STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW. By Gamal Moursi Badr. Martinus Nijhoff, 1984. Pp. viii, 243. ($46.00 U.S.)

Until some time after the Second World War it was generally accepted that states enjoyed complete immunity before foreign courts. However, with the rise of the socialist states and the increasing extent to which even capitalist states took part in ordinary commercial activities there came a growing feeling that this immunity was too extensive. This discontent was not based merely on the ground that there was some measure of unfair competition between state and private trading enterprises. A trend was gradually developing away from the concept of absolute immunity, with an increasing number of states, including some within the socialist world, favouring a form of limited immunity that would be restricted to fields that might be correctly described as falling within the *jus imperium*. Nineteenth century common law decisions on the question were inconsistent. *The Porto Alexandre*[1] interpreted them as granting complete immunity but this was thrown into doubt in *The Philippine Admiral*,[2] and rejected completely in *I Congreso del Partido*.[3] Even before these latter decisions the United States had made it clear, through the medium of the Tate Letter (1952),[4] that no immunity could successfully be claimed before a United States court unless the state enterprise in question was clearly and unequivocally engaged in purely state activity. In Canada the trend has moved from an assertion of absolute immunity in *Dessaulles v. Poland*,[5] to an assertion of restrictive immunity by the Quebec courts in *Allan Construction Ltd. v. Venezuela*[6] and then back to absolutism in *Congo v. Venne*.[7] In this last case there was a strong joint dissent by Laskin and Hall JJ. which eventually found support in the *State Immunity Act*.[8]

In view of these developments it is perhaps not surprising that state immunity has now become a problem on the international level. Mr. Badr's *State Immunity: An Analytical and Prognostic View* analyses the present status of the claim. Those interested in the topic will find his account of the problem as interpreted in a variety of jurisdictions valuable and will be grateful to him for providing texts of the relevant legislation or ordinances enacted in the United States, the United

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[1] [1920] P. 30, [1918-19] All E.R. Rep. 615 (C.A. 1919).

[2] Philippine Admiral v. Wallem Shipping (Hong Kong) Ltd., [1977] A.C. 373, [1976] 1 All E.R. 78 (P.C. 1975) (Hong Kong).

[3] Plaza Larga v. I Congreso del Partido, [1983] 1 A.C. 244, [1981] 2 All E.R. 1064 (H.L. 1981).

[4] M. WHITEMAN, 6 DIGEST OF INTERNATIONAL LAW 569-71 (1968).

[5] [1944] S.C.R. 275, [1944] 4 D.L.R. 1.

[6] [1968] Que. C.S. 523, [1968] Que. R.P. 145 (1967).

[7] [1971] S.C.R. 997, 22 D.L.R. (3d) 669.

[8] S.C. 1980-81-82-83, c. 95.

Kingdom, Canada, Pakistan, Singapore and South Africa, as well as the European Convention of 1972 and the International Law Association's draft convention of 1982.

The first part of this monograph is devoted to tracing the development of the absolute and restrictive doctrines of state immunity, a distinction that has depended upon differentiating the public and the private acts of states.[9] To some extent the test has been factual rather than legal, that is "whether private individuals can also perform an act similar to the foreign state's disputed act".[10] But this can easily cause difficulties since in some states the economic activities of private individuals may be more or less regulated than they are under the *lex fori*, while in others foreign trade is a state monopoly. It is because of the latter possibility that there has been so wide a retreat from the idea of absolute immunity. Mr. Badr suggests that the true distinction between public and private acts has four bases:

> With regard to the formation of the act, the state performs the public act alone. . . . In respect of the parties affected by the act, in the case of a public act they are always and exclusively individuals or corporate entities within the state's territorial jurisdiction. . . . A private act of the state . . . must have a party not subject to the foreign state and not having its place of business in its territory. . . . With regard to its content, a public act regulates some aspect of the public interest as perceived by the state. . . . [T]he public act of the foreign state is nothing more than the regulation of a major or minor aspect of the public interest with which that state is entrusted. . . . The content of a private act of the foreign state is determined through negotiation and compromise; the content of its public act is determined by it alone through a process of deliberation and decision-making. . . . In the case of a public act, the state disposes of a coercive machinery designed to produce compliance and available for use by the state at will. No such self-help measures are possible in connection with a private act. Only the legal remedies open to both parties are available to the foreign state and these call for adjudication of which the outcome is not determined by the will of the foreign state.[11]

The central portion of Mr. Badr's book consists of a critical examination of the state immunity doctrine. In so doing, he suggests that the English approach to state immunity prior to the enactment of the *State Immunity Act 1978*[12] was merely a reflection and an extension to foreign sovereigns of the common law doctrine that the King could do no wrong,[13] and that, despite the changes effected by the *Crown Proceedings Act, 1947*,[14] the foreign implications of the doctrine had tended to be preserved. The author rightly raises the question of why, if a state

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[9] P. 63.
[10] P. 64.
[11] Pp. 68-69.
[12] U.K. 1978, c. 33.
[13] P. 75.
[14] 10 & 11 Geo. 6, c. 44.

accepts the jurisdiction of its own courts in a particular field, it should not be subject to the jurisdiction of a foreign court for the same type of issue when there is a connection between the state and the forum,[15] a point apparently accepted by the Privy Council in *The Philippine Admiral*.[16] However, if there is a truly governmental act that is a genuine exercise of state sovereignty there should be no extraterritorial effects of that act and no foreign nexus. "Lack of nexus would result in denying jurisdiction with regard to [such acts] to the courts of other states as a matter of primary lack of jurisdiction and not as a matter of immunity from jurisdiction".[17] This seems to be the approach adopted by the U.S. District Court for the District of Columbia in 1980 in *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya*[18] and in *Perez v. Bahamas*.[19] The author also comments upon decisions from England and Switzerland that express the same point of view.

It is perhaps not surprising that socialist doctrine tends to maintain the validity of the concept of absolute immunity. However, the socialist states know that they must trade and many of their international contracts expressly provide for arbitration or submission to local courts, and the same is true even of agreements they have entered *inter se*.[20] The reciprocity that they have been compelled to recognize is, of course, basic to international law and this principle is also found in legislative measures adopted by western "capitalist" states. This leads Mr. Badr to state that

> [b]ecause reciprocity is such a determining factor, the current prevalence of a severely restricted, and practically inexistent, immunity from suit would insure that this position will in time become universally accepted and applied through the mere operation of the principle of reciprocity. The major inroads which have already been made into immunity from execution are also bound to become universal. In fact, many countries have already been restricting immunity from execution long before recent national legislation in some countries caught up with that practice. This process is now bound to snowball, feeding on itself, through the action of reciprocal treatment.[21]

It is a maxim of international law that *falsa demonstratio non nocet* and Mr. Badr implicitly applies this maxim in examining socialist practice: "It matters little that in moving away from absolute immunity the restrictions on immunity are disguised as voluntary waivers of immunity and that lip service is still paid to the doctrine of absolute immunity."[22]

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[15] P. 79.
[16] *Supra* note 2.
[17] P. 80.
[18] 482 F. Supp. 1175 (D.D.C. 1980).
[19] 482 F. Supp. 1208 (D.D.C. 1980).
[20] Pp. 100-01.
[21] P. 102.
[22] P. 103.

In view of this, he is of the opinion that there should be no undue difficulty in working out a code of international legal regulation acceptable to both the states that have abandoned the doctrine of absolute immunity and those that still purport to retain it in theory.

At pages 115 through 148 Mr. Badr provides us with an examination of the legislative measures referred to earlier in this review and says that

> [i]n view of their extensive catalogues of claims with respect to which there is no immunity, it would be interesting to see what content, if any, is left to the doctrine of state immunity outside of diplomatic immunities and of cases where the local courts are not entitled to entertain jurisdiction and where, therefore, the question of granting or denying immunity from jurisdiction does not arise.[23]

He points out that generally speaking the majority of states no longer recognize immunity with reference to private acts of the state that belong to the sphere of contract, "this category constituting the bulk of transnational activities of states with the widest practical incidence before the courts".[24] A similar limitation is usually recognized regarding torts that result in material injury and regarding possession or ownership of immovable property. He suggests that the evidence shows a trend that should be made universal:

> There are valid grounds for maintaining that states which intrude into the legal spheres of other states through transnational intercourse should accept before competent courts of the latter the same position they have chosen for themselves before their courts in similar disputes. The public acts of the state (the *acta jure imperii* of the traditionalists) are beyond the reach of the courts of other states because of a primary lack of jurisdiction; there is no need for a defence of immunity in order to protect such acts against foreign judicial interference. Private acts of the state can no longer be elevated to the status of public acts through reference to their purpose; the defence of immunity is no longer available with regard to acts of this nature which have nexus with the state of the forum.[25]

While one is inclined to agree with Mr. Badr's contention, it is probably asking too much, in the light of the way the law has developed and in view of the general conservatism of the legal profession, to expect any abandonment of the concept of immunity, at least for some time to come, even though in practice this "right" of sovereignty has been reduced almost to nought.

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[23] P. 104.
[24] P. 150.
[25] P. 149.

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