and has full authority to define the scope of their immunity from suits based on its own law. This has prompted the creation of a variety of sovereign immunity regimes among the states. Section I of this monograph provides a quick overview of the history of state sovereign immunity, which plays a central jurisprudential role both in the current law and in theories that do not hold a majority of the Court. Then Section II walks through Supreme Court law and its application in federal courts, followed by an explanation of the four exceptions to the doctrine in Section III. Lastly, Section IV discusses sovereign immunity in state courts and lays out a handful of elements that most states include as part of their internal sovereign immunity law. This disagreement has spawned several constitutional theories that try to make sense of the Eleventh Amendment and of precedent attempting the same. The decision surprised all and infuriated most,[16] and, within two years, Congress had passed, and the states ratified, the Eleventh Amendment with near unanimity: That jurisprudence follows in the next section. Rather, [it] grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it. The Court has also enumerated exceptions to the general rule, which follow in the next section. III Exceptions to Eleventh Amendment Immunity There are four situations in which state sovereign immunity cannot be invoked in federal court. The first three are exceptions to the rule: A Congressional Abrogation Congress has the ability to abrogate sovereign immunity and compel a state to court if two conditions are met. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. Board of Regents dealt with a case against Georgia filed in Georgia state court alleging violations of both federal and state law. The state by its own admission had waived its immunity from such suits under its own laws in its own courts but the issue of the federal claims remained. The Supreme Court held, though, that on those factsâ€”that is, when a state voluntarily waives state-court immunity in a state law action and then removes that action to federal courtâ€”the state has waived the immunity it would otherwise have from suit in federal court. In this instance, the state holds the authority to determine the scope of its immunity. Then the section summarizes the different choices that states have made regarding their immunity, before concluding with an overview of important aspects of that immunity where states take different approaches. Maine â€” Sovereign Immunity in State Courts Until the turn of the century, the Supreme Court had exclusively decided questions of state sovereign immunity as it applies to federal court litigation. As a case that concerned a federal cause of action in state court, Alden offered a fresh challenge to the atextual approach employed thus far. The next section walks through the different directions that states took their sovereign immunity, beginning with their state constitutions. B Codification of Sovereign Immunity Although the original Constitution and the Eleventh Amendment failed to clarify how common law sovereign immunity interacts with Article III, it appears that the Framers believed that they possessed sovereign immunity with respect to state law. The largest portion of those states maintain the status quo and establish internal immunity as a jurisdictional bar from suit. The Supreme Court in at least one of those states created internal immunity on its own accord. First, no state, even those whose constitutions did not give waiver authority to the legislature, maintains absolute internal immunity from suit. Second, most states have created their own Tort Claims Act,[99] which establishes a procedural requirement for suing the state, limits on damages or attorney fees, and rules for challenging on appeal. This may include a separate judiciary court, like a state Court of Claims,[] or a commission or board that has sole authority to determine whether the relevant state statute grants sovereign immunity or a waiver of it, depending on the jurisdiction. This "immunity" theory maintains that the Amendment is not the exclusive, or even the primary, source of state sovereign immunity. This is the general sense, and the general practice of

mankind; and the exemption. Some observers point to other statements by these very men as evidence that their support is less certain. See also Alden, U. A Reinterpretation, 83 Colum. The speed and near unanimity with which this matter was taken up and resolved has often been cited by the Supreme Court as proof that, despite the Chisholm holding, the national consensus in strongly favored sovereign immunity. Smith, States as Nations: Dignity in Cross-Doctrinal Perspective, 81 Va. This upstart justification has been called into question. See Alden, U. Some commentators believe that Hall was primed to be overruled in Franchise Tax Board v. See Baude, supra note 7, at 3. See also Baude, supra note 7, at Court of Appeals, U. April 27, also fleshed out this distinction between individual and official suits, holding that sovereign immunity does not shield state officials when sued in their personal or individual capacity, even if the state would indemnify that employee. See also Florida Dept. Florida Nursing Home Assn. The Court remanded the case to the district court and left it to that court to determine when further remand to the state court was appropriate, seeming to imply that the state court, in this pure state-law claim, should determine whether the original waiver was valid under state law. Compare In re Bliemeister, F. Chatham County, U. See discussion on individual capacity suits against state officials, supra note The court purports to create a test specifically for multistate compacts, but it appears to employ an identical analysis. Even if you think that the Eleventh Amendment should be read to ban federal suits by all citizens, it bans only federal suits. United States, U. See supra section II. North Carolina, F. Blair When sovereigns are sued in their own Courts, such a method may have been established as the most respectful form of demand; but we are not now in State-Court;.

Chapter 6 : Do state-owned enterprises enjoy sovereign immunity? | China Law Insight

Head-of-state immunity is a doctrine of customary international law. Generally speaking, the doctrine maintains that a head of state is immune from the jurisdiction of a foreign state's courts, at least as to authorized official acts taken while the ruler is in power.

The information relating to the legal requirements of specific foreign countries is provided for general information only and may not be totally accurate in a particular case. Questions involving interpretation of specific foreign laws should be addressed to foreign attorneys. This circular seeks only to provide information; it is not an opinion on any aspect of U. Department of State does not intend by the contents of this circular to take a position on any aspect of any pending litigation. What is the role of the Department of State assist in effecting service on a foreign government? C a 4 and implementing regulations, 22 C. In addition, the Department provides assistance under Sec. News ; 22 C. What is the Foreign Sovereign Immunities Act? Foreign Sovereign Immunities Act of l, Pub. The FSIA codifies the restrictive theory of immunity, incorporating criteria, which the courts had developed in applying the theory, while codifying and applying international law. The Act prescribes the means of service for suits against a foreign state or agency and instrumentality in Section. What is the restrictive theory of sovereign immunity? A party to a lawsuit, including a foreign state or its agency or instrumentality, is required to present defenses such as sovereign immunity directly to the court in which the case is pending. The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law. Until the twentieth century, sovereign immunity from the jurisdiction of foreign courts seemed to have no exceptions. However, as governments increasingly engaged in state-trading and various commercial activities, it was urged that the immunity of states engaged in such activities was not required by international law, and that it was undesirable: Immunity deprived private parties that dealt with a state of their judicial remedies, and gave states an unfair advantage in competition with private commercial enterprise. The restrictive principle of immunity spread rapidly after the Second World War. Under the restrictive theory of sovereign immunity, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons. Under the restrictive theory, a state is immune from any exercise of judicial jurisdiction by another state in respect of claims arising out of governmental activities de jure imperii ; it is not immune from the exercise of such jurisdiction in respect of claims arising out of activities of a kind carried on by private persons de jure gestionis. What are the general exceptions to the jurisdictional immunity of a foreign state? Since the enactment of the FSIA in , the general exceptions to the jurisdictional immunity of a foreign state have expanded, moving beyond the realm of "commercial activity. What is the difference between a foreign state, political subdivision, agency or instrumentality? Section a of the FSIA gives federal district courts original jurisdiction in personam against foreign states, which are defined as including political subdivisions, agencies, and instrumentalities of foreign states. In order to serve the defendant, the claimant must determine into which category the defendant falls. If in doubt, a claimant may wish to serve the defendant according to both sets of provisions. The term "political subdivisions" includes all governmental units beneath the central government, including local governments. Section b defines an "agency or instrumentality" of a foreign state as an entity 1 which is a separate legal person, corporate or otherwise, and 2 which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and 3 which is neither a citizen of the a state of the United States as defined in Sec. An instrumentality of a foreign state includes a corporation, association, or other juridical person a majority of whose shares or other ownership interests are owned by the state, even when organized for profit. News , states in part: Is there a hierarchical order in which service must be attempted on a foreign state under the Act? The legislative history of and court cases concerning the FSIA are extensive. The FSIA clarifies the circumstances in which a foreign state will be immune from suit and embodies a federal long-arm statute pursuant to which in personam jurisdiction can be obtained over a foreign state, political subdivision, agency or instrumentality, provided that

service of process is effected in compliance with its service provisions. Service must be performed in a hierarchical manner if service cannot be made in accordance with a 1 , then service is attempted pursuant to a 2 and so forth until the various methods are exhausted. Are the methods described in section a exclusive? The FSIA provides the exclusive methods for effecting service of process on a foreign state, political subdivision, agency or instrumentality. How much time does the foreign state have to reply once service has been effected? The 60 day response period must be included in both the summons and the notice of suit where required. Do I have to have documents translated? Section a 3 and 4 require translation of the summons, complaint and notice of suit. Section b 3 requires translation of the summons and complaint and letters rogatory where applicable. Section e requires translation of the default judgment and the notice of default judgment. How do I effect service on a foreign state or political subdivision? The FSIA provides the following hierarchical steps for effecting service: Service Pursuant to Special Arrangement, 28 U. Service by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, 28 U. Service via Diplomatic Channels: The Department of State will not accept a request for service under Section a 4 if the other methods for service in Section a have not been exhausted, if the documents are incomplete, or if requisite translations are not provided. If service is attempted pursuant to Section a 2 , by applicable international convention, and service is denied by a foreign central authority for the convention, a copy of the denial should be furnished. What is a Notice of Suit? There is no pre-printed form. How should a request for service under Section a 4 be transmitted to the State Department? The Department of State accepts requests under Section a 4 received under cover of a letter from either the clerk of court or counsel for the plaintiffs. What is Proof of service via the diplomatic channel under Section a 4? How do I effect service on a foreign state with which the United States does not have diplomatic relations? The FSIA makes no provision for service of process through diplomatic channels where there are no diplomatic relations between the United States and the foreign state. In practice, service has been accomplished where a protecting power arrangement exists, unless the protecting power was restricted to emergency consular protection services.

Chapter 7 : State Sovereign Immunity and Tort Liability

State laws may provide for "discretionary function" exceptions to state liability (a discretionary function exception retains state immunity for essential governmental functions that require the exercise of discretion or judgment, such as planning or policy level decisions).

Functional immunity[edit] Functional immunity arises from customary international law and treaty law and confers immunities on those performing acts of state usually a foreign official. Any person who, in performing an act of state, commits a criminal offence is immune from prosecution. That is so even after the person ceases to perform acts of state. Thus, it is a type of immunity limited in the acts to which it attaches acts of state but ends only if the state itself ceases to exist. The immunity, though applied to the acts of individuals, is an attribute of a state, and it is based on the mutual respect of states for sovereign equality and state dignity. States thus have a significant interest in upholding the principle in international affairs: State offices usually recognised as automatically attracting the immunity are the head of state or the head of government , senior cabinet members, ambassadors and the foreign and defence ministers. For example, an English court held that a warrant could not be issued for the arrest of Robert Mugabe on charges of international crimes on the basis that he was serving as head of state at the time that the proceedings were brought. However, once the accused leave their offices, they are immediately liable to be prosecuted for crimes committed before or after their term in office or for crimes committed whilst in office in a personal capacity subject to jurisdictional requirements and local law. It may be the case that functional immunity is itself being eroded. Recent developments in international law suggest that ratione materiae may remain available as a defence to prosecution for local or domestic crimes or civil liability, but it is not a defence to an international crime. International crimes include crimes against humanity , war crimes , and genocide. The principle of depriving immunity for international crimes was developed further in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, particularly in the Karadzic, Milosevic, and Furundzija cases but care should be taken when considering ICTY jurisprudence due to its ad-hoc nature. This was also the agreed position as between the parties in their pleadings in the International Court of Justice Case Concerning the Arrest Warrant of 11 April Democratic Republic of the Congo v. In the Appeals Chamber of the Special Court for Sierra Leone held that indicted Liberian president Charles Taylor could not invoke his Head of State immunity to resist the charges against him, even though he was an incumbent Head of State at the time of his indictment. Nevertheless, this decision may signal a changing direction in international law on this issue. It is worth noting that the decisions of the Spanish and UK courts in relation to Pinochet were based directly on existing domestic law, which had been enacted to embody the obligations of the treaty. Although a state party to the treaty, Chile itself had not enacted such laws, which define the specified international crimes as crimes falling within the domestic criminal code and making them subject to universal jurisdiction, and thus Chile could only prosecute on the basis of its existing criminal code - murder, abduction, assault etc. The reasons commonly given for why this immunity is not available as a defence to international crimes is straight forward: Criminal acts of the type in question are committed by human actors, not states; and 2 we cannot allow the jus cogens nature of international crimes, i. However, the final judgment of the ICJ regarding immunity may have thrown the existence of such a rule limiting functional immunities into doubt. Regarding claims based on the idea that a senior state official committing International crimes can never be said to be acting officially, as Wouters notes: In November , French prosecutors refused to press charges against former US Secretary of Defense Donald Rumsfeld for torture and other alleged crimes committed during the course of the US invasion of Iraq, on the grounds that heads of state enjoyed official immunity under customary international law, and they further claimed that the immunity exists after the official has left office. Diplomatic immunity Personal immunity arises from customary international law and confers immunity on people holding a particular office from the civil, criminal, and administrative jurisdiction. It is extended to diplomatic agents and their families posted abroad and is also valid for their transfer to or from that post, only for the country to which they are posted. Under personal immunity, private residence, papers, correspondence, and property of an official enjoying

personal immunities are inviolable. According to Cassese , personal immunities are extended to cover personal activities of an official, including immunity from arrest and detention but the host state may declare the person persona non grata , immunity from criminal jurisdiction, immunity from the civil and administrative jurisdiction of the host state. No immunities hold for private immoveable property unless it is held on behalf of the sending state for the purposes of the mission, issues of succession, professional or commercial activity exercised outside of official functions, or the official has voluntarily submitted to the proceedings. Personal immunities cease with the cessation of the post. Cases of overlap[edit] When a person leaves office who is under a personal immunity and has committed a criminal act covered also by functional immunity, the personal immunity is removed, as usual. That is what happened in the Augusto Pinochet case before the House of Lords. Senator Pinochet was able to be extradited to face only charges not under functional immunity and meeting the separate tests for extradition, under English law.

Chapter 8 : State Immunity From Federal Law | blog.quintoapp.com

Sovereign immunity, or state immunity, is a principle of customary international law, by virtue of which one sovereign state cannot be sued before the courts of another sovereign state without its consent.

October Subject s: States have adopted a variety of structures and titles for their Heads of State. Monarchs are in principle themselves the sovereign power in the State Sovereignty. In republics it is the people who are sovereign: Apart possibly from certain ceremonial matters, no distinction is now made between monarchs and presidents as regards their substantive treatment. Heads of State are usually single individuals, but as in Switzerland, and in Bosnia-Herzegovina the office may be vested in a collegial body of two or more people. All such internal constitutional differences have no substantive bearing on the position of Heads of State in international law see also International Law and Domestic [Municipal] Law. A person who is the effective ruler of a State without being, or being recognized as, its titular Head of State or government is not entitled to be treated as Head of State cf the arrest and trial by the United States of General Noriega of Panama in â€" To be entitled to treatment as a Head of State the entity of which the person claims to be the Head must indeed be a State: A Head of a State which is not fully independent Non-Self-Governing Territories may not be entitled as a matter of international law to the same treatment as Heads of independent States, although other States may accord that level of treatment as a matter of courtesy see also Comity. They are essentially sui generis; relevant State practice is sparse and their treatment depends as much on considerations of protocol and usage as on rules of international law. Although a few aspects of their position are now regulated by treaty, it is still essentially a matter of customary international law. Apart from their functional need for special treatment, there are the added considerations that they are the personification of their States and either themselves embody or represent the sovereign power of the State. Useful guidance can sometimes be derived from the treatment accorded to senior State officials or ambassadors or the State itself, although there is no compelling analogy between their positions Heads of Diplomatic Missions ; Consuls ; Immunities ; Immunity, Diplomatic ; State Immunity ; Analogy in International Law. He personifies the State, representing its persona to the outside world. As a matter of international law a Head of State possesses the ius repraesentationis omnimodae, that is the right to represent the State internationally in all respects, and the competence to act for it internationally, with all his legally relevant acts being attributable to the State see para. Equatorial Guinea intervening para. These include in particular the reception and appointment of ambassadors Diplomatic Relations, Establishment and Severance , the conclusion of treaties, the declaration of war Humanitarian Law, International and the conclusion of peace. But the exercise of those powers is often qualified by the internal law of the State. Such domestic provision conferring powers on a Head of State does not preclude the attribution of additional powers by international law, nor are domestic limitations upon his powers necessarily effective on the international plane. The equivalent provision in Art. Recent practice has followed the Nuremberg precedent. No multilateral treaty deals directly and in general with the position of Heads of State. That provision says nothing about what those privileges and immunities might be. The same is true of those treaties eg Art.

Chapter 9 : Hazel Fox QC. The Law of State Immunity | European Journal of International Law | Oxford Ac

The International Law of State Immunity and Its Development by National Institutions Christian Tomuschat ABSTRACT The proceedings between Germany and Italy currently.*