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Book Review: State Immunity: Some Recent Developments

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mat's Handbook of International Law and Practice, now in its third edition (1988). The latter deals only with bilateral diplomatic and consular relations and has a section on selected substantive topics of international law that have a bearing on a diplomat's functions.

In four consecutive parts, Dembinski deals with the common characteristics of external missions, with their staff, with their status and that of their staff, and with their activities. In each part, the various types of external missions are treated separately as the topic requires. The study is based on customary international law as codified in such instruments as the two Vienna Conventions on diplomatic and on consular relations, the Convention on Special Missions, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character and other related instruments. The author also takes into consideration the ongoing work of the International Law Commission of the United Nations on the topic of the diplomatic bag and courier, thus keeping abreast of the latest developments in the codification of diplomatic law. The scant case law available on the matter is not overlooked. The documentation of this study is therefore as comprehensive as can possibly be.

Dembinski's treatment of the novel aspects of contemporary diplomatic law is informative without being overextended. One example is chapter XXVII on parliamentary diplomacy (pp. 253-62). Dean Rusk is credited with having coined the term. While approvingly citing Jessup's 1956 course at the Hague Academy, the author adds some new features reflecting the experience of the last 30 years in the work of international organizations and conferences, and in that of politico-regional state groupings. The normative and procedural rules, as well as the decision-making process, of those international assemblies are succinctly set forth.

If the new dimensions of diplomacy are thus dealt with, its traditional aspects are by no means neglected. The reader will find ample treatment of such topics as the establishment and functions of diplomatic and consular missions accredited to states (pp. 39-47, 71-73, 76-79), their privileges and immunities (pp. 153-213) and the problem of diplomatic asylum (pp. 247-51). A selective bibliography is provided (pp. 263-69), with emphasis on works published since 1960.

This book is a welcome addition to the literature of international law in the particular area of diplomacy. It should prove useful both to diplomats and to students of this branch of international law.

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State Immunity: Some Recent Developments. By Christoph H. Schreuer. Cambridge: Grotius Publications Limited, 1988. Pp. xxiii, 200. Index. £28; \$55.

This volume contains an updated and extended presentation of the Hersch Lauterpacht Memorial Lectures delivered by Christoph H.

Schreuer at the University of Cambridge in March 1987, almost 9 months after the provisional adoption at first reading of the draft articles on jurisdictional immunities of states and their property by the International Law Commission. The traditional link between Cambridge and the Viennese School of International Law is further reinforced by Schreuer's participation, following Seidl-Hohenveldern's lectures a few years earlier, in the traditions set by Verdross, Verosta and Zemanek.

The publication is timely and the choice of subject appropriate in more ways than one. It is topical, controversial and yet practical in that there are not many other areas of codification and progressive development of international law where publicists, privatists and comparativists may meet on common ground without sharp conflict or confrontation. The lectures could provide a valuable addition to the two series of Hague lectures on the same topic given only a decade or so ago.¹ Problems surrounding state immunity still loom large in the wake of national legislation adopted by the United States in 1976 and the United Kingdom in 1978 (the latter enabling UK ratification of the European Convention on State Immunities of 1972), and followed closely by Singapore, Pakistan, South Africa, Canada and, more recently, Australia. Each statute appears to differ from the next in some respect or other. The U.S. trailblazer in 1976 constitutes codification of judicial and governmental practice since the Tate letter of 1952, which, in some curious ways, closely resembles the Austrian Supreme Court's decision of 1950 in *Dralle v. Government of Czechoslovakia*.

The problem areas treated by Schreuer cover a wide variety of fields, including commercial transactions, torts, arbitration, state entities and enforcement. In each of these problem areas, Schreuer critically analyzes the case law of a number of European countries, comparing it with U.S., Canadian and Pakistani practices.

On the whole, Schreuer has indicated his approval of the restrictive trends as reflected in the European Convention of 1972 and the UK statute of 1978, although he would have liked to see a bolder set of restrictive regulations. Australia's latest version appeals to him. While Schreuer would not himself embrace the German logic of a structural criterion for determining the status of a state entity, he would prefer the "nature test" to the "nature and purpose" test for determining the commercial character of a transaction to be disentitled to state immunities. The Austrian-German-Swiss adherence to the "nature" test as the only criterion for determining the application of state immunity is to be contrasted with the relativity and pragmatism of the 1976 U.S. Foreign Sovereign Immunities Act. The International Law Commission, viewing the inadequacy of a single test, be it "nature" or "purpose," has opted for a dual "nature and purpose" test. Primarily, the "nature test" is to apply to all transactions. Only when the nature of the transaction appears to be commercial is the burden of proving

¹ See, e.g., Sucharitkul, *Immunities of Foreign States before National Authorities*, 149 RECUEIL DES COURS 89 (1976 I); and Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 *id.* at 117 (1980 II).

that its purpose is preponderantly governmental shifted to the party claiming state immunity. To be generally acceptable, a practical solution has to take into account the differing views maintained in different legal systems. In the absence of uniformity of practice, harmony is sought, rather than unification of divergent stands.

In this particular connection, the draft articles of the ILC on the exception of commercial contracts or transactions may still be improved at second reading by requiring a tangible territorial connection with the state of the forum to support jurisdiction under the generally accepted rule of private international law. Otherwise, there is a danger not only that immunity will be unduly restricted but also that jurisdiction thus extended will lack a solid foundation in international law, public or private.

The different models adopted by national legislation vary from that of the United States to that of the United Kingdom, with the Canadian statute falling in between. The Australian statute may have gone further in some directions, while the Pakistani ordinance lags behind, discarding the exception of torts altogether. Schreuer, on the other hand, would have expanded all possible limitations on state immunities, whether it be for commercial or noncommercial torts. To some extent, this view is warranted—insurance companies, in particular, should not be allowed to hide behind the coattails of diplomatic agents or permanent representatives to an international organization, leaving the victims of road accidents unprotected. But to promote judicial remedies in the forum of the state where the injury occurred when that injury engaged the responsibility of another state would be tantamount to replacing the international legal system with “*judex in sua causa*.” The forum state would provide the cure, whereas local remedies should have been exhausted in the state whose state responsibility is in question.

It would be facile, indeed, if at any cost physical injury or damage to property inflicted by another state could always be redressed by the forum of the *locus delicti commissi*. Judicial self-help could be the order of the day, supplanting the existing or future international legal system. The truth of the matter must be found closer to earth than that ideal position. International law has not provided each state with ready-made self-help measures or countermeasures to redress by itself, using its own existing machinery, judicial or otherwise, whatever wrong done to it or its nationals by another equally sovereign state. The tort exception in actual practice has given rise in the United States and other countries to abuses at the expense of foreign accredited missions and the very international organizations whose headquarters were supposed to receive the fullest protection from the host country.

Limitations and restrictions on state immunity or exceptions to sovereign immunity should not be allowed to detract or derogate from the obligation incumbent on the host state to protect accredited missions from harassment and impediments to the exercise of their official functions.

Submission to arbitration has time and again been falsely construed as submission to the jurisdiction of the forum state, or worse still, as a waiver of immunity from the jurisdiction of the court of another state. Naturally, a

state is free to waive its jurisdictional immunity, and once a waiver is effected, it is irrevocable. But to agree to an arbitration is as far from a waiver of immunity from the forum state's jurisdiction as is legally imaginable. It represents the exercise of an option in favor of one method of dispute settlement, which is distinctly not to be identified with judicial settlement. The only conceivable connection with judicial functions lies in the arbitral proceeding itself, which is not altogether divorced in certain systems from a limited scope of judicial authority. Unless the arbitration agreement otherwise provides, this covers, in particular, three areas: (1) the validity or interpretation of the agreement to arbitrate, (2) the arbitration procedure, and (3) the setting aside of the arbitral award. Judicial control or review of arbitration in these areas is the consequence of the link between arbitral settlement and judicial control. It does not imply any waiver of immunity from the jurisdiction of the court of another state, much less can it mean implied submission to a judicial ruling on the merits of the case.

The problem raised by the separate legal personality of state entities really has no place in the recent codification endeavors. However, the structural organization of the entity is not without significance in a context not discussed by Schreuer, who lends his approval to functional rather than structural criteria in regard to state immunities. On this ground, Schreuer's position is tenable. The separation of legal entities is a result of deliberate acts of government. State trading corporations are often created for the purpose of trading. But the fact that they were established by the state, whether by a socialist state or a developing country, does not mean that their civil and commercial liabilities are attributable to the state. It was precisely to avoid confusing state responsibility with liability for the conduct of external trade by enterprises that trading corporations or organizations were established. It is a question of mistaken identity when a proceeding is instituted against the state, *eo nomine*, rather than against the particular entity, even though the funds and assets or property may continue to be state owned. Nothing appears to annoy the USSR more than the institution of proceedings against the Soviet state for acts performed by one of its trading corporations deliberately created without immunity or with an explicit waiver of state immunity.

What is more exasperating and less forgivable is the casting of wider nets to cover every other state entity, agency and organ, when the party at fault was merely a trading corporation, an airline or a shipping line. Sister ship jurisdiction is difficult enough to comprehend, but flag jurisdiction or jurisdiction on grounds of a nationality connection is worse than absurd. Is it permissible, for instance, to attempt seizure of the assets of a state railway line, simply because the state-run airline of the same country has failed to pay the airport tax, or vice versa? If such were the case, then the state, whether developed or developing, would be in a much more disadvantageous position than multinational corporations, which own, manage or control various enterprises, each with its own limited liabilities and assets. There is nothing to preclude the Soviet Union from engaging in precisely such bilateral treaty practice to insist on the immunities of the Soviet trade

delegation or commercial representatives, but to allow such representatives to answer for all the claims addressed to all Soviet trading corporations doing business in that same country, and even to waive immunity from execution in respect of assets and property available in that country. Everything is possible with the consent of the state. Why, then, try to imply or assume consent where none was given?

Schreuer would have liked to see measures of constraint operating against state property in a way more extensive or more liberal than under the European Convention, or the UK or U.S. legislation. Execution is seen possibly as an aspect of jurisdiction, while support for execution is supposed to be favored by industrially advanced countries, as opposed to developing or poorer countries. The truth appears to have escaped Schreuer, as his position tends to favor neither individuals nor states for that matter, but rather rich multinational corporations. His ideal legal world would admit execution more widely against state property whenever there has been an arbitral award or an internationally recognized judgment. Since when have we reached that position? What would countries like the Soviet Union or the United States do if domestic courts around the world were to attack assets and funds of U.S. or Soviet embassies or consulates, simply because a court of law, be it a constitutional court or the highest international judicial instance, had awarded damages, as compensation or reparation for injury suffered by nationals of other countries, as a result of the downing of a civilian aircraft or in consequence of a pacific blockade?

While Schreuer's analysis merits further attention and scrutiny, the unmistakable irony lies in his conclusion that states should continue, independently or otherwise following the UK or European model, to adopt legislation on the subject. This is precisely the danger that the Asian-African Legal Consultative Committee, in its collective wisdom, has thought advisable to avoid. Each country has followed a different path of historical legal development. Patience is indeed rarely found but is nonetheless a virtue. The international community should not forsake self-restraint at this juncture but should allow Vienna another chance to serve as the venue of a codification conference on jurisdictional immunities of states and their property. It would surely result in grave injustice if the ILC draft, on the eve of the completion of its second reading, were to be denied access to Vienna.

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Punishing International Terrorists: The Legal Framework for Policy Initiatives. By John F. Murphy. Totowa, N.J.: Rowman & Allanheld, Publishers, 1985. Pp. x, 142. Index. \$24.95.

At every turn, *Punishing International Terrorists* shows the care, experience and insights of its author, John F. Murphy, professor of law at Villanova University. Rather than attempting to write a treatise on his subject, Murphy has gleaned material to illuminate several important policy choices