RECENT BOOKS ON INTERNATIONAL LAW

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BOOK REVIEWS

Jurisdictional Immunities of States and International Organizations. By Edward Chukwuemeke Okeke. New York: Oxford University Press, 2018. Pp. xvi, 408. Index.
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This well-written book offers a thoughtful, substantive discussion of the main issues of international law and domestic practice concerning the jurisdictional immunities of states and international organizations. Based on extensive research and careful analysis, it deserves to become a standard reference for years to come.

As Judge Abdulqawi Ahmed Yusuf, President of the International Court of Justice, notes in the foreword, Edward Chukwuemeke Okeke is especially well-qualified in the field by virtue of his extensive practical experience at the United Nations Educational, Scientific and Cultural Organization's Office of Legal Affairs, the UN's Office of Legal Affairs, and most recently in the Legal Vice-Presidency at the World Bank.

Rather than simply reciting the relevant treaty provisions, statutes, and decisional law, Okeke's aim is to provide practitioners with "a guide on both the state and the trend of the law" (p. xvii) and to "clarify the conceptual confusion about the differences in the jurisdictional immunities of States and international organizations" (p. 2), which he acknowledges are both challenging and controversial. He accomplishes that goal by offering an ambitious but well-focused *tour d'horizon* of both the theory behind, and judicial application of, international immunity law as it applies to both sets of actors.

The author has chosen, wisely, to confine his analysis to jurisdictional immunities (thus excluding immunities from execution, which, as he notes, are related but distinct) and not to address questions concerning the immunities of heads of state and government, diplomats or consular officers, special missions, or other visiting foreign officials (whether current or former), since they arise from different sources of international law.

The book will be an essential resource for legal advisers in foreign or justice ministries and in international organizations, as well as for private practitioners. It can certainly be used in academic settings as a companion for the study of treaty texts and decisional law.

I.

The first part of the volume focuses on state (or sovereign) immunity. The conceptual point of departure is Lord Hoffman's statement in *Jones v. Saudi Arabia* that immunity is not "a matter of discretion, [that can be] relax[ed] or abandon [ed]. It is imposed by international law without any discrimination between one State or another"[1] (p. 7).

Chapter 1 covers largely familiar ground by tracing in some detail the historical development of the relevant principles, from the notion of absolute immunity (*par in parem non habet imperium*) to limited (or restrictive) immunity based on the distinction between *jus imperii* and *jus gestionis*, primarily as expressed in the common law of the United Kingdom and the United States, but including some helpful discussion of its emergence in civil law jurisdictions as well.

Chapter 2 offers a more detailed discussion of the status and content of current international

[1] Jones v. Saudi Arabia, [2006] UKHL 26, [2007] 1 All ER 113, quoting Lord Millett in Holland v. Lampe-Wolfe, [2000] 1 WLR 1573, 158.

law, emphasizing both treaty law (specifically the 1972 European Convention on State Immunity and the 2004 UN Convention on the Jurisdictional Immunities of States and Their Properties[2]) and national legislation (again focusing on the U.S. and UK statutes[3]). The author devotes considerable attention to a discussion of the major international judicial decisions supporting his proposition that jurisdictional immunities are also an accepted rule of customary international law that governs at the domestic level even where no treaty or statute applies.[4]

Questions about who and what are covered, and under what conditions, are addressed in Chapter 3, one of the most substantive in the volume. Here, the primary principle is the distinction between immunities based on status (*ratione personae*) and those based on conduct (*ratione materiae*). The former includes heads of state and government and foreign ministers (a rule of customary international law), as well as diplomats and consular officials (treaty-based rules). The author usefully distinguishes both categories from the emergent (but still confusing) rules regarding "foreign officials" adopted in both U.S. and UK courts.[5] Substantial discussion is devoted to the distinction between the immunities accorded to the state itself as distinct from its subordinate entities (such as ministries and departments, political subdivisions, "organs," and agencies and instrumentalities).

The chapter also takes up the most commonly recognized exceptions, including those for commercial activities, territorial torts, immovable property, and employment contracts, as well as the controversial (or at least less common) exceptions including for acts of state-sponsored terrorism (which the author describes as "peculiar to North America" and "purely a foreign policy tool" (p. 143), expropriation or takings of rights in property in violation of international law, waivers (both express and implied), enforcement of arbitral agreements and awards, and counterclaims (the author treats the latter two as aspects of waiver). He notes the absence of any waiver for criminal conduct.

In Chapter 4, the author addresses the issue of "competing or conflicting norms"—in particular the relationship between (1) state immunity and (2) human rights and *jus cogens*, asking whether they can coexist or be reconciled. He notes two possible approaches: from the perspective of competing norms (to be accommodated) or the perspective of conflicting norms (to be reconciled hierarchically in accordance with their relative status under international law). His response is based on a discussion of the issue in the context of torture, concluding that "[t]he heinousness of torture does not denude the act of its officialness" and therefore, "to deny immunity on the basis of whether a violation of [a] *jus cogens* norm is an official act is both logically and legally unpersuasive. . . . Immunity *ratione personae* attaches to all public or private acts"[6] (p. 197).

The chapter also addresses the Act of State doctrine (in both its U.S. and UK variations), noting that while it too has roots in international principles of comity and territorial sovereignty, it operates as a substantive defense on the merits rather than a jurisdictional limitation.

[2] European Convention on State Immunity (the "Basle Convention"), May 16, 1972, ETS No. 74, 1495 UNTS 182, *reprinted in* 11 ILM 470 (1972); UN Convention on the Jurisdictional Immunities of States and Their Property, UN Doc. A/59/508 (adopted Dec. 2, 2004, not yet in force). *See generally* David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AJIL 194 (2005).

[3] Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. 94–583, Oct. 21, 1976, 90 Stat. 2891, codified at 22 U.S.C. §§ 1330 and 1605 et seq.; UK State Immunity Act, 1978, ch. 33.

[4] Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ Rep. 174 (Apr. 11); Jurisdictional Immunities of the States (Ger. v. It.: Gr. Intervening), Judgment, 2012 ICJ Rep. 99 (Feb. 3).

[5] *E.g.*, *Jones v. Saudi Arabia*, [2006] UKHL 26; Samantar v. Yousuf, 560 U.S. 305 (2010) and its confusing progeny; Kazemi Estate v. Islamic Republic of Iran, 2014 SCC 62, [2014] 3 SCR 176 (Can.).

[6] Okeke acknowledges that the contrary case has been creditably argued, citing Judge Al-Khasawneh's dissenting opinion in *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, 2002 ICJ Rep. 3 (Feb. 14).

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II.

Part Two turns to questions of the jurisdictional immunities of international organizations. As the author rightly notes, these questions differ from those of state or sovereign immunity because international organizations are creatures of multilateral treaty, established by states for certain functions and accordingly given specific responsibilities.

Chapter 5 begins the discussion by addressing the general nature and purpose of international organizations, noting that they do possess international legal personality and are governed by international law. However, because they derive their authority and status from their member states, their immunity has a different objective. "Jurisdictional immunity serves to ensure that member States through their national courts do not interfere in the administration, management, and operation of the international organization"[7] (p. 338). Thus, they "generally enjoy such privileges and immunities from the jurisdiction of their member States as are necessary for the fulfillment of the functions and purposes for which they were established"[8] (p. 242).

Those themes are repeated in Chapter 6 in its exploration of some of the more technical aspects of the legal personality, capacity, and status of international organizations. The discussion emphasizes that an international organization possesses its own legal personality, distinct from and not coextensive with that of its member states but including some measure of implied authority (p. 250). For instance, as an organization, the United Nations "must be deemed to have those powers which, although not expressly provided in the Charter, were conferred upon it by necessary implication as being essential to the performance of its duties."[9]

The focus of Chapter 7 is on sources of the jurisdictional immunities of international organizations, which of course are mainly found in their constituent instruments (charters) or in separate conventions specifically addressing their immunities. Okeke notes that whether international organizations also derive immunities from customary international law remains unsettled (p. 269) That question poses some interesting issues, including whether the practice of non-member states in that regard is relevant and whether the international organizations themselves, as subjects of international law, can (or should) take part in the formation of such rules (p. 270).

His answers tend to the more conservative or classical approach: since immunity is a derogation from state jurisdiction, then "it is the practice of States that can contribute to the formation of customary international law in that regard. . . . International organizations cannot and do not give each other jurisdictional immunities before national courts" (p. 271). In fact, he notes, the practice of states (especially those that host international organizations) has been generally to accord privileges and immunities. However, that practice and the ensuing decisions of domestic courts have largely been treaty-based, so that it remains unclear "whether any State practice of according jurisdictional immunity to international organizations, absent a treaty provision, is accompanied by the requisite *opinio juris* to form customary international law" (pp. 277–78). He concludes the discussion with a review of practice under the relevant U.S. and UK statutes, noting that they serve mostly to give effect to treaty obligations.[10]

Who determines what actions fall within the scope of "official" or functional immunities? The validity and extent of an asserted waiver? What actions fall within the exceptions to immunity? Those issues are addressed in Chapter 8. In practice, of course, the answers are provided mainly by domestic courts. As to beneficiaries, besides the organization itself, immunities in general extend to its officials, representatives of

[7] Referring in particular to Broadbent v. Organization of American States, 628 F.2d 27 (D.C. Cir. 1980).

[8] Citing to the RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 467 (1987).

[9] *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 ICJ Rep. at 182.

[10] An excellent resource on state practice in this regard is AUGUST REINISCH, THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS (2013).

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member states, and experts on mission. Okeke includes a useful discussion of questions (and decisions) regarding the unsettled area of employment-related disputes.

The chapter concludes with a thoughtful discussion juxtaposing the human right to a fair proceeding before an independent and impartial tribunal with the need to protect international organizations so that they can carry out their functions with independence and without interference. The author provides a thoughtful evaluation of a number of decisions on this issue from domestic and international courts.[11]

III.

The concluding part of the book steps back a bit to review (1) the similarities and differences between the international law immunity rules for diplomats, sovereign states, and international organizations, and (2) the more general—and perhaps more powerful—argument that immunity leads to impunity.

Chapter 9 emphasizes the different origins and purposes of diplomatic, sovereign, and international organization immunities. Granting that some parallels exist, Okeke contends that because international organizations are accorded more limited immunity to enable them to carry out the functions given to them by states, their immunity "should not be equated with State immunity. . . . The purpose of the immunity of international organizations is not for its constituent member States to evade their own obligations" (p. 356). In that regard, he singles out for criticism the concurrence in the D.C. Circuit's decision in *Jam v. International Finance Corp.*,[12] which advocated that international organization should be held to the same immunity rules as foreign states under the Foreign Sovereign Immunities Act (FSIA).

Rejecting the argument that equates immunity with impunity, Okeke notes in Chapter 10 that by giving international organizations a limited measure of immunity from the jurisdiction of domestic courts, international law reflects "the preference of internationalism over nationalism" (pp. 365–66) and rests on principles of functionality and reciprocity. As several International Court of Justice (ICJ) judges observed in the *Arrest Warrant* case, he observes, the evolving international law rules on immunity reflect a recognition of the need to balance competing functions: to prevent impunity for perpetrators of grave crimes, on the one hand, and to allow states (and by implication international organizations) to act freely without undue interference.[13]

While jurisdictional immunity may, in some cases, operate to deny justice, Okeke contends that immunity is nonetheless necessary for the benefit of international relations and cooperation. He notes, however, that such immunity does not mean that international organizations are unaccountable since other methods (such as internal dispute settlement mechanisms) exist for providing remedies.

IV.

Regarding Okeke's approach to issues of sovereign immunity, he is emphatically correct in noting that the jurisdictional immunities of states are properly considered rules of international law, not merely discretionary acts rooted in comity, respect, discretion, or consideration of foreign policy interests. U.S. courts (and academics) are fond of quoting Chief Justice Marshall's opinion in *The Schooner Exchange* in 1812 as evidence to the contrary, but in fact his decision rested clearly on the appreciation that it was "a principle of public law, that national ships of war, entering

[11] Among others, Georges v. United Nations, 834 F.3d 88 (2d Cir. 2016); Beer and Regan v. Germany, App. No. 28934/95, Judgment (Eur. Ct. Hum. Rts. Feb. 18, 1999); Waite and Kennedy v. Germany, App. No. 26083/94, Judgment (Eur. Ct. Hum. Rts. Feb. 18, 1999); and Stichting Mothers of Srebrenica v. Netherlands, App. No. 65542/12, Judgment (Eur. Ct. Hum. Rts. June 11, 2013).

[12] Jam v. International Finance Corp., 860 F.3d 703 (D.C. Cir. 2017), *rev'd and remanded*, 139 S. Ct. 759 (Feb. 27, 2019).

[13] *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 ICJ Rep. 3, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, at paras. 74–75.

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the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[14] Even if according jurisdictional immunity to foreign sovereigns was considered discretionary two hundred years ago, it is certainly not true today.

The 2004 UN Convention on the Jurisdictional Immunities of States and Their Properties is an excellent guide to the current substantive corpus of international principles of state immunity law. As Okeke acknowledges, it was adopted unanimously by the UN General Assembly[15] and explicitly states that "the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law"[16] (p. 48). True, to date, only twenty-two states have ratified or acceded to it out of the thirty required to bring it into force, but an additional fourteen have signed and it appears likely the Convention will become effective in the not-too-distant future.

That said, there is of course some room for debate about the precise content of some of the legal rules as well as their application in specific circumstances. Okeke's review of relevant domestic practice bears out the widespread and growing acceptance in domestic laws around the world of the so-called *restrictive theory* (distinguishing *acta jure imperii* and *acta jure gestionis*) in preference to the so-called *absolute* theory. His survey of the various domestic statutory schemes, especially in the common law jurisdictions, is quite useful. In that regard, it is unfortunate that the book was published before the new RESTATEMENT (FOURTH), FOREIGN RELATIONS LAW OF THE UNITED STATES (2018) became available, since it would have provided useful support for many of his observations.

As to U.S. law, Okeke is entirely correct to point out that the Foreign Sovereign Immunities Act contains two exceptions to immunity (those governing foreign expropriations and acts of state-sponsored terrorism) that have not been widely adopted elsewhere. The lack of parallel enactments in other legal systems does not, of course, necessarily suggest that those exceptions are generally considered contrary to customary international law; as with the early U.S. and UK embrace of the commercial activities exception, they might foretell emergent trends.

The terrorism exception has recently been challenged before the ICJ in the proceeding brought by Iran against the United States regarding treatment of Bank Markazi assets.[17] Okeke might also have noted the recent and disturbing inclination of some U.S. courts to expand the expropriation exception to cover foreign takings of property that occur abroad during periods of genocide (and potentially including other massive violations of *jus cogens* norms), an interpretation that promises to expand the scope of the exception far beyond the original intent of Congress.[18]

The FSIA is today under stress in other areas as well. Courts have recently been called upon to address the application of the "territorial tort" exception in the context of transborder cybercrime, for example,[19] and to decide whether (and how) the statute applies to allegations of criminal activity by foreign governments, their agencies or instrumentalities, or other affiliates.[20] On the latter issue, because the statute occupies the field of sovereign immunity law, affirmatively grants exceptions only in respect of carefully specified civil actions, and is entirely silent with

[14] The Schooner Exchange v. McFaddon, 11 U.S. 116, 145–46 (7 Cranch 116) (1812). Marshall's opinion did not in fact use the words "comity" or "discretion" but rested on his appreciation of the relevant "principles of national and municipal law." *Id.* at 135–36.

[15] GA Res. 59/38, Annex (Dec. 2, 2004).

[16] *Id.*, pmbl. para. 1. The ICJ appears to have accepted that proposition at least in certain respects, see *Jurisdictional Immunities of the States*, 2012 ICJ Rep., paras. 66, 89, 99.

[17] *See* Certain Iranian Assets (Iran v. U.S.), Judgment, Preliminary Objections (Int'l Ct. Just. Feb. 12, 2019).

[18] *See, e.g.*, Phillip v. Federal Republic of Germany, 894 F.3d 406 (D.C. Cir. 2018); Simon v. Republic of Hungary, 911 F.3d 1172 (D.C. Cir. 2018).

[19] *Cf.* Doe v. Federal Republic of Ethiopia, 851 F.3d 7 (D.C. Cir. 2017).

[20] *See* In Re Grand Jury Subpoena, 749 Fed. App'x 1 (D.C. Cir. 2018), *cert. denied*, __ S. Ct. __, 2019 WL 286879 (Mem.) (Mar. 25, 2019), and 912 F.3d 623 (D.C. Cir. 2019).

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respect to criminal activity or sanctions, the question becomes one of statutory interpretation and legislative intent. That no other domestic legal systems have adopted exceptions from state immunity for criminal activity will surely have a bearing on the issue.

V.

The application of international organization immunity in U.S. law, once a relatively sedate area, today presents significant challenges. Okeke's clear concerns about the implications of equating immunity under the International Organizations Immunities Act (IOIA)[21] with those provided to foreign states under the FSIA turn out to have been well-founded. Not long after his book was published, the U.S. Supreme Court decided, in *Jam v. International Finance Corporation*,[22] that the IOIA must be interpreted to afford international organizations the same immunity from suit that foreign governments enjoy today under the FSIA. That decision promises to generate considerable litigation and (very likely) confusing results.

The Court approached the issue simply as one of statutory interpretation. Even though states enjoyed absolute immunity under U.S. law when the IOIA was adopted in 1945 (long before the FSIA codified the "restrictive" approach), the Court said that

> [i]n granting international organizations the "same immunity" from suit "as is enjoyed by foreign governments," the Act seems to continuously link the immunity of international organizations to that of foreign governments, so as to ensure ongoing parity between the two.[23]

In the Court's view, it must therefore be read to have contemplated the possibility of changes in the latter body of law. "Whatever the ultimate purpose of international organization immunity may be, the immediate purpose of the IOIA immunity provision is expressed in language that Congress typically uses to make one thing continuously equivalent to another."[24]

Despite the fact that in enacting the FSIA Congress gave no indication whatever that its specific terms (much less the "restrictive" approach in general) would apply to international organizations, the Court applied the "reference canon" of statutory interpretation, which provides that "when a statute refers to a general subject, the statute adopts the law on that subject as it exists whenever a question under the statute arises."[25]

As a result, the IOIA and the FSIA have now in some way become melded. The Court's formalistic (textualist) interpretation leaves the details unresolved and the law confused. On the one hand, the two statutory schemes do not fit well together. As the Court itself noted, the immunities of international organizations flow primarily from treaties, although the IOIA vests a measure of discretion in the president to grant different levels. In contrast, the FSIA was adopted both to codify relevant rules of customary international law and to remove discretion from the executive branch.

More importantly, the problems arise not from denying international organizations "absolute" immunity (international organizations generally do not lay claim to such a rule today and certainly not the IFC) but rather from equating "restrictive" immunity with "functional immunity."[26] As Okeke rightly notes, the two concepts are far from identical.[27]

[21] International Organizations Immunities Act of 1945, 59 Stat. 669, codified at 22 U.S.C.A. § 288 et seq.

[22] Jam v. International Finance Corp., 139 S. Ct. 759 (Feb. 27, 2019).

[23] *Id.* at 768

[24] *Id.*

[25] *Id.* at 769.

[26] Justice Breyer emphasizes this point in his dissent in *Jam*, basing his analysis "primarily not upon linguistic analysis, but upon basic statutory purposes." 139 S. Ct. at 781.

[27] This point is clearly made in the Inter-American Juridical Committee's recently adopted *Practical Application Guide on the Jurisdictional Immunities of International Organization*, CJI/RES.241 (XCIII-O/18), Aug. 10, 2018, at Guideline 4, noting that with respect to international organizations, "not every *jure gestionis* act can be excluded per se."

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Prognostications are risky, but one may anticipate that plaintiffs will argue (and courts may be inclined to conclude) that the *Jam* decision requires finding that at least some official activities of international organizations taken within the scope of their mandates nonetheless fall within one or more of the FSIA exceptions. While the commercial activities exception is likely to be a main focus of concern, the decision did not cabin the rule to that exception, so that arguments under other FSIA exceptions are foreseeable.[28]

VI.

As Okeke rightly emphasizes, "[i]mmunity is not a carte blanche or franchise for officials to be lawless" (p. 12). Arguing in favor of jurisdictional immunity from domestic courts is not the same as rejecting the importance of providing individuals access to effective remedies in order to avoid denials of justice. That is the dilemma posed by principles of jurisdictional immunity, no less for international organizations than for states. One can read the majority's opinion in *Jam*, and Judge Pillard's concurrence in the court below,[29] as implicitly endorsing the principle that immunity must not lead to impunity.

The real question—and the challenge posed by *Jam*—is where (and how) such disputes are best resolved. The answer need not always be in U.S. courts—or even, as Okeke observes, in the courts of the states where international organizations are headquartered (as opposed to where the harm took place), or for that matter in any domestic court. It would seem prudent, if not essential, for international organizations generally to heed the underlying message and take action promptly to fashion appropriate mechanisms by which those claiming to have been aggrieved by their actions or inactions can have their claims heard and, if valid, appropriately remedied.

DAVID P. STEWART
Of the Board of Editors

[28] In the end, Congress will likely need to resolve the issues legislatively.

[29] 860 F.3d 703, 708–13.

The Wealth of a Nation: A History of Trade Politics in America. By C. Donald Johnson. New York, New York: Oxford University Press, 2018. Pp. xxi, 639. Index.
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> I am a Tariff Man. When people or countries come in to raid the great wealth of our Nation, I want them to pay for the privilege of doing so. It will always be the best way to max out our economic power. We are right now taking in $billions in Tariffs. MAKE AMERICA RICH AGAIN.[1]

High tariffs and import quotas, including many that are almost certainly illegal under General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO) rules, have been a principal feature of the Trump administration's trade policy, probably affecting more imports and at higher levels than at any time since the enactment of the GATT in 1947. Beginning June 1, 2018, the administration invoked national security concerns to impose trade restraints on steel and aluminum imported from all major source countries. The restraints consisted of 25 percent tariffs on steel, 10 percent tariffs on aluminum, and quotas on steel and aluminum representing a 30 percent reduction from current exports levels from a few countries.[2] In the course of its ongoing trade "war" with China, the Trump administration has imposed tariffs of 25 percent and 10 percent (in addition to any normal MFN tariffs) on $250 billion worth of imports from China based on China's

[1] Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 4, 2018, 7:03 AM), *at* https://twitter.com/realdonaldtrump/status/1069970500535902208?lang=en; Josh Boak, *AP Fact Check: Economists Say Trump Off on Tariffs' Impact*, BOSTON.COM (Dec. 5, 2018), *at* https://www.boston.com/news/politics/2018/12/05/ap-fact-check-economists-say-trump-off-on-tariffs-impact (quoting President Donald J. Trump).

[2] U.S. Customs and Border Protection Press Release, Section 232 Tariffs on Aluminum and Steel (Apr. 2, 2019), *at* https://www.cbw2qgov/trade/programs-administration/entry-summary/232-tariffs-aluminum-and-steel.