SHORTER ARTICLES, COMMENTS, AND NOTES

THE 2005 UN CONVENTION ON STATE IMMUNITY IN PERSPECTIVE

State immunity is highly unusual among established areas of public international law in that it has been created and developed largely through cases in national courts and through national legislation. In sharp contrast to diplomatic and consular privileges and immunities, the role of reciprocity and of diplomatic negotiation in shaping the rules of state immunity has been rather limited. While national courts have purported to apply these rules as international law, they have inevitably viewed them within the framework of the constitutional approach taken by the particular national legal order to rules of international law and they have looked to earlier national precedents rather than to cases in other jurisdictions. In consequence, cross-fertilization has been rather limited and the process of response by national courts to the changing functions of States in the modern world has been painfully slow. Over the past 30 years, the uncertainties and inadequacies of leaving state immunity rules to national courts has been addressed mainly through national statutes—but while the draftsmen and legislators have paid careful attention to other statutes and tried to follow their best features, this process has compounded the perception of the courts that state immunity is an area of national law, to be interpreted and refined at national level.

The development of the law in the United Kingdom well illustrates these problems. For twenty years Lord Denning sought almost single-handedly to drag the English courts from the shackles of precedents applying an absolute doctrine of sovereign immunity, and to force his fellow judges to address as the true test of immunity the nature of the specific conflict to be resolved. Only with the *Trendtex* case[1] in 1977 did Shaw LJ join Lord Denning to form a majority in the Court of Appeal for the proposition that the rule of *stare decisis*

> does not prevent a court from applying a rule which did not exist when the earlier decision was made if the new rule has had the effect in international law of extinguishing the old rule.[2]

Meanwhile, however, the United Kingdom Government had been actively encouraging within the framework of the Council of Europe the work by a Committee of Experts which had led to the 1972 European Convention on State Immunity. A treaty was believed to be the most satisfactory basis for legislation in the United Kingdom which would not only require English courts to come into line with the restrictive doctrine of immunity but would also bring precision in applying it across a number of areas of law and offer international support for the desired change as well as some reciprocity for the UK as defendant in foreign courts. As the Foreign and Commonwealth Office explained to diplomatic missions, the proposed legislation was to be applied to all sovereign States 'in the belief that the provisions of the Convention reflect with

[1] *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* [1977] 1 All ER 881.
[2] ibid 910.

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sufficient accuracy general state practice in the field of sovereign immunity'.[3] The enactment in 1976 of the United States Foreign Sovereign Immunities Act[4] had led to a shift to New York of business in loans to and commercial contracts with sovereign States, and this led in turn to pressures from the business community and from lawyers in London for early introduction of legislation here.

The Lord Chancellor who introduced the State Immunity Bill in the House of Lords in January 1978, and indeed the labourers in the legislative vineyard supporting him from the Official Box, had hoped for a welcome of the Bill at least from Lord Denning. They were, however, sadly disappointed. The Bill was bitterly attacked first by Lord Wilberforce, as being more limited than the United States Act, as well as being excessively restricted by the jurisdictional restraints in the European Convention and as perhaps being more limited than was generally warranted by international law. Lord Denning followed by expressing 'the gravest misgivings' about the Bill—there had been developments in the law since 1972 and the Bill would 'sterilize and stabilize' the position in the UK. He argued that the Government should not seek in this field to legislate so as to fix national law but should rather await the outcome of the appeal then expected from the *Trendtex* decision.[5]

Following this inauspicious introduction, extensive changes were made to the Bill, in close consultation with experts from the legal profession. The State Immunity Act 1978 gradually established itself as a model—in terms of its precision preferable to the US Foreign Sovereign Immunities Act—and while imperfections have emerged, none have been sufficiently serious to require its amendment.[6] In its early years, however, there is no doubt that the European Convention served to protect the new Act from foreign criticism. The Soviet Union and other East European States challenged the assertion by the Foreign and Commonwealth Office that it correctly reflected international law. The provisions on execution of judgments—which could only be added to the Bill because of the flexibility permitted by the European Convention—caused some dismay when they began to be applied to enforce default judgments against States which had continued to pay no attention to the service of process by their creditors. One foreign Prime Minister suffered the ignominy of an enforced return home on a commercial flight after his aircraft was impounded by court order.

The European Convention on State Immunity however—perhaps because of its highly complex provisions on jurisdictional links—failed to attract more than eight ratifications, the last being Germany in 1990. It became apparent that it would not attract interest outside Europe—or even general support within it. A surprisingly large number of States still clung to the absolute doctrine of state immunity or wished to await the outcome of the ongoing work by the International Law Commission and the United Nations. Just as in 1978, the United Kingdom sought the security of a multilateral treaty as a foundation for legislative change, developing States, Republics of the former Soviet Union, States Members of the Arab League, China and Japan have all made clear in recent years that a treaty elaborated and endorsed by the United Nations is in their view the right basis enabling them to change or to clarify their law.

[3] Circular of 9 Jan 1978.
[4] 28 USC 1330, printed in 1976 ILM 1388.
[5] Hansard HL (17 Jan 1978) cols 63–8, 70–4.
[6] This was a close-run thing pending the judgment of the House of Lords in *Alcom v Republic of Colombia* [1984] 2 All ER 6.

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It follows from this historical account that the right approach at this stage for the United Kingdom Government—and indeed the one which in signing the new Convention it has endorsed—is to welcome the Convention as a major unifying influence on the development of international law rules rather than to focus on its ambiguities, its flexibility or the ways in which it differs from the State Immunity Act. The Convention is—from the United Kingdom perspective—a great improvement on the draft adopted by the International Law Commission in 1991. The years of arduous negotiation, accompanied by wide consultations with those having academic or professional interest in the detail, were worthwhile. Given the diffuse background described in the first paragraph above, and the wide differences in national practice, some ambiguity was inevitable. With the Vienna Convention on Diplomatic Relations, adopted against a much more uniform background of state practice, the United Kingdom by ratifying at an early stage not only helped to swell participation to near universality but also found itself in the position of establishing its own interpretations of ambiguities which were then followed by other Parties.

The most important area of flexibility permitted by the new Convention is that Article 2.2, while giving primacy to the nature of the transaction as regards those transactions not expressly specified as commercial, permits the purpose to be taken into account if this purpose is relevant in the practice of the State of the forum to determining the non-commercial character of a transaction. This is a limited concession and, as Lady Fox points out below, applies only to transactions not falling within the list of the obvious contracts (supply of goods or services, loans or guarantees) which under the UK State Immunity Act and similar statutes cover virtually all commercial actions. It is probably more of presentational than real importance, but it may encourage some hesitant States to become Parties and to leave their courts with the autonomy to change their own practice. Again it may be helpful to recall that early reservations to the Vienna Convention on Diplomatic Relations—on challenge to suspect diplomatic bags and on the immunity of junior mission staff—which met with objections from other Parties that they were 'incompatible with the object and purpose of the Convention', were in many cases withdrawn or simply not applied as the Convention rules came increasingly to be regarded as a uniform regime.

As to the differences between the UN Convention and the UK State Immunity Act—it is not obvious that any of these are sufficiently important to require amendment of the Act in advance of UK ratification. The Act includes specific provisions on a number of matters such as proceedings relating to liability for VAT and customs duties, proceedings concerning title to or possession of property used for the purposes of a diplomatic mission which are not expressly covered in the UN Convention but may be justified under other Conventions or under customary international law. As regards contracts of employment, the Act gives a wider degree of immunity than the Convention and probably wider than can be justified even having regarded to the requirement under the Vienna Convention on Diplomatic Relations to guarantee free appointment (and by implication free dismissal) of members of the staff of the mission. But the main exceptions to immunity as well as the procedural provisions in regard to pre-judgment measures of constraint and the provisions on enforcement of judgments can be applied within the framework of the Act even if making an entirely fresh start on the basis of the UN Convention might have resulted in somewhat different drafting.

Another advantage to the United Kingdom from early ratification of the new

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Convention would be the benefit to UK plaintiffs seeking resolution in foreign courts of disputes with foreign States. Given rules on jurisdiction and availability of evidence, it will not always be the case that the UK plaintiff may sue in British or United States courts. The task will be significantly easier if procedural rules and state immunity fall to be determined within the relatively clear framework of the Convention and if reciprocity—which may sometimes be a factor for the application in foreign courts of rules of immunity—can be simply demonstrated by showing that the UK is a Party to that Convention.

Now that the Convention has been adopted, and signed by the United Kingdom and by others, it is difficult to see what would be gained by the UK from standing aside. Important areas remain—particularly regarding criminal proceedings—where the law is developing, but the Convention will not by entering into force stop this process. The Convention cannot now be improved further or its provisions left to serve merely as a model for national courts. In any event, the development of the law on state immunity mainly through cases in national courts has been shown to be sporadic and unreliable. Commercial firms and aggrieved individuals need more uniformity than can possibly be provided even by far-sighted judges acting alone. The United Kingdom should ratify the Convention and should encourage its European partners in particular to do the same.

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