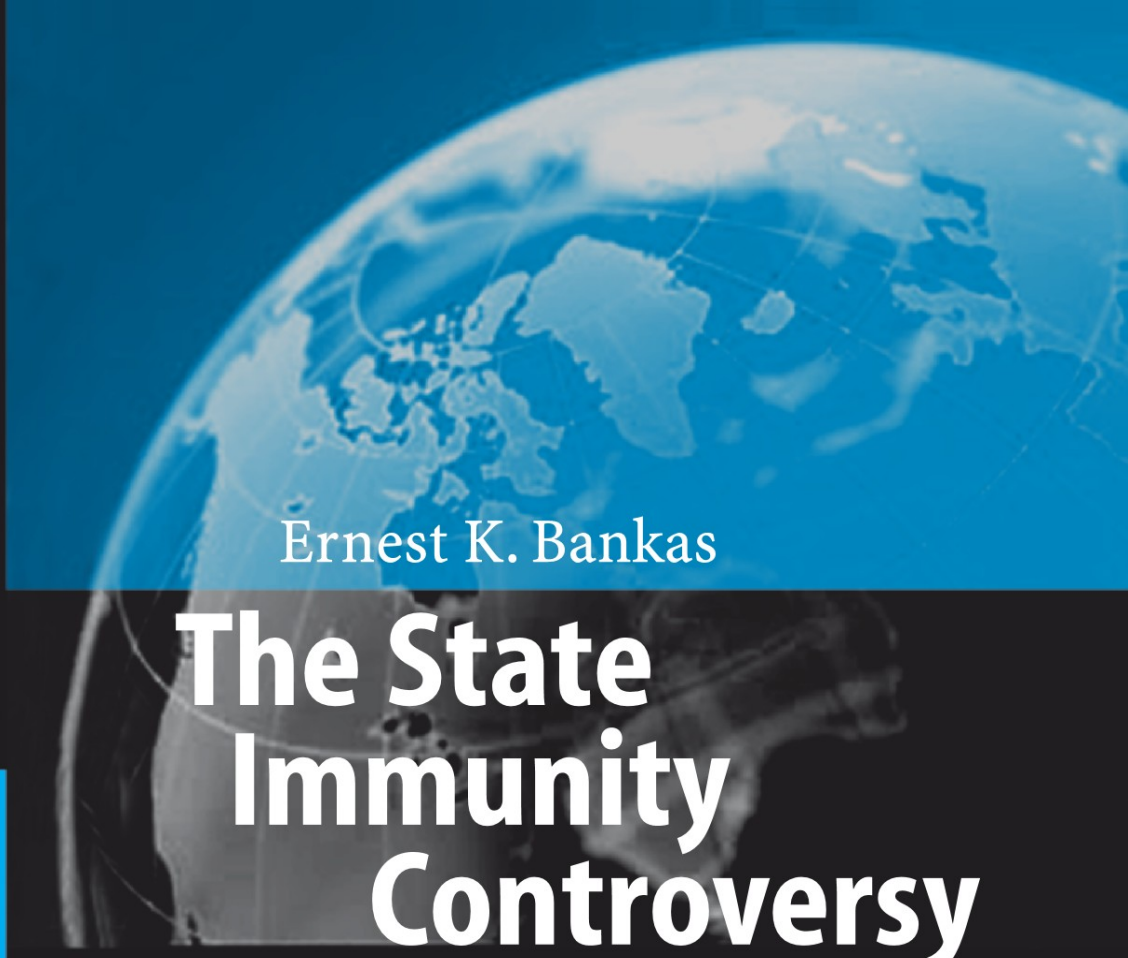
Ernest K. Bankas

The State Immunity Controversy in International Law

Private Suits Against Sovereign States in Domestic Courts

Springer



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Dedication

Dedicated to my Parents:

Darling Dzah and Joseph S.K. Bankas – popularly known as "Shall Pass" – for their love, kindness and support

Specially to my lovely wife, Maureen, and children, Krystle Mawuse Abra Bankas, Latasha Nukunya Ama Bankas; the twins, Alison Akofa Yawa and Alethea Akpene Yawa Bankas, and Joshua Kofi Tawiah Bankas – for their love, kindness and encouragement.

I remain indebted to my wife for her encouragement and patience through all these years. Her contribution to the writing of this book is immeasurable, for she always kept the fort whilst I was away studying and conducting research at the University of Durham Faculty of Law, and the World Court (The Hague). A substantial part of the study was done at the University of Durham, UK, Great Britain.

Again, special thanks to my family and I shall forever be grateful. When the cock crows early tomorrow morning, be advised that Ernest Kwasi Bankas is still saying thank you.

February 23, 2005

Preface

Prior to 1900 the immunity of sovereign states from the judicial process and enforcement jurisdiction of municipal courts was absolute and this in the main *ex hypothesi* was derived from two important concepts, namely sovereignty and the equality of states. Sovereignty may be defined as the power to make laws backed by all the coercive forces it cares to employ. This means that a sovereign state has what can be known as *suprema potestas* within its territorial boundaries. Jean Bodin was the first of writers to propose this idea of sovereignty, but in his exposition of this notion, he undoubtedly created a confusion about the *leges imperii* which arguably turned out to be a starting point for the long controversy between what can be denoted as analytic and an historical method in meta–juridical philosophy as regards immunity of states. His influence, however, has remained a lasting imprint on public international, backed by the fact that all states are equal and independent within their spheres of influence (*superanus*), which implicitly has given root to a meta–juridical philosophy that foreign states be accorded immunity in domestic courts. That this meta–juridical philosophy found application in the Schooner Exchange v. McFaddon is clearly exemplified by Chief Justice Marshall's judgment in the following formulated manner.

"This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an exchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." [See (1812) 7 Cranch 116.]

The decision in the Schooner Exchange over the years in fact became well grounded in the practice of states until quite recently when its currency was thrown into doubt because of the great increase in commercial activities of states.

The Current State of the Law of State Immunity

The power of a domestic court or a national authority to determine whether it has jurisdiction over a particular legal controversy is without doubt a question of private international law and this notion is wholly predicated on whether the subject matter at issue is properly associated with a foreign element. The *lex fori* is therefore designated as an important means of defining legal issues and in determining whether to take jurisdiction or not because it is considered as the basic rule in private international law. The problem, however, becomes more difficult if a sover-

eign state is directly or indirectly impleaded before a national authority. In this respect, the court would be faced with the issue of whether a sovereign state can be sued by a private entity in a foreign court.

Until quite recently the notion of absolute sovereign immunity was embraced and accepted without question, but of late, many have started questioning the legitimate basis of the concept of state immunity and have in turn suggested that limitations be placed on state immunity. This in fact has prompted some countries, notably U.S.A., U.K., Canada, Singapore, Australia, Pakistan and South Africa, to resort to legislation as a means of introducing restrictive immunity into their statute books. In spite of the call by some leading countries to abrogate or modulate the concept of absolute immunity in transnational litigation, Russia and the developing nations, however, still cling without any reservations to the notion of absolute immunity.

It is instructive to note that recent writers have suggested and supported the introduction of restrictive immunity but arguably have failed to provide a straightforward and precise prescription to the problem. While it is clear that the jurisdictional immunity accorded to foreign states is most readily recognised for public acts, it is no more recognised in the Western world for acts essentially commercial in nature. There is therefore a strong trend among some countries toward the complete acceptance of commercial restriction on state immunity. Be this as it may, one is still left wondering whether in this complex world without any supranational authority legislation per se is adequate in containing this elusive problem.

The major problem likely to face litigating parties is that restrictive immunity depends wholly on a method by which governmental (public acts) and commercial acts of states are distinguished in order to determine whether to accord immunity or not. So far it has become almost impossible to find a common ground to formulate a criterion that would perhaps be acceptable to all and sundry. Even domestic courts within many sovereign states have differed in their reasoning or quest to formulate a suitable methodology or proper standards to distinguish commercial acts of states from public acts. This in turn has led to persistent divergence in the practice of states as far as restrictive immunity is concerned. It is therefore far from clear as to the current state of the law of state immunity in respect of customary international law or general international law because it would seem restrictive immunity lacks *usus* and the psychological element of *opinio juris sive necessitatis*. These difficulties in a way have created albeit a penumbra of doubt in the application of the doctrine of restrictive immunity.

It is suggested that codification is inherently problematic and not the only means of resolving the controversy. The hub of this thesis is to find an alternative means of dealing with the problem, thus looking at the influence of early writers on the doctrine of sovereign immunity. In this light I would be able to lay bare the problem and then deal with it objectively. Chapter One focuses on the historical origins of the concept of absolute immunity, where an attempt would be made to prove that early European writers did influence Chief Justice Marshall 's judgment in the Schooner Exchange decision. Chapter Two addresses specifically the reasoning behind the Schooner Exchange judgment and how the said judgment found application in other courts around the globe. Chapter Three reexamines some as-

pects of the rational foundation of state immunity and the reasons why some states are finding it difficult to give up the old order, i.e., state immunity.

Chapter Four evaluates the reasons behind the changing views of states on absolute immunity. It also covers observations on current legal position on absolute and restrictive immunity in the USA and UK, respectively. Chapter Five covers in many respects private suits against African states in foreign courts, while Chapter Six examines the practice of African states in respect of state immunity. Chapter Seven is devoted to ILC draft articles on jurisdictional immunities. Chapter Eight covers issues relating to some unresolved problems of state immunity. Chapter Nine covers issues relating to suits against states for the violation of international law and some aspects of *jus cogens* and *obligations erga omnes*. Chapter Ten reviews the recent adoption of the UN Draft Convention on Jurisidictional Immunity of States and their Property. Chapter Eleven covers issues relating to the current state of the law.

Chapter Twelve, the conclusion, is structured as to have regard to the overall position of the thesis: (1) that codification has its own problems; (2) that treaty provisions between states would be helpful and will certainly bring about stability in transnational business transactions; (3) that there should be judicial development of the law of sovereign immunity as exemplified in Lord Denning 's reasoning on state immunity; (4) that domestic courts should follow the principles of justice, equity and good conscience in dealing with sovereign immunity issues, and thus must make it a point to rely on or supplement their forum data with comparative survey of state practice the world over; (5) that national legislation must be discouraged so as to pave way for the modern judge to have a latitude of freedom to explore and solve by reasoning the difficulties usually associated with immunity of states and international commercial transaction (*jus gentium publicum*). For restrictive immunity is an incomplete doctrine which must be relegated to the background and that municipal courts would be better off by balancing the justified expectations of private traders as against the rights of sovereign states.

This is an expanded version of a thesis which was submitted to the University of Durham, for the degree of Doctor of Philosophy in Law.

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Ernest W. K. Bankas
at Durham
February 1998

Contents