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### State Sovereignty and International Criminal Law

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## BOOK REVIEW

Morten Bergsmo and Yan Ling (eds), *State Sovereignty and International Criminal Law*, Torkel Opsahl Academic EPublisher, 2012, 299 pp., £14.33, ISBN: 978-82-93081-35-7

Reviewed by Hanne Sophie Greve

Dr. Juris, Vice President of Gulating Court of Appeal, former Judge at the European Court of Human Rights, former Commissioner at the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992).

The anthology, *State Sovereignty and International Criminal Law* (as published in separate English and Chinese versions) contains chapters originally prepared for the Forum of International Criminal and Humanitarian Law Li Haopei Lecture Series. Its distinguished authors are primarily of Chinese descent, contributing six out of the eight substantive chapters in the anthology.

By combining the central themes of state sovereignty and international criminal law, the anthology primarily addresses the concerns of those who have reservations as to how fast and far international criminal law has developed, rather than speaking to those already fully persuaded of the advances already made. The anthology should for this very reason be of particular interest to all who regard the rapid development of international criminal law as an advantage. The editors ask whether this is not the time to “consolidate the significant gains in the development of international criminal law since 1993” rather than to pursue “further development at the risk of over-extension”. The anthology illustrates well why this is a question that merits careful consideration. *International* criminal law will have to gain general universal support.

The anthology explores the relationship between state sovereignty and international criminal justice along three main lines of inquiry: (i) the immunity of state officials from the exercise of foreign or international criminal jurisdiction, or both; (ii) whilst the *ad hoc* international tribunals are closing down, the shift of attention to the exercise of national jurisdiction over core international crimes (CICs), making the scope of universal jurisdiction more relevant to perceptions of state sovereignty; and (iii) the question as to whether the amendments to the Statute (Rome Statute) of the International Criminal Court (ICC) concerning the crime of aggression could exacerbate tensions between the interests of state sovereignty and accountability.

In Chapter 5, Bingbing Jia, Professor of International Law at Tsinghua University (and former staff member of the ICTY and the ICTR) addresses immunity from foreign jurisdiction for state officials – representatives of the state acting in that capacity other than heads of state (or government) and diplomats – for international crimes. State immunity for such state officials has been denied before international criminal tribunals but immunity rules

and practices are not as clear before national courts. Universal jurisdiction is scrutinised in this context, and Professor Jia summarises by stating that the current practice in respect of universal jurisdiction is inconsistent and developing. He then looks at the rationale for immunity for these representatives of the state – an immunity that is mainly functional in nature. In the *Arrest Warrant* case,<sup>1</sup> the ICJ concluded that “the functions of a Minister of 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”. But, the ICJ continues, while jurisdictional immunity is procedural in nature “it cannot exonerate the person to whom it applies from all criminal responsibility” – jurisdictional immunity may only bar prosecution for a certain period or for certain offences.

Immunity is examined against treaty crimes, in relation to which the treaty itself may have an answer; and against crimes representing breaches of *jus cogens*. The judgment of the ICJ in the case *Armed Activities on the Territory of the Congo*<sup>2</sup> affirmed that the mere fact that compliance with a *jus cogens* rule – *in casu* the prohibition against genocide – may be at issue in a dispute “would not give the Court jurisdiction to entertain that dispute”. Jurisdiction for the ICJ is always based on the consent of the parties. The chapter examines whether inter-state relations are in possession of a degree of superiority over the needs of punishing serious international crimes. The answer is, currently, probably in the affirmative, and reference is made to the UN Charter as the basic instrument that regulates inter-state relations.

In Chapter 7, Erkki Kourula, Judge of the Appeals Chamber of the IC, analyses some of the challenges in the application of universal jurisdiction in the prosecution of CICs. Issues addressed include the lack of a uniform position on universal jurisdiction, the question of “overlapping” jurisdictions and subsidiarity, the immunity of state officials, and the overall feasibility of prosecutions based on universal jurisdiction.

Reference is made to the dialogue between the European Union and the African Union (AU) to clarify their respective understanding of the principle of universal jurisdiction. Africa welcomes the principle as such. As many African states experience constraints on their capacity to prosecute crimes, the assertion by national courts of the principle of universal jurisdiction has led to misunderstandings and aggravated inter-state tensions as it has given rise to perceptions particularly of political abuse. European states view the exercise of universal jurisdiction as an essential weapon in the fight against impunity for serious crimes of international concern, and as an important measure of last resort in situations where the state where the crime has allegedly been committed, and the state(s) of nationality of the suspect and victims, are unwilling or unable to prosecute. With the controversy surrounding the principle of universal jurisdiction, there is a need to agree on a definition and to distinguish it from other related principles and rules of international law, the crimes covered by the principle, and the immunities and conditions for the application of universal jurisdiction. A working group within the Sixth Committee of the UNGA has been established to address the scope and application of the principle of universal jurisdiction.

It is argued that the exercise of universal jurisdiction by national jurisdictions over CICs can only be positive in the fight against impunity. Universal jurisdiction serves as a positive supplement to the pursuit of justice by the international criminal tribunals.

<sup>1</sup>*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports (2002) 3.

<sup>2</sup>*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility*, Judgment, ICJ Reports (2006) 6.

The question of whether the Rome Statute amendments exacerbate tensions between the interests of state sovereignty and accountability are taken up in Chapter 3. Dr. Zhou Lulu, Director of the Treaty Division of the Department of Treaty and Law in the Chinese Ministry of Foreign Affairs, provides a brief analysis of the 2010 amendment to the Rome Statute whereby the crime of aggression was formally added to the jurisdiction of the ICC.<sup>3</sup> The crime of aggression is the present version of “crimes against peace” as it was called in the mandates of the International Military Tribunal (IMT) in Nuremberg and the IMT for the Far East. Its definition, the conditions for exercising jurisdiction over the crime and elements of the crime require considerable clarification. Dr. Zhou voices concern that except where there is a referral of such a crime to the ICC by the United Nations Security Council (UNSC), the relative vagueness of the preconditions for the ICC’s exercise of jurisdiction in such cases may challenge international security and stability.

As for universal jurisdiction, Dr. Zhou ascertains that there are still major differences among states as to what it entails. Double standards may add to the problem. The Permanent Court of International Justice (PCIJ) in the *Lotus* case<sup>4</sup> affirmed that sovereign states may act in any way they wish so long as they do not contravene an explicit prohibition. Derived from this principle, the theory of extraterritorial jurisdiction was advanced. The common interest of humankind makes for obligations *erga omnes*. Relative universal jurisdiction requires that the alleged culprit is present in the state that will exercise its jurisdiction. Universal jurisdiction is absolute where there is no requirement for the suspect to be present in the actual state – Dr. Zhou understands this jurisdiction to be limited to cases of piracy. She then explores three possible theoretical bases of universal jurisdiction: (i) the principle of sovereignty; (ii) the principle of obligations *erga omnes*; and (iii) the theory of combating criminal activity and ensuring that crimes never go unpunished. Dr. Zhou concludes by asserting that universal jurisdiction may be misused as a political tool.

Criminal immunity of state officials abroad is the third issue addressed. The irrelevance of official capacity was affirmed in 1946 by the UN General Assembly (UNGA) as one of the Nuremberg Principles. Similarly Article 27 of the Rome Statute provides that the rank or the position of the defendant will not relieve him or her of responsibility for an act that constitutes a crime under international law. However, Article 98(1) differentiates between immunity before foreign states and before the ICC. State parties to the ICC have used their sovereignty to yield jurisdiction to this Court. Basic elements of criminal immunity of state officials abroad are explained and explored.

In June 2013, a leaked electronic mail from Judge Frederik Harhoff at the ICTY caused turmoil. The judge suggested that recent acquittals of two Croatian generals, one Serbian general and two Serbian security officials could have been the result of political pressure. He wrote that he had heard that ICTY President, Theodor Meron from the USA, had put pressure on fellow judges to approve the acquittals. Moreover, Judge Harhoff accused the Tribunal of having changed its policy on convictions. At the same time, critics from outside the ICTY wondered if “beyond reasonable doubt” had become a higher threshold to pass in consequence of these cases. Be this as it may, it is an illusion to think of any legal system as infallible, but there is no better option available than to try and improve the legal order as such in all its different aspects and in every instance. Political meddling is a shadow that follows social unrest and serious crimes unaccounted for. It already appears before the

<sup>3</sup>The amendment will enter into force on 1 January 2017.

<sup>4</sup>*The Case of the S.S. “Lotus” (France v. Turkey)*, 1927 PCIJ Series A, No. 70.

barricades go up – look at the situation in the Ukraine, not to speak of that in Syria. Any unrest acts as a magnet also on outside forces – some who only seek violence, some who have other dark motives.

Rule of law is an ideal and a goal – to be strived for ardently and perennially. It should be of no surprise that an international legal order encounters similar problems and challenges as does the rule of law within national legal systems. By means of an enlightened dialogue, the world community needs to overcome shortcomings and find reasonable answers to the challenges. World leaders have pledged to ensure that impunity for CICs is not tolerated, and that such violations are properly investigated, prosecuted and sanctioned.

The principle of righteousness must rule the international order. The need to shape history as a willed development rather than as a sequence of political events is acute. It takes vision and commitment to work for the rule of law in international relations and an audacious willingness to help move the frontiers for the well-being of *all* people, but also informed and profound thinking to approach this ideal. I favourably welcome and recommend *State Sovereignty and International Criminal Law* as enriching in this context. The anthology may be openly accessed and downloaded through the website [www.fichl.org](http://www.fichl.org).

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