GAMAL MOURSI BADR

STATE IMMUNITY

AN ANALYTICAL AND PROGNOSTIC VIEW

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by

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INTRODUCTION

Ours is a world in which the volume of the external trade of the vast majority of nations has greatly expanded and continues to be on the rise. Transnational intercourse of all kinds is now a feature of an interdependent world economy in which no nation can afford to stand aloof from a market-place which has assumed global dimensions. It is also a world where many nations, and not only of the Socialist bloc, conduct some of their transnational business themselves, or else they entrust it to state-owned corporations and to agencies of the state. In these circumstances it becomes of prime importance to know whether a foreign state or an agency or instrumentality thereof can be sued before the local courts and, if so, whether the final judgement obtained can be enforced against the funds or property of the judgement debtor. The question of the immunity of states from suit and from execution is thus one of direct practical relevance not only to the legal profession but also to governments and the business and banking communities all over the world. The economic effects of a particular legal stand on state immunity are obvious. The position of national courts on state immunity can either attract more business or discourage further dealings with foreign states or their agencies. It can thus affect the balance of payments and, in general, the role the country plays in the world market. It is no secret that among the reasons behind the quick enactment by the British Parliament of the State Immunity Act of 1978 was the fact that London began to lose some international business to New York after Congress passed the Foreign Sovereign Immunities Act in 1976.

The historical evolution of the doctrine of state immunity, its application by the judiciary of countries representative of various

but ineluctably convergent trends, and the different academic approaches to the question by international lawyers over the years have all received much recent and definitive treatment.[1] Although it may appear repetitious and, indeed, presumptuous to go over the same ground here anew, a historical survey of the doctrine of state immunity will provide the reader with a readily available and most useful background before embarking on the substantive study of the question. While acknowledging with gratitude the obvious debt which this part of our study owes to previous efforts in this area, it is hoped that some new insights into substantive issues will be gained in the course of the historical survey. Also, cross references will be made to some of the points to be discussed in subsequent parts of this study.

Useful as the historical survey of the evolution of the doctrine of state immunity is, attention can perhaps more profitably be focused on the critical analysis of the concept of immunity itself, and on several important landmarks which, in recent years, have dotted the long and turtuous path of the doctrine of state immunity, and have affected it in such a way that their continued influence on the future evolution of the doctrine in international law can hardly be doubted. The landmarks in question are the European Convention on State Immunity and Additional Protocol of 1972, the U.S. Foreign Sovereign Immunities Act 1976, the British State Immunity Act 1978, the Singapore State Immunity Act 1979, the Pakistani State Immunity Ordinance 1981, the South African Foreign States Immunities Act 1981 and the Canadian State Immunity Act 1982. The provisions of these instruments deserve to be carefully surveyed in order to determine whether there is any pattern common to all seven of them, and also in order to point out the direction which those provisions individually and collectively may be said to have imposed on the future development of the doctrine of state immunity.

The importance of these recent instruments stems not only from the fact that the Convention is the latest and most comprehensive instance of a multilateral consensual regulation of the subject, or from the fact that the U.S. and U.K. Acts mark a definite break with the past in two countries which were among the latest and the most prominent adherents of the absolute immunity doctrine.[2] In fact, in any survey of state practice and of national legislation regarding state immunity, mere numerical majority would be a misleading indication of the current state of

the law. More weight should be given to the practice of states having a larger volume of external trade and a more extensive involvement in transnational intercourse of all kinds, than to that of states which exist in relative isolation and are not involved to any considerable extent in transactions with foreign nationals, or in transactions between their own nationals and foreign states. The first category of states may be said to reach out more often and more intensively into the juridical domains of other states, and thereby give rise to more frequent claims by foreigners against them, or by their nationals against foreign states. For such states, the question of jurisdictional immunity is of more importance, and their practice with regard to it is a more significant indicator of the state of international law on the subject. The same cannot be said of the second category of states, for some of which maintaining diplomatic missions to some foreign states may constitute the bulk of their involvement in the juridical domain of those states. Some other states of this category may have their transnational activities dominated by one particular foreign state which is their only or main trade and business partner. This would impart a particular colouring to their practice in respect of state immunity, and would therefore diminish the significance of the said practice as a factor in the formulation of generally accepted norms governing state immunity. Hence the particular importance of the Convention elaborated by the twenty-one member states of the Council of Europe and of the legislation recently enacted by the U.S.A., by the U.K., by Canada and by the other nations mentioned above.

In a first part of the present study we shall follow the historical evolution of the doctrine of state immunity, from the time when only personal immunities of individual sovereigns were recognized by the classical writers on the nascent science of international law, to the developments of the nineteenth and twentieth centuries, which gave the doctrine its proper form and content. The relevance of the early American and English decisions, usually cited as having established the absolute rule of immunity, will receive a new evaluation. Then the parallel emergence of two specific rules of immunity, one restrictive and the other absolute, in various jurisdictions will be dealt with. The subsequent transition from absolute immunity to restrictive immunity in some major jurisdictions will then be examined. This first part will conclude with a chapter in which certain objective, factual and universally appli-

cable criteria for distinguishing between the public and the private acts of a foreign state – a distinction crucial to the restrictive theory – will be proposed in what is believed to be an original contribution of the present study to solving one of the few remaining difficulties of the law of state immunity.

In the second part of the present study we shall take a fresh look at state immunity, unrestricted by the traditional perimeters within which the discussion seems to have been confined. A critical analysis will be made of the concept, in which none of the hitherto dogmatically held positions will be left unquestioned. A focal point in the analysis will be the comparison of internal law and international law with regard to the position of the state before the courts. While accepting as valid that there is a need for protecting the public acts of the state from interference by the courts of other states, the question will be considered of whether such protection can be achieved without recourse to the defence of jurisdictional immunity. Lack of jurisdiction suggests itself as a logical and more technically sound means of ensuring that the courts of one state do not sit in judgement of the public acts of another. The objective definition, based on the nature, and not on the purpose, of the acts of foreign states, is gaining universality, and is being increasingly used to describe disputed acts as private and hence to deny immunity to foreign states. In this light, assimilation of the position of foreign states before local courts to their position before their own courts emerges as a realistic characterization of the current state of the law of state immunity. The necessary protection of the public acts of the state from foreign judicial interference is taken care of by the lack of jurisdiction for the foreign courts with regard to those acts. The analysis will extend to the possibility of finding a common ground where adherents of absolute immunity, who are now definitely in the minority, could join the current trend towards a progressively restricted immunity and agree to a unified regulation of the subject which all states could accept. The role of reciprocity in helping such a development will be considered.

In the third part of this study, the provisions of the seven recent instruments on state immunity and their similarities will be surveyed, and, possibly, dissimilarities will be identified. General conclusions derived from the developments in both Part II and Part III will follow. Briefly stated, our purpose in these two parts of the present study is, first, to analyse the very concept of state

immunity and, second, to assess the current state of the law on the subject, and, in so doing, try to predict its foreseeable future developments in the light of the dynamics of the current trend.

G.M. Badr
New York
January 15, 1984

PART I

THE EVOLUTION OF THE DOCTRINE OF STATE IMMUNITY

CHAPTER 1

HISTORICAL BACKGROUND

The genesis of the doctrine of state immunity is not readily discernible and its historical evolution does not follow a clearly defined course. The classical writers on international law during its formative stage did not deal with the notion that a foreign state enjoys immunity from the jurisdiction of the courts of another state. Only the personal immunities of foreign sovereigns and ambassadors are mentioned by, for example, Gentili (1552-1608), Grotius (1583-1645), Bynkershoek (1673-1743) and Vattel (1714-1767). It is interesting and worthy of note, however, that a distinction was already drawn between a foreign sovereign's or an ambassador's public acts and property and his private acts and property. Bynkershoek even went to the extent of holding that the goods of a sovereign, however acquired, whether of a public or private nature, were liable to process to compel an appearance.[3] The same author expressly states that the property of the sovereign, public and private, is subject to the authority of the judge of the place.[4] Vattel distinguishes between the sovereign's private acts and his acts as sovereign, and between his private and his public property.[5] Vattel states elsewhere (B. 2, para. 83) that "[m]any sovereigns have *fiefs*, and other properties, in the lands of another prince; they hold them in the manner of other individuals."

The fact is that the rules of state immunity, as such, have derived mainly from the judicial practice of individual nations since the nineteenth century. Municipal courts took the lead in creating the rules of state immunity, properly so called; doctrinal opinions and international conventions in this field are practically all of subsequent growth.[6] American courts were the first, in point of time, to formulate the doctrine of state immunity. The judge-