The enduring validity of immunity *ratione materiae*: A reply to Professor Pisillo Mazzeschi

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1. *Introductory remarks*

Professor Riccardo Pisillo Mazzeschi has devoted a stimulating article to a specific aspect of the international law on immunities: the scope *ratione personae* of immunity *ratione materiae*. On the basis of a rich analysis, he concludes that not all State officials, but only certain categories thereof, benefit from immunity *ratione materiae*. I believe that the author's approach, which radically departs from the dominant view of international lawyers on the subject, is not only questionable from a methodological point of view, but also leads to an unsatisfactory normative result.

Hereinafter, I shall not attempt to discuss each and every precedent or argument that is aptly relied upon by Professor Pisillo Mazzeschi in support of his thesis. I shall rather focus on certain assumptions that seem to have played a decisive role in the author's approach to the issue, and then explain my position as to the (in)adequacy of the conclusions reached by him.

2. *Inductive and deductive reasoning in the identification of a rule of general international law*

One of the assumptions at the basis of Professor Pisillo Mazzeschi's analysis is that contemporary international law ought to be identified by

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relying on an inductive method, and not on deductive reasoning based on 'general, aprioristic and unproven principles'. A second, related assumption is that, in any event, the types of deductive arguments that could be advanced in support of the existence of the disputed rule (*i.e.* the traditional rule granting immunity *ratione materiae* to State officials in general) should be deemed obsolete in the light of the most recent evolutions of the international legal system.

On the level of principles, I should like to recall the obvious fact that the views of States and other subjects of international law on a given issue may well be influenced by deductive reasoning or considerations. Admittedly, one could argue that this aspect relates to the so-called 'material sources' of international law and would therefore have little relevance when assessing the existence of a 'positive' rule of international law. That would be, however, a simplistic way of addressing the question: for, if one accepts the idea that a rule of general international law can only exist in the *opinio juris sive necessitatis* of the generality of the subjects of the international legal system, one cannot but also accept the hypothesis that one or more subjects – or even the generality of them – may recognize the existence of a rule because they regard it as useful or necessary to preserve some fundamental features of the legal system. Consequently, recourse to deductive reasoning in identifying a rule of general international law may be acceptable, even in contemporary international law, in so far as there appear to be well-founded reasons for believing that the reasoning and the conclusions it entails are generally shared by States. That deductive arguments are not irrelevant in ascertaining rules of general international law, including in the field of immunities, is clearly demonstrated, for instance, by the well-known precedent of the *Arrest Warrant* case, where the International Court of Justice (ICJ) recognized the existence of a rule according personal immunity to a minister for foreign affairs on the basis of logical inferences relating to the nature of his or her functions, and not of an examination of practice and *opinio juris* relating to the matter.[1] The fact that States did not challenge the

[1] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v *Belgium)* (Judgment of 14 February 2002) [2002] ICJ Rep 22, para 54: 'The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability.'

Court's findings as to the actual existence of such a rule only confirms the correctness of the Court's assumptions and, more generally, the admissibility of recourse to deductive reasoning in identifying rules of general international law.

As to the specific question of the personal scope of immunity *ratione materiae*, the general attitudes of States would seem to indicate that many – if not a large majority – of them might still share at least some of the considerations that Professor Pisillo Mazzeschi views as outdated in this context (such as those relating to the protection of the State's domestic organization; non-interference with the constitutional 'life' of a foreign State; or the protection of the State's 'exclusive jurisdiction' in its relationship with its own agents). In this regard, it is highly significant that, during the debates that took place in the Sixth Committee of the United Nations General Assembly, in 2008 and from 2011 to 2014, on the chapter of the report of the International Law Commission (ILC) dealing with 'Immunity of State officials from foreign criminal jurisdiction', the ILC view[2] that immunity *ratione materiae* accrues to State officials in general was widely supported by States. In particular, the two draft articles provisionally adopted in 2014, whereby the ILC confirmed its approach to this matter,[3] were received favorably in the Sixth Committee.[4]

[2] As expressed by the ILC Chairman, Mr. Edmundo Vargas-Carreño, in his introduction of the 2008 ILC report; see UN Doc A/C.6/63/SR.22, para 42: 'The ILC had supported the Special Rapporteur's view that all State officials should be covered by the topic, given that they all enjoyed immunity *ratione materiae*'. See also the two draft articles provisionally adopted by the ILC in 2014, reproduced in footnote 3 below. The opinion that immunity *ratione materiae* accrues to State officials in general was also espoused by the two successive Special Rapporteurs of the ILC; see, in particular, Roman A Kolodkin, 'Second report on the immunity of State officials from foreign criminal jurisdiction' (10 June 2010) UN doc A/CN.4/631, at 11-12, para 21; as well as the 'Third report on the immunity of State officials from foreign criminal jurisdiction', by Concepción Escobar Hernández (2 June 2014) UN doc A/CN.4/673, at 50-52, paras 145-151 (adopting as a criterion, however, the exercise of State prerogatives or governmental authority).

[3] See ILC, 'Report of the International Law Commission on the Work of its 66th Session' (5 May – 6 June and 7 July – 8 August 2014) UN doc A/69/10, at 231-237, para 132:

Article 2 Definitions

For the purposes of the present draft articles:

...

3. *Immunity* ratione materiae *as a form of 'procedural irresponsibility' subject to certain exceptions*

The question of the legal foundation of immunity *ratione materiae*, and in particular whether such immunity should be regarded as a substantive defense (based on the idea that official acts are attributable only to the State and not to the individual organ) or simply as a procedural bar to prosecution, should not be overemphasized in this context, as Professor Pisillo Mazzeschi appears to do. In my view, there is a very simple explanation, as to the rationale for immunity *ratione materiae*, which is likely to be shared by the generality of States: *i.e.* the fact that, as a general rule, State officials *may not be held responsible, before the authorities of another State*, for conduct performed by them

(e) 'State official' means any individual who represents the State or who exercises State functions.

Article 5 Persons enjoying immunity ratione materiae

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

The commentary to draft article 2 (e) indicates: 'From this standpoint, the essential element to be taken into account in identifying an individual as a State official for the purposes of the present draft articles is the existence of a link between that person and the State. This link is reflected in draft article 2, subparagraph (e), through the reference to the fact that the individual in question 'represents the State or [...] exercises State functions."' (ibid 234, para 9); 'The phrase "who represents" must be understood in a broad sense, as including any "State official" who performs representational functions.' (ibid 234, para 10); '"State functions" must be understood, in a broad sense, to mean the activities carried out by the State. This designation includes the legislative, judicial, executive or other functions performed by the State.'; ibid 235, para 11); 'Given that the concept of "State official" rests solely on the fact that the individual in question represents the State or exercises State functions, the hierarchical position occupied by the individual is irrelevant for the sole purposes of the definition. Although in many cases, the persons who have been recognized as State officials for the purposes of immunity hold a high or middle rank, it is also possible to find examples of such persons at a low level of the hierarchy. Consequently, the hierarchical level is not an integral part of the definition of State official.'; ibid 235, para 14).

[4] The few critical comments that were made related to the need for clarifying certain aspects of the definition of 'State official'; in particular, '[t]he question was asked whether personnel contractually mandated by a State to exercise certain functions would fall under the definition of "State official" and whether the term covered teachers and professors in State-run institutions of learning.'; see ILC, 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session, prepared by the Secretariat' (21 January 2015) UN doc A/CN.4/678, para 42.

in an official capacity. In that sense, immunity *ratione materiae* is indeed a question of 'irresponsibility', but only a relative one: States must, as a matter of principle, regard official conduct performed by an organ of a foreign State as being attributable to that State and not to the individual. In contrast, the State on behalf of which the conduct was performed remains free to hold, under its internal law and before its own authorities, the individual personally responsible (civilly, criminally or both) for such conduct. That State is also entitled to waive immunity *ratione materiae*, thereby allowing another State to prosecute the individual. Thus, it is probably right to state that immunity *ratione materiae* entails a type of 'irresponsibility' that is procedural, rather than substantive, in nature.[5] All that being said, it remains difficult to understand why the alleged procedural nature of immunity *ratione materiae* should entail any limitation as to the circle of its beneficiaries.

Professor Pisillo Mazzeschi considers that the idea of 'the necessary irresponsibility of individual State agents when acting in an "official capacity"', idea 'which belongs to the historical period in which international law only recognized the collective responsibility of the State', 'has lost all validity in contemporary international law, which admits the personal responsibility of the individuals, and especially of individual State agents, alongside with the collective responsibility of the States'. Undoubtedly, as the author rightly points out in the last section of his article, the development of an extensive body of criminal international law has led to the formation of a general exception to immunity *ratione materiae* of foreign officials (at least from criminal jurisdiction), the operation of which is now excluded in respect of conduct constituting a crime under international law. However, there is no evidence that the evolutions having occurred in the field of criminal international law would have produced such a radical result as the disappearance of the traditional rule granting immunity *ratione materiae* to State officials in general. In fact, it would be difficult to understand

[5] At the same time, we share the author's view that immunity *ratione materiae* of State officials cannot be equated to the immunity of the State itself; it would otherwise follow that a State official would not benefit from immunity *ratione materiae* for conduct which, although official, is to be regarded as having been performed *jure gestionis* from the perspective of State immunity. On this issue, see GP Buzzini, 'Lights and Shadows of Immunities and Inviolability of State Officials in International Law: Some Comments on *Djibouti* v. *France* case' (2009) 22 Leiden J Intl L 455-483, at 462-464.

why and how normative developments having affected the legal characterization of certain conduct under international law could have produced any modification of the circle of potential beneficiaries of immunity *ratione materiae*.

4. *Assessing State practice in relation to immunity* ratione materiae

Professor Pisillo Mazzeschi's position is also grounded on the assumption that a rule granting immunity *ratione materiae* to all State officials could only exist if it were supported by 'extensive, constant, consolidated and uniform practice', and that such a practice would necessarily presuppose the existence of a sufficient number of cases in which State authorities would have granted immunity *ratione materiae* to a most diverse range of foreign State officials.

The author observes that few decisions can be found in support of the existence of a rule of general international law granting immunity *ratione materiae* to State officials other than diplomatic agents, certain high-ranking officials, consular agents and members of special missions, and even suggests – without much substantiation – that those judgments are based on erroneous or unconvincing grounds. At the same time, he does not mention some other judicial pronouncements that do recognize – albeit in abstract terms – the existence of a rule granting such immunity to State officials in general, including low-ranking ones. Amongst those pronouncements one could refer, for instance, to the recent decision of the Swiss Federal Criminal Tribunal in the *Nezzar* case[6] (which Professor Pisillo Mazzeschi only cites as one of the judicial precedents pointing to the exclusion of functional immunity in respect of international crimes), or to the opinions expressed by several Lords in the *Pinochet* case before the United Kingdom House of Lords.[7] In any event, the limited amount of

[6] Swiss Federal Criminal Tribunal, Cour des plaintes (Decision of 25 July 2012) BB.2011.140, A. c. Ministère public de la Confédération, B. e C., para 5.3.2.

[7] House of Lords, *Regina* v *Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Ugarte* (24 March 1999) reproduced in (1999) 38 ILM 581-663. See the opinions of Lords Browne-Wilkinson (at 594), Goff of Chievely (at 606), Millet (at 644) and Phillips of Worth Matravers (at 657).

(domestic) case law is not necessarily an obstacle to the recognition of the existence of a rule of general international law, provided that the corresponding *opinio juris* can reasonably be inferred from other elements, including – as we have seen – the clear attitudes of States in international forums such as the Sixth Committee of the General Assembly.

In order to deny the existence of the rule granting immunity *ratione materiae* to State officials in general, Professor Pisillo Mazzeschi also points to a number of instances in which claims for that type of immunity were rejected by domestic courts. However, it is worth noting that most of those precedents appear to be of little relevance in determining the personal scope of immunity *ratione materiae*, as they concern situations where the inapplicability of immunity was due to reasons unrelated to the person of the potential beneficiary. Such is undoubtedly the case of the various pronouncements that rejected claims for immunity in relation to acts committed by State officials outside the territory of their State and without the consent of the territorial State (e.g. espionage; aerial intrusions or unlawful trespassing in foreign territories or maritime spaces; crimes such as murder, abduction or acts of terrorism committed in the territory of a host State or in a third State).[8] The same is true with respect to other cases where claims for immunity *ratione materiae* were dismissed because the conduct at issue constituted a crime under international law (such as serious breaches of the law of war).[9]

For other decisions in support of the disputed rule, see also 'Immunity of State officials from foreign criminal jurisdiction' Memorandum by the [ILC] Secretariat, doc A/CN.4/596, para 169.

[8] On this question, see ibid paras 162-165. Admittedly, as pointed out by Professor Pisillo Mazzeschi, the Italian Court of Cassation, in two judgments relating to the abduction of Mr. Abu Omar, took the view that there is no rule of customary international law granting functional immunity to State officials in general (see footnotes 49 and 51 in Professor Pisillo Mazzeschi's article). However, in my opinion, these pronouncements should not be accorded too much weight as they were made in relation to acts committed in the territory of a foreign State and clearly exceeding the scope of consular or diplomatic functions, *i.e.* to acts presumably falling outside the scope of the traditional rule granting immunity *ratione materiae* to State officials.

[9] See 'Immunity of State officials' (n 7), paras 180-212.

5. *The inadequacy of the proposed normative solution*

In addition to these considerations, most of which are of a methodological nature as they relate to the broader question of the ways and means of identifying contemporary rules of general international law, I should point out that the normative solution proposed by Professor Pisillo Mazzeschi, which limits the benefit of immunity *ratione materiae* to a restricted number of State officials, raises concerns in terms of logic and substantive adequacy.

In my view, the main difficulty relates to the author's suggestion as to the existence of a 'more modern' *ratio* that would be at the basis of immunity *ratione materiae*, namely the protection of the external relations of the State (in his words, 'the protection of only some State functions: those which are typically important for the external activities of every State'). Following that approach, the rationale for immunity *ratione materiae* in contemporary international law would appear to be very similar – if not substantially identical – to that for immunity *ratione personae*. And this is not surprising, given that the author holds that 'the categories of State officials that have a right to functional immunity are relatively limited in number, almost tending to coincide with the categories of officials who a have right to personal immunity'. However, if that approach were correct, it would be difficult to explain why immunity *ratione materiae* should also be accorded, as the author himself concedes, to *former* heads of State, heads of government or ministers for foreign affairs as well as to *former* members of special missions, *i.e.* to individuals who usually no longer play a role in the conduct of the external relations of their State. Moreover, as regards incumbent State officials, immunity *ratione materiae* would retain some usefulness only for those officials (such as consular agents) who, while playing an active role in the external activities of their State, do not benefit from immunity *ratione personae* during their term of office.

As for the material scope of immunity *ratione materiae*, Professor Pisillo Mazzeschi seems to agree that the acts covered by such immunity are not limited to those pertaining to the conduct of foreign relations. This is, in itself, correct. At the same time, it reveals the weakness of the approach. For, the mere fact that immunity *ratione materiae* also covers 'internal acts' demonstrates that the real purpose of that type of immunity is to protect the State's organizational structure and its

relationship with its own organs. And that is precisely the reason why former heads of State, heads of government and ministers for foreign affairs, who no longer benefit from immunity *ratione personae*, continue to be afforded immunity *ratione materiae* in respect of official acts performed during their mandate (*i.e.* both their 'internal' acts and their acts relating to the external activities of the State). Such being the case, it is hard to understand why State organs other than heads of State, heads of government and ministers for foreign affairs should not be afforded the same kind of protection from the exercise of foreign jurisdiction over their official acts. From that perspective, one could even consider that the rationale for immunity *ratione materiae* is stronger in respect of an *incumbent* middle-ranking or low-ranking State official, than in respect of a *former* high-level State official who used to perform – but not longer does – functions pertaining to the State's foreign relations.

6. *Some remaining uncertainties about the notion of State 'official'*

Admittedly, stating that immunity *ratione materiae* applies to State officials in general does not yet tell us precisely who should be considered a State official for that purpose. In this regard, it has been suggested that only those officials who are deemed to exercise some elements of governmental authority enjoy immunity *ratione materiae*.[10] As we have already seen, draft article 2 (e) on immunity of State officials from foreign criminal jurisdiction, as provisionally adopted by the ILC at its 2014 session, follows a cautious approach on this matter, by defining a State official as 'any individual who represents the State or

[10] See Concepción Escobar Hernández, ILC Special Rapporteur, 'Third report on the immunity of State officials from foreign criminal jurisdiction' (2 June 2014) UN doc A/CN.4/673, at 50-52, paras 145-151. The point had already been raised in the ILC during the 2008 debate; see ILC, 'Report of the International Law Commission on its Work of the 60th Session', (5 May-6 June and 7 July-8 August 2008) UN doc A/63/10, at 333, para 288: 'A view was expressed that the scope of persons covered could be narrowed down to those who exercise the specific powers of the State (a criterion which would make it possible to exclude from the scope of the topic certain categories of officials, such as teachers, medical workers, etc.); reference was made in this regard to the notion of "public service" used by the Court of Justice of the European Communities.' See also (n 4).

who exercises State functions.'[11] That being said, there is a significant difference between possibly restricting the notion of 'State officials' enjoying immunity *ratione materiae* to those officials who exercise elements of governmental authority, and radically limiting the scope of immunity *ratione materiae* – with the only exception of consular agents – to the same small circle of State officials who already benefit from immunity *ratione personae*.

7. *Conclusion: in defense of the alleged evil of immunity*

In short, I do not share the author's approach and conclusions, as they would be tantamount to stating that, apart form the specific case of consular agents, the only meaningful role that is played by immunity *ratione materiae* in contemporary international law is to afford a residual protection to a handful of former State officials who have ceased their functions, relating to the external activities of the State, for the protection of which they were deemed to need the benefit of such immunity (although they already enjoyed immunity *ratione personae*!)...

This line of reasoning vaguely reminds me of another curious idea: that according to which immunity *ratione materiae* from foreign criminal jurisdiction would only apply to conduct that is not *ultra vires* (in other words, to conduct that is fundamentally legal!); an idea which, in spite of its normative inadequacy,[12] has become widespread among those who consider that the best way to pursue the laudable goal of combating impunity is to fight the evil of immunity in all its forms and manifestations, even at the cost of relying on dubious legal arguments.

[11] See 'ILC Report' (n 3).

[12] On this question, see Buzzini (n 5) 466: 'In any event, it is submitted that excluding in general terms *ultra vires* acts from the scope of immunity *ratione materiae* from foreign criminal jurisdiction would be problematic, since this might lead to defeating the whole purpose of such immunity; for it would seem that, in most cases, official conduct giving rise to a criminal offence should probably also be regarded as *ultra vires*'.