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BOOK REVIEWS

Rosanne Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford: Oxford University Press, 2008, ISBN 9780199232475, £76.95, 449 pp. (hb).
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'I must at the outset pay tribute to the careful judgment of my noble and learned friend, Lord Mance, which meticulously confronts and deals with every objection to his view of the case; a tribute no less sincere for the opinion I have formed that he was wrong.' So spoke Lord Hoffmann in *Jones* v. *Saudi Arabia*,[1] the English authority in which the House of Lords rejected the argument that the grant of state immunity to a foreign state in respect of a civil claim based on allegations of torture abroad at the hands of that state violated the individual right of access to a court safeguarded by Article 6 (the right to fair trial) of the European Convention on Human Rights. Rosanne Van Alebeek's book invites a similar, although not so categorical, response. It is densely and ingeniously argued. It represents a bold, original, and provocative attempt to recast the terms of the debate. Most of its essential conclusions are ultimately unobjectionable. But it is hard to agree with many of the iconoclastic positions it stakes out en route.

The monograph centres on two distinct but related controversies. The first is over whether the modern doctrine of restrictive state immunity, which posits that a state is entitled to immunity from the jurisdiction of the courts of another state in respect of what are termed 'acts *jure imperii*' (namely inherently sovereign acts), is compatible with international human rights law, especially when it poses a procedural bar to civil actions against foreign states for alleged violations of fundamental international human rights themselves. The second concerns whether what Van Alebeek and others term 'functional' immunity, along with the various personal immunities accorded by international law, such as diplomatic immunity and the immunity of a foreign head of state, bar the prosecution of serving and, in the context of the first, former state functionaries for conduct allegedly amounting to international crimes. The author frankly acknowledges at the outset that the bulk of national case law,

1 [2007] 1 AC 270, 298, para. 65.

as well as the international authorities,[2] 'compel the conclusion that arguments against immunity rules based on international human rights law and international criminal law have not fared particularly well' (p. 2). She takes the firm view, however, that 'the arguments of *both* opponents *and* proponents in the debate on a human rights exception to immunity rules proceed from unarticulated – and problematic – assumptions as to the epistemology of rules of customary international law and suffer from a lack of theorization on the nature and substance of the respective immunity rules' (p. 6, emphasis in original). In this light, her book 'sets out to reconsider the nature and substance of the rule of state immunity, the rule of functional immunity and the rule of personal immunity in order to identify the parameters of coherent argument in a debate on the scope of these respective rules', on the basis of which it 'proceed[s] to assess the possible influence of international human rights law and international criminal law on these rules' (p. 6).

To her declared end, Van Alebeek constructs an elaborate intellectual edifice founded on a somewhat scientistic taxonomy of arguments and on an epistemology of international law which, while disavowing naturalism, harks back to it with its insistence on the customary, but not voluntary, legal character of 'necessary' rules – that is, on the status as customary international law of rules deducible from the fundamental principles of the international legal order, rather than distilled from the evidence of state consent to the specific rule in question as manifest in sufficient and sufficiently representative state practice accompanied by *opinio juris*. At the same time, she accepts (p. 95) that if such necessary rules exist, they cannot be applied in preference to clearly and consistently enunciated positions voluntarily adopted by states. It is Van Alebeek's conviction that '[t]o be coherent, both the form of state of the law arguments and the substance of state of the law and policy arguments on the relation between the three immunity rules and developments in international human rights law and international criminal law must reflect sound legal theory on the nature and the scope of all rules relied on' (p. 6). Readers may lose patience even at this early stage with the book's tendency towards over-elaboration, over-abstraction, and opacity of expression, as illustrated in the preceding sentence. Those brave souls who soldier on, however, will be rewarded and frustrated in equal measure by a highly sophisticated, nuanced, and idiosyncratic argument which contents itself with neither the empiricism and voluntarism of positivist orthodoxy nor the sort of progressive a priori reasoning that is tone-deaf to the internal logic of mainstream analysis. Like the prophet and the heretic, Van Alebeek exhibits a pronounced independence of mind.

Chapter 2, the first substantive chapter, argues for a wholesale reconceptualization of the theoretical underpinnings of restrictive state immunity, which, to Van Alebeek's mind, is not the non-exercise, in obedience to international law, of a jurisdiction enjoyed by the forum state but, rather, a function of a 'lack of essential competence' on the part of that state. That is, state immunity is not an immunity

2 See *Al-Adsani v. United Kingdom*, 123 ILR 24 (2001) and *Kalogeropoulou v. Greece and Germany*, 129 ILR 537 (2002), in the European Court of Human Rights; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [2002] ICJ Rep. 3, in the International Court of Justice.

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from jurisdiction at all but, rather, a want of jurisdiction *in limine* over another state's acts *jure imperii*. Moreover, such 'immunity' does not, in Van Alebeek's eyes, represent merely a narrowing of a previously absolute state immunity, which truly was a restraint on an existing competence, and one which reflected the dignity, as distinct from the equality, of states; and it does not, she asserts, properly turn on the distinction between acts *jure imperii* and acts *jure gestionis* (namely acts of a character such that any private person could perform them). Instead, 'two distinct issues of competence [are] cloaked under the concept of state immunity for *acta jure imperii*' (p. 65). The first, founded on the independence of states, removes from the essential adjudicative competence of a state the exercise by another state of exclusive competences within its own territory. The second, founded on the equality of states, deprives a state of the competence to determine rights and obligations under international law. The epistemology of customary international law, Van Alebeek submits, does nothing to render the form of her argument illegitimate, since, she claims, customary international law comprises not just voluntary rules founded on state practice and *opinio juris* – both of which, she contends, are ambivalent on point – but also those rules of a different 'epistemological quality', such as the rules governing the essential competence of national courts over the acts of foreign states, which are '*necessary incidents* of the constitutional principles of the international legal order' (p. 93, emphasis in original). 'In brief', she concludes, '[t]he analysis of the influence of international human rights law on the law of state immunity and hence the arguments in favour [of] or against a human rights exception to state immunity rules cannot be limited to the standard inductive approach to the identification of exceptions to the rule' (p. 97).

In a similar vein, chapter 3 calls for the overthrow of our current understanding of the so-called functional immunity of foreign state officials for official acts, which Van Alebeek argues is not part and parcel of state immunity but, rather, is a consequence of a substantive lack of personal responsibility 'for acts committed as arm or mouthpiece of their home state' (p. 104). On this analysis, as long as the officials perform the relevant acts in their official capacity and 'within the context of the exercise of state authority under international law', by which is meant – as per chapter 2 – in the exercise of their home state's exclusive territorial competences or 'in the context of international law' (p. 116), 'they are presumed to have acted as a mere arm or mouthpiece of their home state' (p. 114), so that the impugned acts will in law be the acts of their home state, and functional immunity will bar proceedings against them in foreign courts in respect of these acts. But the presumption of authority may be defeated where, *inter alia*, states agree, by means of a rule of international law, 'that certain activity may never be cloaked by the authority of the state' (p. 130). In such cases, 'the act is not official in character and the state official incurs responsibility in his personal capacity' (p. 131), with the result that functional immunity is not available. Van Alebeek asserts once more that customary international law does not foreclose such arguments, since reliance in this context on state immunity rather than on an immunity predicated on the absence of personal responsibility is, she claims, not general and consistent, with the result that the former 'interpretation' of functional immunity is 'open to criticism' (p. 156).

It is something of a relief to read at the beginning of chapter 4 that, '[u]nlike the rule of state immunity and the rule of functional immunity', the rules on the personal immunity from jurisdiction that international law requires be accorded to certain foreign state officials such as diplomats and heads of state, being 'immunities from jurisdiction in the proper sense of the word', 'do not need reformulation in order to understand the nature and substance of these requirements under international law' (p. 158). Furthermore, they are 'conspicuous examples of customary international law that relies on state practice and *opinio juris* for its formation', so that their scope can be determined only 'through straightforward inductive reasoning' (p. 158).

It is in chapter 5 ('The immunity of state officials in the light of obligations of individuals under international law') and chapter 6 ('The immunity of states and their officials in light of the fundamental rights of individuals under international law') that Van Alebeek mounts the 'substance' arguments as to the relationship between immunities and international human rights law and international criminal law for which her 'form' arguments in chapters 1 to 3 purport to prepare the ground. In chapter 5, the central contention is that, since state officials incur individual criminal responsibility – that is, responsibility in a personal capacity – for crimes under international law regardless of whether they act in an official capacity, such crimes are not in law the state's, no functional immunity arises as a consequence in respect of them, and serving and former foreign state officials may therefore be prosecuted for them. But, Van Alebeek cautions, this does not necessarily mean that domestic courts enjoy competence to try all allegations of crimes under international law by state officials, since competence over certain crimes of this character (the examples given being crimes against humanity, apartheid, genocide, and aggression) may depend on a determination by the court that a foreign state has violated international law. As regards personal immunities and international crimes, the author upholds the status quo. In chapter 6, while suggesting that 'both the form and substance of arguments in favour [of] and against [a human rights] exception [to immunities] suffer from the underdeveloped theory on the law of state immunity', Van Alebeek concludes that 'international law immunity rules are not affected by the developments in international human rights law', there being 'no coherent state of the law arguments in favour of a human rights exception' (p. 416). She contends, however, that there exists a degree of tension between state and personal immunity and international human rights, especially the right of access to a court inherent in the right to a fair trial, a tension which provides 'a forceful policy argument for the reconsideration of certain applications of immunity' (p. 416). But '[t]he room for coherent argument in favour of [such] a reconsideration . . . is narrow' (p. 417). In passing, in both chapter 5 and chapter 6 Van Alebeek dismisses a range of familiar arguments, such as those based on *jus cogens*, for the non-applicability of the various immunities.

A short review such as this does not permit engagement with every twist and turn of Van Alebeek's labyrinthine argument, the account of which given above is also perforce truncated. Suffice to say that, while a good many excellent points are made, as many objections could be raised on both the macro and micro levels.

Most fundamentally, the repeatedly alleged lack of coherent theory underpinning restrictive state immunity as currently conceived (of which, *pace* Van Alebeek, the functional immunity of state officials is no more than a manifestation) is a straw man. For a start, if state immunity is 'a sort of necessary principle of the international legal order' (p. 12), it is simply not good enough as an epistemological matter to posit, as Van Alebeek does, the incoherence of the orthodox account of such immunity – that is, as turning in its restrictive form on the distinction between acts *jure imperii* and acts *jure gestionis* – by selective reference to the dicta of certain national courts. Turning to principle, Van Alebeek's attack on the conceptual coherence of the *jure imperii*/*jure gestionis* antinomy is undermined by her failure adequately to grasp what sovereignty means, how it underpins the equality of states – or, as it is more fully termed but never called by Van Alebeek, the sovereign equality of states – and how the latter constitutes, sufficiently satisfyingly, the theoretical basis of state immunity in both its formerly absolute and currently restrictive versions. Although, in its original absolute form, state or sovereign immunity may, as Van Alebeek suggests, or, equally, may not have been conflated with notions of the dignity of the monarch's person and later of the state, it ultimately bears no principled relation to such courtly concerns, at least as it has been subsequently rationalized. It is simply a corollary of the quasi-metaphysical quality we call sovereignty (or *suprema potestas*), by which we mean having no power superior to oneself. If by definition each sovereign (namely each person or polity possessed of sovereignty) need yield to no other power, each sovereign must by definition be equal. For one sovereign, however, to subject another to the processes of his or her or its law would necessarily be to deny that equality – or, putting it another way, would by definition be to deny the other's sovereignty by assuming power over it. It would be a contradiction in terms. *Par in parem non habet imperium*, as the maxim has it. Nor is the conceptual complexion any different under the now restrictive doctrine of state immunity. For sovereignty to be made subject to the power of another remains an oxymoron, the only difference being that, whereas under the absolute doctrine sovereignty was considered manifest in the respondent state per se, under the restrictive doctrine the respondent state is treated as the embodiment of sovereignty only in respect of acts which a state alone can perform (as distinct from acts which, although performed by said state, are the sort of thing that private parties could do). (In this light, state or sovereign immunity can be thought of as always having been accorded to the state and its various emanations *ratione materiae* – that is, by virtue of the subject matter in question, that subject matter being sovereignty itself.) Restrictive state immunity as conceived in the mainstream account is therefore not only theoretically coherent but also as much a 'necessary' proposition as Van Alebeek's reconceptualization. The interminable debate over whether the distinction between acts *jure imperii* and acts *jure gestionis* turns on the nature or the purpose of the relevant act stems not from 'a poor understanding of the nature and the scope of the rule of state immunity' (p. 53) but from the challenges of appreciation inherent in any application of tidy principle to messy fact. And while Van Alebeek rightly points out that the generally accepted territorial tort exception does not square with the dichotomy between acts *jure imperii* and acts *jure gestionis* (p. 68), at least as classically construed

(p. 70), it is drawing an exceptionally long bow to turn the exception into the rule (see, seemingly, pp. 70–1). All that the general acceptance of this exception to state immunity reveals is that states are not purists but rather have accepted, and not only here, the policy-based intrusion of considerations of territoriality into what is otherwise, apart from those based on waiver, a set of exceptions expressive of the *jure imperii/jure gestionis* divide – a point implicitly acknowledged, as recalled by Van Alebeek (p. 70), by the District Court for the District of Columbia in *Letelier* v. *Chile*[3] and the Supreme Court of Canada in *Schreiber* v. *Canada (Attorney General)*[4] and highlighted in paragraph 8 of the commentary to Article 12 of the International Law Commission's 1991 draft Articles on Jurisdictional Immunities of States and Their Property.

More generally, the book's formal legal analysis can be overdetermined, placing a weight on the insignificant, the eccentric, and the exceptional that they simply cannot bear. The upshot of such analysis in the form of Van Alebeek's vision of state and (and although they are the same thing) functional immunity is counter-evidentiary. One is seized by the urge to cry 'But it does move!', although this time in defence of the orthodoxy.

All this said, with the exception of her stance on the 'functional' immunity of serving and former state officials in respect of international crimes, Van Alebeek's basic conclusions as to the lack of effect to date of international human rights law and international criminal law on the international law of immunities are unimpeachable, and do not differ in essence from those likely to be drawn by most jurists of a less doctrinaire stamp. Despite the sound and fury of the arguments, the verdict is measured. To this reviewer's way of thinking, this is a recommendation; to others it may prove a disappointment. Either way, Rosanne Van Alebeek is to be heartily congratulated on the breadth and depth of her research, on her rich, creative, and sustained – albeit overly lengthy and sometimes elusive – argumentation, and on her bracingly and courageously contrarian outlook.

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Patrick Capps, *Human Dignity and the Foundations of International Law*, Oxford: Hart Publishing, 2009, ISBN 9781841133577, 306 pp., £40.00 (hb).
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Is international law really law? Does international law exhibit a moral purpose? These questions continue to plague the discipline. The responses of international lawyers have been varied but far from reassuring. Three kinds are identified at the outset of the book under review. First, Patrick Capps believes that, in relation to the

3 488 F Supp. 665 (DDC 1980).
4 [2002] 3 SCR 269.
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