The immunity of State organs – A reply to Pisillo Mazzeschi

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1. *Pisillo Mazzeschi's main thesis*

Pisillo Mazzeschi has carried out an in depth enquiry of the topic of immunity. One should not only take into account the piece he wrote for *Questions of International Law*, but also the substantive contribution he has made to an Italian legal encyclopedia.[1] His findings have already been critically analysed by Gionata Buzzini, Philippa Webb and Chimène I. Keitner and may be summarized as following: the distinction between immunity *ratione personae* (personal immunity) and immunity *ratione materiae* (functional immunity) still holds good in international law, since the first covers an organ only in the discharge of its function; the second, in contrast, covers an organ once it has completed its mandate. Pisillo Mazzeschi seems to imply that the two kinds of immunities do not coexist when the organ is discharging its function, since it is entitled to personal immunity, a view which cannot be shared by this author. During its mandate the organ is protected both by personal immunity for any act performed outside its function and by functional immunity for acts falling within its official duties. The difference is that functional immunity endures even after the organ completes its official functions, whilst personal immunity ends.

While the majority of international lawyers affirm that the category of persons entitled to functional immunity is wider than the category of those holding personal immunity, Pisillo Mazzeschi argues that the category of persons entitled to both types of immunity *tends* to be identical. Personal immunity and functional immunity are enjoyed by the so

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[1] R Pisillo Mazzeschi, 'Organi degli Stati Stranieri (Immunità giurisdizionale degli)', (2014) Enciclopedia del Diritto, Annali 735-794.

called Troika (Head of State, Head of government, Minister for foreign affairs), diplomatic agents and members of special missions, whilst consular agents hold only functional immunity. However according to Pisillo Mazzeschi functional immunity is not the same for all the categories of organs mentioned above. He says that '[w]ith regard to the duties of the various officials, international practice shows that functional immunity is recognised broadly to diplomatic agents and members of special missions; in a more restricted way to the three most high ranking State representatives; and in an even more limited way to consular agents'. Outside the troika, diplomatic agents, members of special missions and consular agents, nobody else would be entitled to functional immunity according to customary international law.

I do not share this opinion which Pisillo Mazzeschi illustrates, after having criticised a number of authors with an impressive review of theories and sub-theories which on occasions are difficult to grasp. All State organs are entitled to functional immunity, whilst only a few of them (the troika, diplomatic agents and member of special missions) enjoy personal immunity.

2. *The foundation of functionalimmunity*

The rationale of functional immunity is grounded on the attribution to the State of the acts of its organs. The State as a legal person cannot act on its own, but rather does so through its organs. This means that an act performed on official duty is an act that is attributed to the State for which the organ operates and does not remain its own (but for a few exceptions). This simple truth is supported by logic and by State practice, as we shall see.

In sanctioning functional immunity, the international legal order protects the State domestic organization shielding it under the principle of non-interference /non-intervention. A State is entitled under international law to be respected as far as its internal and external structure is concerned (ie its organization). It does not matter that this, as Pisillo Mazzeschi points out, is a deductive reasoning, it is a presumption that is a consequence of principles of international law. Functional immunity (or immunity *ratione materiae*) stems from the fact that the acts performed by an official are attributed to the State to which he belongs.

Disregarding functional immunity means an infringement of the sovereignty and independence of the foreign State. If the act performed by the State official amounts to an international wrong, only the State is responsible and not the State official (unless an international crime has been committed). The issue of functional immunity has been the object of a resolution of the *Institut de droit international* (Naples session 2009). The Resolution affirms in Article II, paragraph 1, that:

> 'Immunities are conferred to ensure an orderly allocation and exercise of jurisdiction in accordance with international law in proceedings concerning States, to respect the sovereign equality of States and to permit the effective performance of the functions of persons who act on behalf of States'.[2]

It is not possible here to perform an enquiry on the notion of State organs and whether functional immunity also covers acts performed *ultra vires*. As far as the determination of a State organ, whose conduct is attributed to the State, Article 4 of the Draft Articles on responsibility of States for internationally wrongful acts, adopted by the International Law Commission (ILC) in 2001 and widely regarded as declaratory of customary international law, after having attributed to the State the conduct of its organs (paragraph 1), affirms in paragraph 2 that 'An organ includes any person or entity which has that status in accordance with the internal law of the State'. It is thus undisputed that the status of the organ is determined by the internal law of the State. In the commentary to Article 4, paragraph 2, the ILC says that 'Where the law of a State characterizes an entity as an organ, no difficulty will arise'.[3] The ILC Draft Articles attribute the act committed *ultra vires* to the State (Article 7). This does not mean that the organ is automatically entitled to functional immunity.

The topic of the immunity of State officials from criminal jurisdiction is currently under investigation by the ILC. In the Memorandum prepared by the UN Secretary General, as well in the reports prepared

[2] IDI, *Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crime*, <www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf>.

[3] Report of the International Law Commission. Fifty-third Session (23 April – 1 June and 2 July – 10 August 2001) UN doc A/56/10, 90.

by the Rapporteurs (Roman A. Kolodkin and thereafter Conception Escobar Hernandez) the distinction between personal and functional immunity is absolutely clear. What is more important is that the assumption that State officials enjoy functional immunity from criminal jurisdiction is affirmed in the Memorandum and Reports and is supported by a consistent body of practice. Article 5, as provisionally adopted by the ILC, affirms that 'State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction'. The draft provisionally adopted also deals with the notion of State official and State function which are employed instead of State organs.

3. *Exceptions to functional immunity*

There are two exceptions to functional immunity. The first is the commission of an international crime. In case of commission of an international crime, the act is attributed to the State for which the organ is performing its activity and at the same time remains an act of the organ. The consequence is a dual responsibility: the State is internationally responsible for having committed a violation of international law; the organ bears criminal responsibility for having committed an international crime and may be judged according to the principle of universal criminal jurisdiction. There is no necessity to refer to specific case-law, since the principle of criminal responsibility in case of commission of an international crime is a doctrine universally accepted.

The second exception relates to clandestine activities. The spy (in time of peace) or the intruder in a foreign country may be a State organ, but he cannot shield under the principle of functional immunity. Therefore one cannot invoke precedents on clandestine activities to prove, as Pisillo Mazzeschi does, the non-existence of the rule on functional immunity for all State organs. In the case of *Rainbow Warrior*, France asserted that their secret agents (who were military personnel) were organs of the French State entitled to functional immunity, a plea which was not accepted by New Zealand since the French agents behaved in a clandestine way when intruding in the port of call of the Rainbow Warrior. In the *Abu Omar* case, the Italian Court of Cassation held the US

agents responsible for the extraordinary rendition of Abu Omar.[4] The judgment is correct, but erroneously motivated. The existence of the Italian jurisdiction was due to the fact that the US agents, who did not enjoy personal immunity, performed a clandestine activity (they were CIA agents) and not, as the Court of Cassation argued, because of non-existence of the doctrine of functional immunity.[5]

4. *Armed forces and functional immunity*

Military forces deserve, according to Pisillo Mazzeschi, a separate treatment. He takes into account the status of military forces abroad in time of peace and in wartime, including occupation and UN peace-keeping forces.

Peace and wartime/armed conflict need to be kept separate and cannot be dealt with in the same way. The basic feature is that in times of peace, armed forces enter foreign territory with the consent of the territorial State, whilst in a situation of wartime/armed conflict this condition is absent, unless a State is intervening with the consent/request of the constituted government in a territory where a civil war takes place.

In time of peace, the status of foreign forces is usually regulated by a SOFA. This does not mean that a member of a visiting armed force is deprived of immunity *ratione materiae* in the absence of a SOFA when performing his functions. Usually a SOFA grants immunities that are wider than those connected with the activity of the armed forces and/or details the allocation of jurisdiction between the visiting and the receiving State.

Completely different is a situation of armed conflict. In such a circumstance, members of armed forces cannot be tried by the enemy un-

[4] Corte di Cassazione (sez V penale), 29 November 2012, n 46340, *Proc Gen Appello Milano, Nasr Osama Mustafá Hassan detto Abu Omar e altri*, (2013) 96 Rivista di diritto internazionale 272.

[5] The same goes for the case *Medero et al* judged by the Court of Cassation on 11 March 2014, n. 39788. The Court held Medero et al responsible for the extraordinary rendition of Abu Omar since the diplomatic immunity was terminated and the rendition did not fall under the category of acts covered by immunity. Even this judgment neglects the argument of clandestine activity.

less a crime of war has been committed. If captured, they enjoy the status of prisoners of war. A different treatment is granted to spies and saboteurs (war treason), but this point is also regulated by the law of armed conflict.

In a situation of occupation (or similar situations), where there are contingents belonging to different nations, the real problem is the allocation of jurisdiction between the occupying armed forces. As a matter of fact SOFAs regulate the relationship between the foreign forces and the receiving State (if its authority has been re-construed), but not between the foreign forces present on the ground. As the *Lozano* case[6] proves, in the absence of such an agreement, the principle to be applied is that of functional immunity.

As far the *Enrica Lexie* incident is concerned it is true that the High Court of Kerala repelled the theory of functional immunity. The Supreme Court of India in its judgment of 18 January 2013 voided the Kerala judgment asserting at the same time the Indian jurisdiction and refusing to endorse the Italian claim of functional immunity for the two marines. However the Court left the door open stating that the principle of functional immunity could be raised before the Special Court instituted for dealing with the case. Thus the case is not yet concluded.

5. *The choice of case law*

The case-law quoted by Pisillo Mazzeschi to substantiate the denial of functional immunity is almost all comprised of examples of clandestine activities (espionage) or international crimes, ie activities falling under the exceptions to functional immunities. Pisillo Mazzeschi also quotes recent judgments of the Italian Court of Cassation affirming that those stating functional immunity (eg *Lozano* case) are poorly motivated. For my part, I find poorly motivated those judgments that deny functional immunity like the *Abu Omar* judgment where the Court of Cassation erroneously held that the only precedents were the *Lozano* case and the *Mc Leod* case, which *inter alia* was incorrectly referred to. Also the recent judgment on *Mendero et al*, that is confirming the *Abu*

[6] Corte di Cassazione (sez I pen), 24 July 2008, n 31171, *Lozano*.

Omar judgement, is a follow up of the issue on extraordinary renditions and thus falls under the exception to functional immunity.

I prefer to stick with the *Blaskic* case, which Pisillo Mazzeschi quotes as one of the few cases supporting functional immunity but that he does not adequately underline. It is worth emphasizing the following passage of the judgement:

> 'The Appeals Chamber dismisses the possibility of the International Tribunal addressing subpoenas to State officials acting in their official capacity. Such officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since. More recently, France adopted a position based on that rule in the Rainbow Warrior case. The rule was also clearly set out by the Supreme Court of Israel in the Eichmann case'.[7]

In addition to the case law, one also has to refer to other elements of State practice which reveal the *opinio juris* of States. One important manifestation is the statement contained in the Background Paper on 'Immunity of State Officials from Foreign Criminal Jurisdiction' presented at the Inter-sessional meeting of Legal Experts to discuss Matters Relating to International Law Commission held on 10th April 2012 at AALCO (Asian-African Legal Consultative Organization) Secretariat, New Delhi[8]. The Report states:

> 'Unlike immunity *ratione personae* dealt with in the previous pages, immunity *ratione materiae* covers only official acts, that is, conduct adopted by a State official in the discharge of his or her functions. This

[7] ICTY, *Prosecutor v Tihomir Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997) para 38.

[8] <www.aalco.int/Background%20Paper%20ILC%>. The AALCO serves as an advisory body to its member States.

> limitation to the scope of immunity *ratione materiae* appears to be undisputed in the legal literature and has been confirmed by domestic courts. In its recent judgment in the Djibouti v France case, the International Court of Justice referred in this context to acts within the scope of [the] duties [of the officials concerned] as organs of State'.

6. *Authors' view*

It is not insignificant that among the authors who have up till now commented on Pisillo Mazzeschi's paper, not one has supported his stance. On the contrary, Pisillo Mazzeschi's arguments have been widely criticised. The extensive notion of immunity *ratione materiae* has been also endorsed by Pierre d'Argent in a recent contribution.[9] Learned authors support this finding, for instance Jean Salmon[10] and Brownlie.[11] P-M Dupuy, in the 12th edition of his manual also seems to share the broad notion of functional immunity.[12] There may be other learned authors (few?) who share the opposite view and express their doubts about the wider notion of functional immunity. The most celebrated example is Conforti.[13] However Pisillo Mazzeschi has taken to the extreme an opinion that Conforti only submits cautiously and nonetheless with some doubt.

7. *Immunity and human rights*

Is immunity an obstacle to the enjoyment of human rights of the victim and in particular to the right to compensation? The answer is both yes and no. Yes, in the sense that the wrongdoer cannot be sued by the

[9] P d'Argent, 'Immunity of State Officials and the Obligations to Prosecute' in A Peters, E Lagrange, S Oeter, C Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (Brill 2014) 248-249.

[10] J Salmon, 'Representatives of States in International Relations', *Max Planck Encyclopedia of Public International Law*, <http://opil.ouplaw.com> para 32-44.

[11] J Crawford (ed), *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 688-689.

[12] P-M Dupuy, Y Kerbrat, *Droit international public* (12th edn, Dalloz 2014) 155-156.

[13] B Conforti, *Diritto Internazionale* (10th edn, Editoriale Scientifica 2014) 263-265.

victim in a foreign State. No, in the sense that the wrongdoer is not immune within its own legal order: immunity is not impunity. The victim has the choice to sue the wrongdoer before his nation State and/or to sue the State for which the organ is acting before a tribunal of a foreign State. In this second case the tribunal should decline its jurisdiction if the activity is to be qualified as *jure imperii* as it usually does in the majority of the cases involving functional immunity. Unfortunately the ICJ, in its judgment on *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening*), did not endorse the argument according to which the immunity of a foreign State should not be recognised if the activity *jure imperii* is in contrast with a peremptory norm of general international law. In this case the victim can always ask his State to intervene in diplomatic protection to vindicate his rights, as has been pointed out in the judgment on Jurisdictional Immunities.

8. *Conclusion*

The reasoning according to which personal immunity and functional immunity should be kept together is not convincing. Personal immunity should be kept separate from functional immunity. It may be that an organ, such a diplomatic agent, enjoys both immunities, but in such a case the immunities cover different acts and function in different ways, with the consequence that after the termination of the mission the agent is no longer immune for acts accomplished in his personal capacity, whilst he continues to enjoy functional immunity for acts accomplished in his official capacity.

Unlike personal immunity, which belongs to a small number of State officials, functional immunity belongs to all State officials for acts performed on behalf of the State, since it, as a legal person, can act only through its organs. The customary international norm is aimed at protecting the organization of the State from external interference and the State may pretend that the acts carried out by its organs be attributable to it. The functional immunity is disregarded if the organ commits an international crime or is carrying out clandestine activities. In such cases there is a dual attribution: the act is attributable to the State but it also remains an act of the individual committing it.