

Micaela Frulli. ***Immunità e crimini internazionali. L'esercizio della giurisdizione penale e civile nei confronti degli organi statali sospettati di gravi crimini internazionali.*** Turin: Giappichelli Editore, 2007. Pp. xvi, 341. €39.00. ISBN: 9788834875919.

1 Introduction

This book offers a thorough and detailed analysis of the doctrinal debate on the controversial question whether state organs are entitled to invoke any kind of immunity, before either international or national tribunals, when accused of committing or ordering the commission of international crimes, such as war crimes, crimes against humanity, and genocide. The problem is not merely a theoretical one, given that, since the end of the Second

World War and in particular since the *Pinochet* Affair¹ (decided in 1999 by the British House of Lords), national judges from all over the world have been required to determine whether all state organs can benefit from immunity from jurisdiction and, if so, whether this can cover all the possible violations of international law, including the most serious ones. Initially, and as long as the courts could properly cope with the question of the immunity of former military officers, no problem seemed to emerge with regard to the possibility of judging the latter for crimes committed during a war; however, the choice seemed to be more controversial when the accused were high-ranking representatives of the state and the acts in question were performed in times of peace. The leading case in this regard was the above-mentioned *Pinochet* case, since it made clear the differing attitudes of judges according to the accused's rank in the state hierarchy and, as the author notes, according to whether or not the person in question was still in office. The debate which ensued with regard to those issues and to the controversial practice which had developed on the subject makes the book reviewed here particularly interesting. First, it has the merit of taking into account the different points of view expressed by scholars dealing with the topic and comparing them with the practice – described in a historical perspective – of international and especially of national courts and tribunals. Secondly, even though the literature on the subject of immunities is quite broad, this work stands out thanks to the author's original approach to the subject and to the accuracy of the analysis conducted.

The volume is divided into two parts: the first deals with functional or *ratione materiae* immunity covering deeds performed by state agents acting in an official capacity; the second concerns the analysis of personal or *ratione personae* immunity, which immunizes some categories of individuals from civil and criminal jurisdiction while discharging their duties. With regard to functional

immunity, the book attempts to determine whether there is a general rule that can prevent criminal or civil courts from exercising their jurisdiction over acts performed by foreign agents on behalf of the state they belong to, or whether some specific norms exist which grant immunity to particular subjects in given circumstances. Depending on which hypothesis is chosen, the ability to prosecute state agents for international crimes can be treated either as an exception to a general norm of international law or as an expression of the principle that everyone can be put on trial (unless it is proven that he or she is entitled to immunity covering the acts performed or, more generally, the preclusion of any jurisdiction). Each of the two parts deals with this question from the point of view both of criminal and of civil jurisdictions by going over the practice of national and international courts and tribunals and by analysing the general attitude of states emerging, in particular, from the treaties or conventions which they negotiated, with the aim of combating impunity for international crimes. Both parts of the volume are organized into chapters, each of which is followed by a useful conclusion.

2 Part One: Functional or *ratione materiae* Immunity

The first part of the book relates to *ratione materiae* or functional immunities. It is organized into three chapters. The first deals with the general issues usually taken into consideration in the analysis of this kind of immunity, such as the *ratio* for it, the question of the existence of a general rule governing its regime, the identification of the organs entitled to the privilege and the relationship between the immunity of the state and that of its officials. The second chapter, which deals with the practice which has developed with regard to the topic examined, is in turn organized into three sections according to the historical evolution of international law on this matter. The last chapter relates to functional immunity from civil jurisdiction.

¹ *R. v Bartle and Commissioner of Police for the Metropolis and Others, ex parte Pinochet* [1999] ILM 581.

Throughout her analysis the author considers the points of view of both those who believe that a general rule on functional immunity exists and the scholars who instead claim that specific norms grant immunities to particular subjects. According to the former, *ratione materiae* immunities are accorded on the ground that the state, and not the individual, is to be held responsible for acts committed by its officials in the exercise and within the limits of the functions performed by them on the behalf of the state in question. Even if discharged by individuals, official acts belong to the state which, according to the principle *par in parem non habet jurisdictionem*, cannot be brought to trial before a foreign national court. Although most scholars agree with this thesis, it seems that the author argues that a thorough analysis of the practice, which is heterogeneous in this regard, suggests that, at the moment, it is not possible to conclude that such a general rule of international law exists.

In Frulli's opinion, this assumption is also validated by the attitude shown by states in regulating the matter of the prevention and punishment of the most serious violations of human rights. Following a historical perspective the book traces the development of international norms dealing with international crimes, starting with those developed immediately after (and as a consequence of) the events which occurred during the Second World War.

The analysis of the fundamental legal texts and documents relating to international crimes shows that a norm which excludes the possibility of immunity is expressly provided for, albeit only in the case of instruments dealing with offences (for example, genocide) which, by their very nature, require the involvement of high-ranking state authorities to be carried out. Otherwise, a specific rule in this regard is not included in the conventions concerning crimes which can be committed even by low-ranking state agents. The author appears to say that foreign officials are generally liable to prosecution for international crimes committed while in office, even when they acted on behalf of the state which, in this case, will

be held responsible too. Also, the inclusion of a rule in the Statutes of the International Tribunals providing for the irrelevance of the official position of any accused person can be interpreted, according to the author, not just as an exception to a general norm on functional immunity, but also as an expression of the intention of the states to clarify that no kind of exemption from criminal jurisdiction, whether provided for by international law or by national legislation, can be invoked before international tribunals.

On the contrary, scholars who hold that a general rule on functional immunity has developed as a norm of customary law seem to explain their assumption by concluding that international criminal jurisdiction is the international community's reaction to international crimes; the impossibility of appealing to any kind of immunity as a defence should be seen as a sort of sanction against the state which contributes to or tolerates the perpetration of criminal acts by its agents. This thesis is also consistent with the conclusions reached by the International Court of Justice in the *Arrest Warrant* case,² where it assumed that state agents could never be prosecuted by national courts for acts performed in an official capacity, while they could be put on trial before international tribunals for the same conduct. The opinion of the ICJ is objectionable, in the author's opinion, since it does not take into account the practice of national courts or tribunals which, in a large number of cases, have not recognized any kind of immunity for state agents who committed international crimes. In this regard, the Court limited itself to mentioning the *Pinochet* case, arguing that in that circumstance the House of Lords decided not to grant functional immunity to the former Chilean Head of State since torture cannot be considered an act performed in an official position but rather in a private capacity.

² *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Rep (the *Yerodia* case).

However, the author expresses the view that the assumption that international crimes cannot be committed in an official capacity can lead to the dangerous conclusion that just the individual, and not the state to which the agent belongs, can be held responsible for the offences committed. It is therefore preferable to qualify international crimes as *ultra vires* acts (when they are not ordered or authorized by the state to which the agent belongs), with the consequence that national tribunals would be allowed to prosecute state agents for acts committed while exceeding their authority, while at the same time, according to Article 7 of the Articles on State Responsibility for International Wrongful Acts,³ the possibility of calling upon the state to respond to the acts performed by its organs would not be jeopardized. Those who consider crimes as if they were performed in a private capacity could therefore reach the same conclusion by responding that the state could anyway be held responsible even when it failed to prevent its organs from performing criminal acts.

The last chapter of Part One deals with functional immunity from civil jurisdiction. The author makes a distinction in this regard between civil law and common law states, since only in the latter it is possible to claim compensation before civil tribunals for damages suffered as a consequence of the perpetration of international crimes, while in the former it is possible only to bring the civil action in the criminal proceeding. From an analysis of the practice, it is possible to infer that civil judges did not consider that a general rule on immunity existed which should have precluded the exercise of their jurisdiction over state agents accused of having committed international crimes. Perhaps the author could have said a little more about the *ratio* for this conclusion, since some of the arguments provided, with reference to damages claims brought before both criminal and civil jurisdictions, are relevant for the analysis of the topic of immunity and for the development of

the practice of criminal courts. For example, in the *Ferrini* case,⁴ to which Frulli refers, the Italian Supreme Court justified its decision to deny the immunity of the Federal Republic of Germany holding that, on the basis of what had emerged from the practice of national and international courts, the prohibition of torture had acquired the status of *jus cogens* under international law and, as such, it was intended to prevail over the norms which grant immunities. The argument is not a new one; it was used in the *Pinochet* case by some of the Lords to justify the decision to extradite the former Chilean Head of State and it is shared by some scholars, though not by the author of the book. Indeed, in the second part of the volume reviewed here, which concerns personal immunity, the author challenges the basis of this argument by simply wondering why the same conclusion was not reached with regard to the opportunity to exercise jurisdiction over state agents in office.

The second construction developed by the Italian judges in support of their decision in the *Ferrini* case is based on a comparison between functional immunities and state immunity. Even though the author concludes that it is inappropriate to compare the two regimes, it might have been interesting if she had provided a broader illustration of the arguments of those who assume the contrary and had gone more deeply into the reasons for challenging their assumptions, since the matter is nowadays a topical one. Perhaps the reason the book does not dwell upon the subject may be ascribed to the fact that this analysis postulates the existence of a general norm on *ratione materiae* immunity.

As a result of the study she has conducted, the author comes rather to the conclusion that a general rule on functional immunity can be garnered neither from the practice of courts and tribunals nor from the attitude of states. This stance is based on the knowledge that foreign officials have received different

³ UN Doc. A/56/10 (2001).

⁴ *Ferrini v. Federal Republic of Germany*, Corte di Cassazione, 11 Mar. 2004 [2004] *Rivista di Diritto Internazionale* 539.

treatment depending on their rank or on the fact of having performed acts, and not on the acts themselves done in the exercise of their official functions and within their mandate. These elements, in which the author's opinion seems to imply that functional immunity cannot be considered a substantive defence, can be seen as tending to the opposite conclusion. Assuming that the acts undertaken by state agents in an official capacity must be attributed to the state they belong to, it follows that, in order to grant immunity, national jurisdiction has first to verify that the defendant is a state representative who acted while in office and within his or her official functions. In this case, as a general rule and according to the abovementioned principle *par in parem non habet jurisdictionem*, national tribunals should abstain from exercising their jurisdiction over acts of the foreign state.

Adhering to one thesis rather than the other can lead to different constructions with regard to not taking functional immunities into account when dealing with international crimes. In the author's view, it is the expression of the attitude of states that they feel free to exercise their jurisdiction over foreign officials, if it is not for the existence of particular international conventions or rules which prevent them from acting in such a way; other scholars hold that this must be viewed as an exception to the general rule on functional immunity, justified by the consideration, which the author agrees with, that in the case of massive violations of human rights, the protection of human dignity should always prevail over respect for state sovereignty.

3 Part Two: Personal or *ratione personae* Immunities

The second part of the book deals with personal or *ratione personae* immunities, and in particular their scope. The author's analysis focuses on the question of establishing which organs are entitled to benefit from this privilege. This part of the book is organized into

three chapters. The first deals with the main issues relating to personal immunity, such as its origin, its scope, and the *ratio* for it. The second chapter is in turn divided into two sections, one dealing with the practice of national courts, the other with international criminal tribunals. The last chapter of part two examines the question whether state agents other than those to whom personal immunities are traditionally granted can benefit from them.

According to international law, personal immunities are accorded with the aim of sheltering foreign officials from any interference by the host state which could jeopardize the discharge of their official functions. The *ratio* for these kinds of immunities is indeed traditionally expressed by the dictum *ne impediatur legatio*. If this is so, the author rightly wonders whether the view held by most scholars is correct, namely that the Head of State, the Head of Government, and Foreign Ministers are all entitled to absolute personal immunity. Neither international law nor practice is clear in this regard. Indeed one can agree with the author here, who argues that a distinction should be made in the treatment of state representatives according to their rank, the type of act performed abroad, and the kinds of measures adopted. In fact, not all measures which can be adopted by states are able to hamper foreign officials in the exercise of their work. For example, while the restriction of personal freedom, or other active measures, or the issue of an arrest warrant can violate personal immunity according to the judgment of the ICJ in the *Yerodia* case, the same reasoning should not be extended to investigative activity or to the mere issue of an arrest warrant (here the author criticizes the decision of the ICJ). The practice in this regard seems to have been quite heterogeneous before the judgment in the abovementioned *Arrest Warrant* case was delivered. On that occasion the ICJ tried to strike a balance between international rules granting personal immunities and those proscribing international crimes, and it concluded that an incumbent senior state agent must be immune from foreign criminal jurisdiction even when he is abroad on a private

visit. The judgment, which has heavily influenced the subsequent jurisprudence, is based on the opportunity to preserve the peaceful settlement of international relationships of States by granting their representatives protection from possible abuses perpetrated by the unfair exercise of criminal jurisdiction. Allowing national tribunals the power to try all foreign officials could mean giving them an instrument which, in the absence of the appropriate guarantees, could be aimed at destabilizing the states to which they belong.

Frulli argues that if this construction, which is correct in principle, is applied indiscriminately to Heads of State and other state officials such as Foreign Ministers, as emerges from the judgment of the ICJ and from the subsequent practice of some states' tribunals, it can result in unsatisfactory protection of human rights. Indeed the right balance between respect for state sovereignty and the demand for justice could be reached by granting absolute personal immunity just to the incumbent Head of State, or even to the Head of Government, where that is considered to be the highest office within the state's internal organization. But, according to the reasoning behind personal immunities, extending the same treatment to ministers or consular agents suspected of having committed international crimes means a step backwards in the fight against impunity. The author correctly stresses that states should give careful consideration to the matter, but it is undeniable that the correct balance between respect for state sovereignty and the prosecution of international crimes can only be guaranteed if adequate safeguards for the rights of the defendant are introduced into national criminal rules of procedure.

This reasoning seems to justify the different regime adopted for international criminal tribunals, the statutes of which provide for an explicit exception to personal immunities. Indeed they are not organs of one state but derive their jurisdiction, even with regard to Heads of State, from the international community as a whole. In addition, their rules of procedure provide sufficient guarantees of respect for due process standards. For these

reasons, international criminal tribunals are the appropriate *forum* in which to conduct proceedings against state representatives. But, given this assumption, it is correct to wonder, as the author does, what happens when the state is required by an international tribunal to surrender an incumbent senior state official and, as such, to violate its obligation to respect personal immunities.

The question can be easily solved in the case of the *ad hoc* International Criminal Tribunals for Former Yugoslavia (ICTY) and for Rwanda (ICTR), as they were created by binding resolutions of the UN Security Council which required all member states of the UN to cooperate with their work and which, according to the combined provisions of Articles 25 and 103 of the Charter, are intended to prevail over any other obligations which may bind the state, including respect for personal immunities. But in the case of courts established by an international agreement or treaty, such as the International Criminal Court (ICC) or the Special Court for Sierra Leone (SCSL), it is impossible to reach the same conclusion. The state could find itself in the embarrassing situation of having to choose between the obligation to cooperate with the international tribunal, assumed through the ratification of its statute, and the duty to respect the personal inviolability and immunity from restrictive measures which Heads of State are certainly entitled to – according to customary international law, as it emerges from the consolidated practice of states and of their organs. With regard to the ICC, the solution, according to the author, can be found in Article 98.1 of its statute. It provides that 'the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law (with respect to the State or diplomatic immunity of a person or property of a third State), unless the Court can first obtain the cooperation of that third State for the waiver of the immunity'. The author does not mention the possible solution to be adopted whenever the same question arises before the SCSL, but perhaps it is possible to refer to the arguments proposed

in her comment on the decision of the Court in the *Charles Taylor* case.⁵

4 Concluding Remarks

Micaela Frulli's very interesting book has the merit of systematically reorganizing the complex matter of the immunities of state agents suspected of having committed international crimes. The analysis of the practice of both international and national tribunals is solid, accurate, and detailed. Perhaps the very broad table of cases at the end of the volume could have been made easier to consult by adding the pages of the book where each case is mentioned.

The inquiry conducted by the author, which takes into consideration both the opinions expressed by scholars and the practice relating to the topic of immunities, is in any case particularly clear, notwithstanding the difficulty of the subject treated. This makes the book a functional instrument both for those scholars who want to approach the topic for the first time and for researchers who mean to examine the matter in greater depth. In this regard it is worth mentioning the very useful conclusions which follow each chapter of the volume, which accompany the reader step by step through the author's construction right up to the final considerations, which retrace all the arguments put forward in the volume, the observations made, and the conclusions reached with regard to the topic examined.

However, even though Frulli's point of view clearly emerges from a reading of the book (the last few pages in particular), the author provides states, international and national judges, all those who are called upon to apply international law, and in the end also the

reader, with all the instruments and the information necessary for forming their own opinions and for reaching their own conclusions on the fundamental issues proposed. Indeed everyone is called upon to participate in the stimulating task of thinking about a new balance between respect for state sovereignty, expressed by granting broad immunities to state agents, and the urgent need to condemn the most serious violations of human rights and of human dignity.

Chiara Ragni

Researcher in International Law,

University of Milan

Email: Chiara.Ragni@unimi.it

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⁵ *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-I, Appeals Chamber Decision on immunity from jurisdiction, 31 May 2004, available at www.sc-sl.org; Frulli, 'The Question of Charles Taylor's Immunity', 2 *J Int'l Criminal Justice* (2004) 1118.