BOOK REVIEWS

State Immunity and the Violation of Human Rights edited by **Jurgen Bröhmer** [The Hague, Kluwer Law International, 1997, xvii + 342 pages, ISBN 90 411 0322 8]

Among those who were killed on 12 November 1991 at the Santa Cruz Cemetery in Dili, East Timor was a young man of New Zealand nationality. When in the next year, the Indonesian general in command of the troops who fired the shots visited the United States, he was served with a writ issued out of the Federal District Court by the young man's mother claiming damages for the tortious death of her son.[1] The action was brought pursuant to the venerable Alien Tort Claims Act of the United States whose antecedents go back to 1789.[2] The Act confers original jurisdiction on a United States District Court in the case of "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States" [page 44]. Since the general was only visiting the United States and hastened back to Indonesia after service, the plaintiff is likely to obtain only moral satisfaction from her default judgment for the sum of US$10 million unless the defendant has identifiable assets in the United States or other countries, including Australia and New Zealand, which are likely to recognise a judgment based on service *in personam*. It is certain that Indonesian courts will not enforce any judgment which she may obtain.[3]

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1 Todd v Panjaitan No 92.12255-WD (D Mass, 17 September 1992). The Center for Constitutional Rights of New York initiated the action on behalf of the mother. The Center has also sponsored actions on behalf of alleged victims against Karadzic and assorted Argentinian, Haitian and Guatemalan ex-generals during their visits to the United States for various reasons: for further details see Simon "The Alien Tort Claims Act: justice or show trials?" (1993) 11 Boston University International Law Journal 1, 27 note 154 especially.

2 Now found in (1976) 28 USC section 1350. See also the 1991 Torture Victim Protection Act, USC section 1350 which gives a cause of action to aliens and citizens alike in respect of the torture or extra-judicial killing of an individual committed under actual or apparent authority of a foreign nation against the individual who had subjected the plaintiff or deceased to such torture or death. In the latter case, the action survives for the benefit of the estate or any person who can bring suit for the deceased's wrongful death.

3 Not because of political reasons, but for the simple reason that Indonesian law does not permit the recognition and enforcement of foreign judgments: see Code of Civil Procedure (Indonesia) Article 436.

Could she have sued the Indonesian Republic? Not, it would seem, in the United States. Under the 1976 Foreign Sovereign Immunities Act of the United States, Indonesia is entitled to sovereign immunity which only exempts tortious conduct from such immunity in respect of "personal injury or death occurring in the United States"[4] which the allegedly wrongful death in East Timor clearly does not fit. Indeed, if Indonesia were prepared to say that the general acted as an instrumentality of the state, it may well be that he could claim the protection of sovereign immunity as well. It is clear that the provisions of the Alien Torts Claims Act must be read subject to any claim of immunity the defendant may be entitled to under United States law.[5]

Furthermore, since the Alien Torts Claims Act only gives a remedy in respect of breaches of international law, it is necessary to establish that the defendant was under apparent authority or colour of law of any nation, except for those crimes such as piracy, which are recognised *per se* as crimes under international law.[6] An action in the home state of the offender or even at common law in Australia or New Zealand would be bound to fail since the act of the offender would invariably be "justified" by the law of the place of commission.[7]

Of course, Indonesia is not the only state against which violations of human rights can be alleged. Such allegations have also been made against the Commonwealth of Australia[8] and indeed, virtually every state around the globe. But until recently, they were treated as the internal concern of the state committing them if the victims were its own subjects, or the exclusive concern of the state of nationality if the victim was a foreigner.

In the first case, redress was often impossible since the courts of states committing violations of human rights are usually reluctant to grant redress,

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4 28 USC section 1605(a)(5).

5 See Argentine Republic v Amerada Hess Shipping Corporation (1989) 488 US 429.

6 See Tel-Oren v Libyan Arab Republic (1984) 726 F 2d 774 (DC Circuit) per Edwards J at 791-796.

7 This was the case in Phillips v Eyre (1870) Law Reports 6 Queen's Bench 1 where the assaults and unlawful imprisonment by Governor Eyre, committed in the suppression of a rebellion in Jamaica, were held to be "justified" by an Act of the colonial Assembly; refer Kruger v Commonwealth of Australia (1997) 146 Australian Law Reports 126 where the removal of young aboriginal children was authorised by a Territorial Ordinance which the High Court of Australia held to have been validly enacted.

8 See Kruger v Commonwealth of Australia (1997) 146 Australian Law Reports 126.

and the state of nationality is frequently guided more by concern for its national interest than the private interests of the citizen concerned. Thus, it is not surprising that there is great interest in the trend started by the decision of the United States Court of Appeals in *Filartiga v Pena-Irala*[9] in 1980. The court in that case allowed the parents of a Paraguayan youth tortured to death by government agents in Asuncion to recover US$10.4 million in damages against the executioner when they located him in Brooklyn, New York. The issue is this: is there a new weapon in the fight against torture, extermination and expropriation by unscrupulous or careless governments?

Dr Bröhmer has made this topic the subject of his doctoral dissertation and we are fortunate indeed that it has been published by Kluwer International as Volume 47 of its series on International Studies in Human Rights. Dr Bröhmer has for many years been associated with the Europa Institute of the University of the Saarland in Germany. He expresses in his Foreword his appreciation for the guidance received from Professor Georg Ress, the Director of that Institute. Professor Ress was the Rapporteur of the International Law Association Committee on State Immunity on which I served as alternate Australian member to Professor James Crawford. Dr Bröhmer ably assisted that Committee and has made good use of the materials and national reports which the Rapporteur collected for the work of the Committee. Thus, this reviewer can say that he contributed in a very modest way to the author's research. However, it is a pity that the author by 1 March 1996, when he closed the research, had not contacted me for an update. In that case I could have given him the proper references to the originally unreported material.

Dr Bröhmer commences with a very thorough review of the existing law on state immunity in general and liability for tortious acts in particular. He refers to the two major developments of the last 40 years: the unregretted departure of the principle of absolute immunity (if such a principle ever existed), and the acknowledgement that the gross violation of human rights is no longer an "internal affair" but a breach of fundamental principles of international law. He discusses in some detail the national statutes passed in recent decades by the United States, United Kingdom and other common law countries including Australia. Most attention is paid to the United States because that is where "most of the action is". In contrast, it is interesting to note that the restriction of state immunity in civil law countries has been the product of

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9 (1980) 630 F 2d 876 (Second Circuit).

judge-made law.[10] He points out the general acceptance of the principle that states should bear tortious liability regardless of whether that liability is incurred in the exercise of state or private functions, in the legislation of the United States, United Kingdom, Canada and Australia. But in each case, that immunity exception is tied to a territorial nexus, albeit expressed in somewhat different versions.

Thus, section 13 of the 1985 Foreign Sovereign Immunities Act (Cth)[11] provides that a foreign state is not immune in an action concerning the death of or personal injury to a person "caused by an act or omission done or omitted to be done in Australia" [page 96]. In relation to the very similar wording of the United Kingdom provision which uses the formula "caused by an act or omission in the United Kingdom",[12] Dr Bröhmer argues that it may be wide enough to cover a failure to warn in the United Kingdom of risks created abroad (for example, the planting of a bomb in Frankfurt designed to explode in a plane flying over the United Kingdom)[13] [page 89] and even the suffering of harm in the United Kingdom as the result of an act done abroad. He bases the latter possibility on Order 11 rule 1(f) of the English Rules of the Supreme Court. This provision has been copied in most Australian state jurisdictions[14] and allows service out of the jurisdiction in cases where the proceedings concern damage suffered wholly or partly within the jurisdiction as the result of a tortious act committed abroad.

Certainly that provision, as interpreted by the New South Wales Court of Appeal,[15] would permit the New Zealand mother, bereaved of her son at Dili, to come to New South Wales. If still suffering trauma, she could invoke the jurisdiction of the Supreme Court against the Indonesian defendant and claim compensation for the whole of the damages suffered, subject to that Court being satisfied that New South Wales is not "a clearly inappropriate forum".[16]

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10 Argentina is the exception: see Law 24.488 of 31 May 1995 on the Immunity of Foreign States before Argentine Tribunals.

11 Which the author describes as based on United States and United Kingdom legislation but "in many ways more precise", a tribute to its principal author, Professor James Crawford.

12 (1978) State Immunity Act (UK) section 5.

13 Although the author does not refer to it, this interpretation is no doubt derived from the reasoning of the Privy Council in The Distillers Co Ltd v Thompson [1971] Appeal Cases 458 (on appeal from New South Wales).

14 For example, New South Wales Supreme Court Rules Part 10 rule 1A(e).

15 See Girgis v Flaherty (1985) 4 New South Wales Law Reports 248.

16 For such a dismissal of a claim against a foreign governmental instrumentality see

But it is difficult to see how the existence of that jurisdiction could overcome the clearly expressed territorial limitations on the tort immunity exception set out in United Kingdom and Australian statutes. The position is very similar to the Alien Torts Claims Act of the United States: the conferral of jurisdiction does not overcome the question of state immunity. It would be quite contrary to the intention of the drafters of the legislation to give it such a wide interpretation since their main concern was the imposition of liability for motor car accidents which typically occur wholly within the host state.

Dr Bröhmer does not approve of the territorial nexus limitation and, even less, of the distinction apparently still drawn by German courts between wrongful acts committed *jure imperii* for which immunity remains, and those committed *jure gestionis* for which immunity is denied. With some justice, he points to an illogicality. In relation to commercial matters, a foreign state is liable without a territorial restriction on the basis that the state, like any commercial body, can calculate its risks and insure against it if engaging in commerce. True, insurance against liability for gross human rights violations would be impossible to obtain, but the author points out that a state can avoid liability by abstaining from such acts while it cannot avoid liability for commercial transactions going wrong. With respect, this may be a bit simplistic. Even in well-regulated states with a strong tradition of democracy and civil order, security operations can go wrong, as evidenced by the Rainbow Warrior episode in New Zealand.

If the territorial nexus requirement is abandoned and, *a fortiori*, with the *jure imperii* distinction, will we finish up with unrestricted liability for states committing gross violations of human rights? Dr Bröhmer shrinks from that conclusion. He refers to the case of *Hugo Princz v Federal Republic of Germany*[17] in which the plaintiff, a United States Jewish citizen who found himself in Slovakia in 1941, sought to recover damages for the terrible sufferings he underwent at the hands of the Nazi regime. Although the trial judge found that the action could be sustained, the Court of Appeals upheld the claim to immunity made by the Federal Republic. Dr Bröhmer approves of that decision arguing that if private liability had been found to exist, the post-war democratic German State would have been bankrupted by the many claims not only survivors of the Holocaust and their families could make, but in theory, anyone who had suffered as the result of German war actions. He

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Adeang v Nauru Phosphate Royalties Trust [1992] Australian Current Law Reporter 85 Victoria 2, unreported, 8 July 1992 per Hayne J (Supreme Court of Victoria).

17 (1994) 26 F 3d 1166 (Court of Appeals, District of Columbia).

could not refrain from pointing out, with some justice, that the former Allied States too might find themselves liable. Indeed, having regard to this genocidal century, an orgy of civil claims could be imagined, all taking place in the State of Texas with its most generous juries and based on service on the Embassies of virtually all states present in Washington DC (with the obvious exceptions of Cuba, Iran, Iraq and Libya). He is quite right in not being able to accept that prospect. Here, the essence of state immunity, safeguarding the very survival of the state, comes into play.

What, then, is the alternative? Dr Bröhmer suggests a distinction between actions directed at individuals (such as the murder of a Chilean, former General Orlando Letelier in Washington DC which had been orchestrated by the Chilean Secret Service during the rule of General Pinochet) and actions undertaken in the course of operations directed against other nations, groups and ethnic communities. The problem with this distinction is that it would let almost everybody off the hook. Not only would it cover the obvious case of the Holocaust which was not directed against Mr Princz in particular but against all Jews, but it would also leave virtually all the egregious cases of violations of human rights subject to state immunity.

To return to the East Timor example: the violence at the Santa Cruz cemetery was not directed against the plaintiff's son individually, but against all those who were considered supporters of Fretelin. In almost all cases of human rights violations, the action is directed against a group, not against individuals. Even the Rainbow Warrior incident was not directed against the unfortunate Dutch citizen who died, but against Greenpeace. The result would be that state immunity would be even further restricted than it currently is under the territorial nexus requirement.

It is true that in his draft Article, the author seeks to define the exceptions to the tort immunity exception a bit more precisely [page 214]. The denial of immunity without a territorial nexus requirement would only occur in the case of violations of fundamental human rights which are part of the *jus cogens* body of international law. This would include torture, extra-judicial killing and the use of slave labour. It may also cover the wholesale removal of children from an ethnic or racial group with a view to destroying its cultural and family identity.[18] However, the action must "be aimed at" the

[18] Compare Gaudron J in Kruger v Commonwealth of Australia (1997) 146 Australian Law Reports 126, 190 because the forcible removal of the children in the Northern

killed or injured individual and, for good measure, must not be in violation of "other norms of international law designed to protect large groups of individuals, for example, the prohibition of genocide". Further, it must not occur in the context of an armed conflict between states (but apparently not in an armed conflict with rebellious groups within a state).

Even with those limitations, the accused state can plead immunity if it would be bankrupted by the multitude of claims or if it has submitted the matter to an international institution for adjudication and award of possible adequate compensation. Once again, the requirement that the action must be "aimed at" the individual rules out most claims except the specialised assassinations, such as that of Letelier. Otherwise, the more persons the violating state murders, the greater apparently will be its claim to immunity.

If we are to remain with the territorial nexus requirement for lack of a better alternative, it may be useful to look at a widening as proposed by the International Law Association in Buenos Aires.[19] That text would extend the nexus to situations where "the act or omission which caused the death, injury or damage either occurred wholly or partly in the forum State or if that act or omission had a direct effect in the forum State". As Dr Bröhmer remarks, this provision represents the most far-reaching attempt to restrict immunity.[20] It would cover the case of letter bombs mailed from abroad and defamation broadcast from outside the forum state. However, if the jurisprudence of the European Court of Justice is any guide on the issue of "directness", it would not cover secondary damage (such as continuing trauma or injury[21]) or derivative liability (such as an action by relatives for the wrongful death of the deceased in another country[22]).

Notwithstanding my profound disagreement with the solution which Dr Bröhmer advocates, I consider the book well worth reading. Not only does it set out in detail the existing state of the law on the subject, it alerts the reader to a crucial issue. What steps can an individual take who has been wronged

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Territory was not done "with intent to destroy" their racial group as such. See also Dawson J who points out that it was done "in the best interests of the Aboriginals concerned": ibid at 161.

19 International Law Association, Proceedings of the (1994) 66th Conference, Buenos Aires at 491.

20 Text at 133.

21 Marinari v Lloyd's Bank Plc [1996] Queen's Bench 217 (Case C-364/93).

22 Dumez France SA v Hessische Landesbank [1990] European Court Reports I-49.

by human rights violations whether by the state of citizenship or by a foreign state? How can we make the individual torturers, murderers and plunderers pay for their gross transgressions? And, most important of all, how can we deter such conduct in the future by raising the cost thereof? Even if it is not possible to give immediate answers to these questions, Dr Bröhmer has started the debate and supplied the materials and arguments. For that he is to be congratulated.

Hon Dr Peter Nygh