

Morten Bergsmo and Ling Yan (eds). ***State Sovereignty and International Criminal Law***. Beijing: Torkel Opsahl Academic EPublisher, 2012. Pp. 281. £15. ISBN: 9788293081357.

*State Sovereignty and International Criminal Law*, edited by Morten Bergsmo and Ling Yan, brings together two recent issues of international law: the rise of international criminal law as a building block in the nascent constitution of the international legal order and the increasingly active participation of China in international law. Even though China is a permanent member of the United Nations Security Council (UNSC), it has until recently been de facto absent from the debates over norms of international law. Likewise, international criminal justice is a field of law that stagnated for more than 40 years. The last two decades have witnessed a revival of both phoenixes.

This anthology, prepared in the context of the Li Haopei Lecture Series of the Forum for International Criminal Law, offers the view of Chinese and European international lawyers, scholars and judges on three issues: immunity of state officials from foreign prosecution for international crimes; universal jurisdiction and the newly adopted amendment to the Rome Statute of the International Criminal Court (Rome Statute) on the crime of aggression.<sup>1</sup> These three issues are highly topical.

In the third and perhaps pivotal chapter, Zhou Lulu, director of the Treaty Division of the Department of Treaty and Law, Ministry Foreign Affairs of China, gives a brief analysis of a few controversial issues in contemporary international criminal law. All of the controversial issues addressed in this article, including aggression, universal jurisdiction and immunity, are discussed by the other contributors to the book – some agreeing and some disagreeing with Zhou.

Zhou initiates the debate by making assertive and controversial points on controversial issues. She begins provocatively with the crime of aggression, as defined in the amendment to the Rome Statute adopted at the 2010 Review Conference of the Rome Statute in Kampala, Uganda. The preconditions for the International Criminal Court (ICC) to exercise jurisdiction over crimes of aggression will, she asserts, harm international peace and security as the amendment leaves too much 'discretion to prosecutors and judges which could lead to abuse' (at 29).

In contrast, Guo Yang (Chapter 6) states that the amendments will 'complete the regime of collective security with a judicial tool' (at 127). What is striking is that Guo, unlike his fellow contributors, seems very optimistic – perhaps rather idealistically – that the international criminal justice system will 'make sure that state leaders will now think twice before they resort to force in dealing with international disputes, which will definitely not make the world less safe than it is today' (at 128). This well-written chapter clearly highlights the various points of tension in the drafting of the amendment.

The second controversial issue that Zhou addresses is the doctrine of universal jurisdiction. Zhou contends that 'the overriding objective of universal jurisdiction is not purely justice-oriented. Its application is always fraught with political motivation and may be misused through politics' (at 45). I would rather say that the application of universal jurisdiction is constrained by politics. After all, when Belgium changed its universal jurisdiction law – Belgium being the state that most often comes to mind when we refer to universal jurisdiction – it was because of the United States' threat to move the headquarters for the North Atlantic Treaty Organization from Brussels if it did not rescind its 1993 Act.

Taking a similar stance regarding the current criticism expressed by African states and institutions of how universal jurisdiction is exercised, Zhou is preoccupied with establishing a rule of priority in favour of states that have territorial and national jurisdictions. Zhou's argument on the principle of subsidiarity is taken up by Judge Erkki Kourula of the Appeals Chamber of the ICC (Chapter 7). Kourula, highlighting the challenges discussed at the African Union

<sup>1</sup> Rome Statute of the International Criminal Court, 37 ILM 1002 (1998) [Rome Statute].

(AU)–European Union Ministerial Troika meetings on the issue of universal jurisdiction, stresses the importance of the principle of subsidiarity. However, unlike Zhou, he recognizes that this issue is more a ‘matter of policy’ than of positive law (at 139).

Zhu Lijiang (Chapter 9) describes in some detail the procedural progress made at the UN General Assembly sessions on the scope and application of the principle of universal jurisdiction. In support of Zhou and Kourula, he is of the view that the states that participated in the Sixth Committee agree that the principle of subsidiarity should be respected when applying universal jurisdiction.

Is piracy the only crime subject to universal jurisdiction under customary international law? This is one of the other issues of disagreement between the authors of the book. Chengyuan Ma (Chapter 8) claims that it is not, whereas Lulu Zhou believes it is. China’s official position, as stated before the Sixth Committee, is that customary international law only provides universal jurisdiction for the crime of piracy. In his analysis of the statements made by states, states groups and observers, Lijiang Zhu deems that ‘piracy falls within the scope of [universal jurisdiction] and that there is a disagreement among these states as to whether genocide, crimes against humanity and war crimes also fall within the scope of universal jurisdiction’ (at 215). That being said, the table designed by Zhu shows that among the participants at the Sixth Committee 31 believed that war crimes are subject to universal jurisdiction; 26 believed that piracy is subject to universal jurisdiction; 25 believed that genocide is subject to universal jurisdiction and 23 believed that crimes against humanity are subject to universal jurisdiction (at 215). The difference between the number of statements mentioning one international crime and not the other as subject to universal jurisdiction – and especially the fact that war crimes were mentioned more often than piracy – is so insignificant that I fail to see why the author favours piracy.

As for China’s position on universal jurisdiction, Ma comprehensively demonstrates the legal impediments of having universal jurisdiction based on international treaty: *nullum crimen sine lege*, *nulla poena sine lege* and the prohibition of analogy. He calls for a change in the domestic law: ‘[I]t is necessary to accept universal jurisdiction based on customary international law in the Criminal Law, but it is hard to achieve now’ (at 183). However, this shift would be of no use if China did not recognize aggression, genocide, crimes against humanity and war crimes as being subject to universal jurisdiction under customary international law.

Then again, Lijiang Zhu remarks that although the principle of universal jurisdiction has matured into customary international law ‘it is hard to say that its definition, scope and application are clear’ (at 221). In his view, arguments that negate the unclearness of the definition, scope and application of universal jurisdiction are ‘simply publicists’ teachings, staying at the level of legal doctrine in international law’ (at 222). The author’s emphasis on the two elements necessary for customary international law – *opinio juris* and state practice – lead him to assert that we ‘should be prudent and cautious, not confusing *lex lata* with *lex ferenda*’ (at 222). There is, in fact, a fascinating debate between the various authors represented in this book.

Another topic on which Zhou takes a state-centric stand is the immunity of state officials. Unsurprisingly, in regard to the immunity of state officials, Zhou adopts the conventional view that immunities from foreign domestic jurisdiction are not the same as immunities from international jurisdictions. This is basically the view of the international courts and tribunals.<sup>2</sup>

<sup>2</sup> See Judgment, *Arrest Warrant Case of 11 April 2000*, ICJ Reports (2002) 3 [*Arrest Warrant*]; Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-139), Pre-Trial Chamber I, 12 December 2011; Décision rendue en application de l’article 87–7 du Statut de Rome concernant le refus de la République du Tchad d’accéder aux demandes de coopération délivrées par la Cour concernant l’arrestation et la remise d’Omar Hassan Ahmad Al Bashir, *Le Procureur c Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-140), La chambre préliminaire I, 13 Décembre 2011; Decision on Application for Subpoenas, *Prosecutor v. Krstic* (IT-98-33-A) Appeals Chamber, 1 July 2003.

Jia Bingbing (Chapter 5), Judge Liu Daqun from the Appeals Chamber of the ad hoc tribunals (Chapter 4) and Claus Kreß (Chapter 10) all agree that proceedings before international criminal courts are different from proceedings before national criminal courts and that immunity might apply before one forum and not before the other. However, they disagree on the reasons and, therefore, on whether the head of a state not party to the Rome Statute is still protected by his immunity from the jurisdiction of the ICC.

Jia Bingbing explains that immunity of state officials is a derivative of state immunity. As the case law demonstrates, immunity prevails over jurisdiction of domestic courts.<sup>3</sup> Jia goes further and addresses immunity from prosecution for the commission of treaty crimes. Should a treaty provide for an exception to immunity for the crimes that are the object of the treaty, then the respective treaty provision constitutes *lex specialis* and, as such, derogates from the general rule on immunity.

In the same vein, Judge Liu concludes that there are no immunities before international criminal courts. However, this is different for non-contracting states. Relying on Article 34 of the Vienna Convention on the Law of Treaties, he asserts that a state and its officials cannot be bound by a treaty that it has not signed.<sup>4</sup> While the *pacta tertiis* rule was irrelevant if the impugned provision formed a rule of customary international law, Liu believes that the immunity of heads of state from the international criminal court is not yet customary international law.

According to Liu, only situations referred to the ICC by the UNSC under Chapter VII can strip a head of a state that is not a party to the Rome Statute of the cloak of immunity. In such a case, the head of state – and, most fundamentally, his state – are bound by the UN Charter to accept and carry out the decision of the UNSC to apply the ‘statutory framework provided for in the Statute’, including Article 27 of the Rome Statute.<sup>5</sup> That being said, a little subtlety applies as to the arrest and surrender by national authorities of the foreign head of state – Article 98 is also part of the ‘statutory framework provided for in the Statute’.<sup>6</sup> Thus, Liu believes that the ICC should obtain a waiver of immunity of the state concerned before asking for the arrest and surrender of the head of state. Otherwise, the immunity under international law of the state concerned would be violated.

Kreß gives a personal account of the drafting history of Article 98(1) of the Rome Statute, which every scholar and practitioner dealing with the question of immunity should read. Once and for all, Kreß explains why Article 98(1) is not, as Judge Liu stated, a ‘tacit acceptance by the drafters that the non-immunity of head of state is not a rule of customary international law’ (at 66). Instead, writes Kreß, who is one of the drafters of Part 9 of the Rome Statute, ‘Article 98(1) of the Statute has been carefully worded so as to avoid any view on the question of general international law’ (at 232).

Unlike Liu, Kreß attempts to provide *opinio juris* and practice as proof that the exception to immunity for international criminal courts is *lex lata*. Modestly, Kreß acknowledges that the cases where an incumbent head of state has been brought before an international criminal court *ante Prosecutor v. Omar Hassan Ahmad Al Bashir* were quasi-inexistent. The only decision before

<sup>3</sup> *Arrest Warrant*, *supra* note 2; *Jurisdictional Immunities of the State*, ICJ Reports (2012) 99; *Al-Adsani v United Kingdom*, ECHR (2001) (Application No. 35763/97); *Jones et al. v. United Kingdom*, ECHR (2014) (Applications No. 34356/06 and 40528/06).

<sup>4</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331.

<sup>5</sup> Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09-3), Pre-Trial Chamber I, 4 March 2009.

<sup>6</sup> Article 98(1) of the Rome Statute reads as follow: ‘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 *Al-Bashir* episode that addresses immunity *ratione personae*, he says, is *Prosecutor v. Charles Ghankay Taylor*.<sup>7</sup> However, at the time of the decision, Taylor was no longer the president of Liberia. Kreß, while recognizing the scarcity of the practice, states that '[u]nder the modern positivist approach to customary international law ... a weighty case can be made for the crystallization of a customary international criminal law exception from the international law immunity *ratione personae* in proceedings before a judicial organ of the international community' (at 254).

The most groundbreaking part of the chapter is when Kreß spells out the principles in support of what he terms the 'customary law avenue'. Indeed, the case law on immunity (as rare as it may be) has to be fused to principles. And, in principle, 'it is impossible to deny that the ICC Statute constitutes a legitimate attempt to establish an organ that directly exercises the international community's *jus puniendi*' (at 247). It is for this reason, Kreß says, that the ICC has greater powers than a national criminal court. His explanation of the elements of this modern positivist approach is well worth reading, since it is precisely the explanation that is adopted *sotto voce* by most of the courts and tribunals dealing with international criminal law.

Indeed, we often fail to see how the case law noted by courts to deprive incumbent high-ranking state officials of their immunity *ratione personae* is actually forming a rule of customary international law while these cases did not concern incumbent high-ranking state officials. Finally, Kreß clearly explains the rationale for depriving high-ranking state officials of their immunity, even if there is no solid practice providing for this exception to the general rule on immunity. Nonetheless, he remains duly cautious and acknowledges that the custom he believes to have come into existence is affected by a 'relatively high vulnerability to change because the hard practice that contributed to its crystallization is fairly scarce' (at 254). It would be interesting to know Kreß's reaction to the recent AU call at the Assembly of State Parties to amend Article 27 of the Rome Statute.<sup>8</sup>

*State Sovereignty and International Criminal Law* demonstrates that China's new scholars aspire to tame the 'bête noire of the international criminal lawyer'.<sup>9</sup> This book informs us about what legal scholars from Europe and from the most populated state in the world have to say about fundamental issues of international criminal law. It provides a plurality of points of view with a certain unity. Like the current work of the International Law Commission on formation and evidence of customary international law, the book evidences the difficulty in ascertaining that a rule has reached the status of customary international law.

Various approaches have been proposed on how rules of customary international law are generated: from 'traditional' to 'modern' custom and from custom *à la* Li Haopei to custom *à la* Antonio Cassese. The division between Cassese and Li in the *Duško Tadić* case on whether violations committed during internal armed conflict gave rise to individual criminal responsibility – which unfortunately is not discussed in this anthology published in honour of Li Haopei – is emblematic of the two opposing theories on how custom is generated.<sup>10</sup> As we know, the *Tadić* Appeals Chamber decided that the law of war crimes extended to internal armed conflicts. Ultimately, *Tadić* was endorsed by the drafters of the Rome Statute.<sup>11</sup> However, as Judge Li argued in his dissenting opinion – most rightly – there was no proof of state practice and *opinio juris* to establish such a rule of customary international law.<sup>12</sup> He stated that the Appeals Chamber decision was

<sup>7</sup> Judgment, *Prosecutor v. Charles Ghankay Taylor* (SCSL-2003-01-1), Appeals Chamber, 31 May 2004.

<sup>8</sup> Statement by the Honorary Frederick Ruhindi, Deputy Attorney General/Minister of State for Justice and Constitutional Affairs of the Republic of Uganda on Behalf of the African Union at the 12th Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, The Netherlands, 21 November 2013.

<sup>9</sup> Cryer, 'International Criminal Law vs State Sovereignty: Another Round?' 16 *EJIL* (2006) 5, at 981.

<sup>10</sup> Judgment, *Prosecutor v. Duško Tadić* (IT-94-1), Appeals Chamber, 27 Feb. 2001.

<sup>11</sup> Rome Statute, *supra* note 1, Article 8.

<sup>12</sup> Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Duško Tadić* (IT-94-1), Appeals Chamber, 2 Oct. 1995, § 5–13.

an ‘unwarranted assumption of legislative power which has never been given to this Tribunal by any authority.’<sup>13</sup> The AU claimed the same concerning the *Al Bashir* decision. In fact, the AU even considered seeking an advisory opinion from the International Court of Justice (ICJ).

The law-making power of international adjudicating bodies is a familiar topic to any international lawyer. Von Bogdandy and Venzke write that it is ‘beyond dispute’ that ‘judicial lawmaking is not just a collateral side effect of adjudicatory practice.’<sup>14</sup> On immunity, Kreß notes that Article 98(1) of the Rome Statute is the expression of ‘a remarkable decision by states Parties to entrust the Court with the power to make a decision about the existence or non-existence of “legal obligations [of those states] under international law with respect to the state or diplomatic immunity of a person or property”’ (at 234). ‘Judicial legislation’ often takes place under the premise of clarification.

This book selected three topics that are indeed at risk of expansive judicial pronouncements. Even though in a less authoritative way than decisions of international courts and tribunals, ‘the writings and opinions of jurists have often been considered ... in the identification of rules of customary international law’.<sup>15</sup> For this reason, the book under review is important. *State Sovereignty and International Criminal Law* has been published in both English and Chinese. Hence, the barrier of language is surmounted. The three areas of tension between sovereignty and international criminal law selected need to be addressed in a comprehensive manner by international lawyers in China, Europe and elsewhere. This book fosters such a dialogue.

## Individual Contributions

*Morten Bergsmo and Ling Yan*, On State Sovereignty and Individual Criminal Responsibility for Core International Crimes in International Law;

*Wang Houli*, The Life and Contributions of Professor Li Haopei;

*Zhou Lulu*, Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law;

*Liu Daqun*, Has Non-Immunity for Heads of State Become a Rule of Customary International Law?

*Jia Bingbing*, Immunity for State Officials from Foreign Jurisdiction for International Crimes;

*Guo Yang*, International Criminal Court: A Judicial Guarantee for International Peace and Security?

*Erkki Kourula*, Universal Jurisdiction for Core International Crimes;

*Ma Chengyuan*, The Connotation of Universal Jurisdiction and Its Application in the Criminal Law of China;

*Zhu Lijiang*, Universal Jurisdiction before the United Nations General Assembly: Seeking Common Understanding under International Law;

*Claus Kreß*, The International Criminal Court and Immunities under International Law for States Not Party to the Court’s Statute.

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<sup>13</sup> *Ibid.*

<sup>14</sup> Von Bogdandy and Venzke, ‘Beyond Dispute: International Judicial Institutions as Lawmakers’, 12(5) *German Law Journal* (2011) 980, at 981.

<sup>15</sup> International Law Commission, *Memorandum of the Secretariat, Formation and Evidence of Customary International Law* (2003).