

International Law Immunities and Employment Claims

A Critical Appraisal

Pierfrancesco Rossi

• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

1385 Broadway, New York, NY 10018, USA

29 Earlsfort Terrace, Dublin 2, Ireland

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2021

Copyright © Pierfrancesco Rossi, 2021

Pierfrancesco Rossi has asserted his right under the Copyright, Designs and Patents Act 1988 to be identified as Author of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording, or any information storage or retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or damage occasioned to any person acting or refraining from action as a result of any statement in it can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is Crown Copyright ©. All House of Lords and House of Commons information used in the work is Parliamentary Copyright ©. This information is reused under the terms of the Open Government Licence v3.0 (<http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3>) except where otherwise stated.

All Eur-lex material used in the work is © European Union, <http://eur-lex.europa.eu/>, 1998–2021.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Rossi, Pierfrancesco, author.

Title: International law immunities and employment claims : a critical appraisal / Pierfrancesco Rossi.

Description: Oxford ; New York : Hart, 2021. | Includes bibliographical references and index.

Identifiers: LCCN 2021032701 (print) | LCCN 2021032702 (ebook) | ISBN 9781509952977 (hardback) | ISBN 9781509953011 (paperback) | ISBN 9781509952991 (pdf) | ISBN 9781509952984 (Epub)

Subjects: LCSH: Administrative agencies—Officials and employees—Foreign countries. | International officials and employees—Legal status, laws, etc. | Labor laws and legislation. | International agencies—Privileges and immunities. | Immunities of foreign states.

Classification: LCC K3440 . R67 2021 (print) | LCC K3440 (ebook) | DDC 341.3/3—dc23

LC record available at <https://lcn.loc.gov/2021032701>

LC ebook record available at <https://lcn.loc.gov/2021032702>

ISBN: HB: 978-1-50995-297-7
ePDF: 978-1-50995-299-1
ePub: 978-1-50995-298-4

Typeset by Compuscript Ltd, Shannon

Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY



To find out more about our authors and books visit www.hartpublishing.co.uk. Here you will find extracts, author information, details of forthcoming events and the option to sign up for our newsletters.

TABLE OF CONTENTS

<i>Acknowledgements</i>	vii
<i>Table of Cases</i>	xiii
<i>Table of Instruments</i>	xxxvii
1. Introduction	1
2. The International Law Immunities from Civil Jurisdiction – An Overview	7
I. Introduction	7
II. Basic Concepts: Immunities, Jurisdiction and Substantive Law	7
III. The Functional Rationale of the International Law Immunities from Civil Jurisdiction	11
IV. Scope of State Immunity	14
A. The Sources of the Law of State Immunity.....	15
B. The Problematic Distinction between <i>Acta Jure Imperii</i> and <i>Acta Jure Gestionis</i>	17
V. Scope of International Organisation Immunity	22
A. The Sources of the Law of International Organisation Immunity.....	22
B. The Variety of Standards of International Organisation Immunity.....	25
VI. Scope of Diplomatic and Consular Immunity	28
VII. Conclusions	31
3. The Undue Persistence of Absolute Immunity in Employment Litigation	32
I. Introduction	32
II. Alleged Lack of Subject-Matter Jurisdiction of the Territorial State.....	32
A. Exclusive Jurisdiction of Foreign States and International Organisations	33
B. Exclusive Competence of International Organisations’ Internal Remedies.....	40
III. Absolute Immunity Based on Functionalist Policy Arguments	45
IV. Absolute Immunity Based on the Public Nature of Employment	54

x *Table of Contents*

V.	Absolute Immunity Based on the Official Nature of Employment	61
A.	Employment as an Official Act of Diplomatic and Consular Agents	61
B.	Employment as an Official Act of International Organisations	66
VI.	Persistence of Absolute Immunity under Express Treaty Provisions.....	70
VII.	Conclusions: The Need for Limited Immunity Standards in Employment Litigation	75
4.	Restrictive State Immunity Standards in Employment Matters	76
I.	Introduction.....	76
II.	The Emergence of Employment-Specific Approaches to Restrictive State Immunity.....	77
III.	Approaches Based on the Nature of the Workplace	83
A.	The ‘Workplace Test’ in Immunity Instruments and Judicial Practice	83
B.	Drawbacks of the ‘Workplace Test’ and its Declining Relevance.....	90
IV.	Approaches Based on the Status and Functions of the Employee	93
A.	The Diffusion of the ‘Status and Functions Test’ in State Practice.....	94
B.	The Varied Outcomes of the ‘Status and Functions Test’	98
C.	The ‘Status and Functions Test’ under the UN Convention on State Immunity.....	107
V.	Approaches Based on the Nationality and Residence of the Employee.....	115
VI.	Approaches Based on the Subject Matter of the Claim.....	122
A.	The Distinction between Monetary and Non-monetary Claims	122
B.	The ‘Subject-Matter Test’ under the UN Convention on State Immunity.....	128
VII.	Approaches Based on Forum Selection Clauses in the Employment Contract.....	136
VIII.	Restrictive State Immunity in Employment Matters under Customary International Law	140
IX.	Conclusions	148
5.	Limited Immunity Standards for Employers Other than the State.....	150
I.	Introduction.....	150
II.	Limited Standards of International Organisation Immunity in Employment Matters.....	150

III.	Limited Standards of Diplomatic and Consular Immunity in Employment Matters.....	161
A.	Distinguishing Official and Non-official Employment of Staff	162
B.	Employment as a Commercial Activity not Subject to Diplomatic Immunity	168
IV.	Conclusions	176
6.	Reconciling Immunities and the Employees’ Right of Access to Justice	178
I.	Introduction.....	178
II.	Approaches Deferring to International Obligations to Grant Immunity to Employers	179
III.	Approaches Requiring the Availability to Employees of Alternative Means of Redress.....	184
A.	The Diffusion of the ‘Alternative Remedies Test’ in Judicial Practice	185
B.	The Requirement of Availability of the Alternative Remedy	194
C.	The Requirement of Effectiveness of the Alternative Remedy	202
IV.	The Risk of Remedy Gaps and the Need for a Consistent Approach.....	211
V.	Conclusions	218
7.	Conclusions	220
I.	Argument No 1: Absolute Employer Immunity Is an Unfounded Legal Myth	220
II.	Argument No 2: Well-Defined Standards of Limited Employer Immunity Can Be Identified.....	221
III.	Argument No 3: The Equivalent Protection Test Should Apply to All Employer Immunities	222
IV.	The Way Forward: Human Rights Law as an Agent of Coherence.....	223
	<i>Bibliography</i>	225
	<i>Index</i>	235