

A few remarks on the functional immunity of the organs of foreign States

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1. *Introduction*

I read with great interest the article by Pisillo Mazzeschi and the subsequent reactions to it, all of which were stimulating in terms of the variety of views expressed and the arguments supporting them. That said, no-one, myself included, should make the presumption that the opinions he expressed are necessarily the right ones, especially when it comes to unwritten international law.

For my part, I can only share in general terms the thesis put forward by Pisillo Mazzeschi, who argues, with some exceptions, that State organs do not enjoy functional immunity in foreign courts. The reason for me holding this opinion is very simple: I also supported this opinion in a number of my own academic writings, albeit solely with regard to immunity from *criminal* jurisdiction.¹ I would also recall that the same thesis has already been well supported by De Sena who put forward a wealth of arguments in a book published back in 1996.²

It is perhaps appropriate to recall that functional immunity is enjoyed, according to settled practice, by diplomatic and consular officers, Heads of State, Heads of Government, and Foreign Ministers, i.e. those whose roles primarily involve international relations. Foreign troops,

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¹ B Conforti, 'In tema di immunità funzionale degli organi statali stranieri' (2010) 93 *Rivista di diritto internazionale* 5 ff; see also my *Diritto Internazionale* (10th edn, Editoriale Scientifica 2014) 266 ff.

² P De Sena, *Diritto internazionale e immunità funzionale degli organi statali* (Giuffrè 1996). By this Author, see also 'Immunità dell'individuo-organo dalla giurisdizione e responsabilità dello Stato: rapporti e problemi di coordinamento' in M Spinedi, A Giannelli, ML Alaimo (eds), *La codificazione della responsabilità internazionale alla prova dei fatti* (Giuffrè 2007) 467.



which are present in a State which has given permission for them to stay and to perform their functions within its territory also enjoy, in my opinion, functional immunity on account of an old customary rule³; but I acknowledge that not everyone is of the same opinion. The question of whether immunity may be enjoyed by the organs of foreign States is, therefore, residual.

My reflections will concern only immunity (or rather the non-immunity) from criminal jurisdiction of State bodies other than those belonging to the categories of organs mentioned above. As for civil jurisdiction, and despite the uncertainties of the practice identified by Pisillo Mazzeschi, I am of the opinion that the responsibility for acts performed by the organs rests upon their State, possibly falling within the immunity of the latter from the jurisdiction of foreign States. I shall return to this point in the following paragraph.

2. *The deductive and inductive methods*

According to Pisillo Mazzeschi, a customary rule, or its fall into desuetude, can only depend on the practice, that is to say (and I apologise for recalling a scholastic definition of custom) on behaviour repeated over time by States (*diuturnitas*), supported (though not all are in agreement on this second element) by the opinion that it is necessary or that it conforms to the law (*opinio juris sive necessitatis*). The ICJ has also repeatedly used this notion, which in my view indicates no more than the application of the inductive method. Obviously, a thorough examination of the practice cannot be carried out by every domestic or international judgment; this is rather a task for the doctrine. Courts, when they do not refer to their precedents, speak *purely and simply* of customary law, or of old established rules, etc. But, by doing so, they do not adopt a deductive method. In this regard, I have some doubt that, as was argued in one comment, that the ICJ judgment in *Arrest Warrant* is an example of the use of the deductive method, since the old rule favouring the immunity of Foreign Ministers is exactly a product of practice.

³On this point, I agree with the view taken by Ph Webb, 46 ff.

The critique of Pisillo Mazzeschi concerning doctrine that followed a dogmatic line, ie according to ‘aprioristic and unproven principles’, such as the principle of respect for the organisation of foreign States, the principle of the protection of the State’s ‘exclusive jurisdiction’ in its relationship with its own agents, and the like, is a valid one.

It must be said, however, that, if the method is questionable, it remains to be asked what indeed is the value of principles, in particular, the general principles of law recognised by civilized Nations, i.e. the only source of international law aside from customs and agreements. According to the *communis opinio*, such principles may be used to fill gaps in international law, on a matter for which practice is non-existent and where there are no treaties applicable to the case. In my view, they are also applicable when the practice is uncertain and, consequently, a customary rule cannot be detected. Neither of these instances occurs as regards the immunity of State organs from foreign *criminal* jurisdiction, except for the categories of diplomatic agents and some supreme organs mentioned above, which are surely immune. It seems to me that the practice identified by Pisillo Mazzeschi, and pertaining to this kind of jurisdiction, is sufficient for the conclusion that a custom is in force. In my view, the matter of immunity from civil jurisdiction is different, since it is characterised by uncertain practice, as Pisillo Mazzeschi recognises. I believe, in this case, that the general principle of law, whereby a legal person must respond when one of its organs is acting within its powers, is applicable. Therefore it is the State, and not the organ which has carried out private or public acts in its name, which is responsible for the civil consequences of such acts. Consequently, the State, and not the organ, may be called to respond before foreign judges, provided that such acts are not immune from civil jurisdiction.

3. *Practice. But which practice?*

Pisillo Mazzeschi focuses mainly on internal case law, which is not, for the most part, favourable to immunity⁴. As I have indicated, I agree

⁴Among these judgments, I would not say, as has been affirmed, that there is no room for the judgment of the Indian Supreme Court of 18 January 2013 in the case of *Enrica Lexie* in which two members of the Italian military, according to investigations



with the results of his research because, among other things, the number of State judgments that were collected for the research outnumbers that of the decisions which I found in the above-cited 2010 article.

It is of a great importance to emphasise the fact that the practice gathered consists of State judgments. This is, in fact, the *true practice of States* on all matters relating to immunities. In contrast, what States say at international level, the statements of representatives of governments within the relevant international organs, and the consensus expressed by delegates within the Sixth Committee of the General Assembly of the United Nations with regard to the reports of the International Law Commission, are not conclusive.

It is important to stress this point. In matters where the domestic courts are called upon to rule, international cases, and even the ICJ, seem to be more worried about the resilience of international relations than the interests of any victim, who is sacrificed to immunity.

Emblematic, though not strictly pertinent to our subject, is the well known story that began with the numerous judgments of the Italian Court of Cassation issued between 2004 and 2011, which denied immunity to Germany for compensation to victims of war crimes committed by German troops in Italy. We cannot say that the subsequent decision of the ICJ of 3 February 2012, favouring immunity, was wrong, since it was founded precisely on a clear practice of domestic courts, al-

carried out in India, allegedly killed two Indian fishermen. It is true that in the opinions of the two judges to whom we owe the judgment, Chief Justice Altmar and Judge J Chelameswar, only the issue of lack of jurisdiction under the rules of the Indian and international Law of the Sea is dealt with, and answered in the negative. It is also true, however, that, in the introductory part of the first of the two opinions, in paras 44 and 66-70, we can read the argument for the defence of the two Italian soldiers and a wide response from the 'Additional Solicitor General', one favourable and the other opposed to the applicability of the principle of functional immunity. I wonder why, if the Court had accepted the Italian view, it would not have said so in order to close the case and make a final decision on the fate of the two soldiers, one of whom remains in custody. I acknowledge, however, that, *formally*, the final word will only come at the end of this thorny story. It has also been said that some judgments about secret service agents should not be quoted, since the immunity from criminal jurisdiction of such persons is universally considered to be already excluded. The fact is that in some judgments the non-immunity is precisely considered an application of the general rule on State organs. So ruled the Italian Court of Cassation, in its judgment of 29 November 2013 (reprinted in (2013) 96 *Rivista di diritto internazionale* 272), in the case of Abu Omar, an Egyptian citizen accused of terrorism and seized by Italian and US agents to be sent back to Egypt where he faced a strong possibility of torture.



beit not the Italian ones. But the decision was open to criticism, in another respect, namely for not giving a signal at least regarding the need for the practice to evolve on a matter in which, in the absence of damages, the victims of serious violations of human rights remain without any form of satisfaction⁵. A signal in favour of victims later came from the decision of the Italian Constitutional Court of 22 October 2014, which we can only hope will be supported and confirmed by courts in other countries.

Some other examples could be made here. For instance, the jurisprudence of the European Court of Human Rights still applies the distinction between *acta jure imperii* and *acta jure gestionis* to labour relations with foreign States, notwithstanding that immunity is now excluded in various States as far as retribution disputes are concerned. But, to go on with other such examples would lead us too far away from our subject.

In conclusion, in a number of fields, old international norms concerning the immunity of States and their organs persist, compressing the rights of victims arising from the activities of these entities. It is hoped that there will be some erosion of such norms at least in the most serious cases. Then, in cases where practice has already progressively developed, such as the immunity from criminal jurisdiction of most of the State organs, it seems to me that insisting on immunity is, with all due respect, somewhat backward-looking.

⁵ For a more detailed treatment see B Conforti, 'The ICJ Judgment in Jurisdictional Immunities of the State' (2011) 31 Italian YB Intl L 136 ff.

