Ernest K. Bankas

The State Immunity Controversy in International Law

Private Suits Against Sovereign States in Domestic Courts

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To my parents and children—Joshua, Krystle, Latasha, Alison and Alethea and all my teachers.

Preface to the Second Edition

The application of restrictive immunity by the courts of western European countries, American and Canadian courts, however, trenchant has failed to provide a uniform solution to the state immunity controversy. This is so in view of the fact that it is difficult to subject the power of a sovereign to a law that lacks usus and opinio juris in a horizontal legal system, hence the problem cannot be resolved effectively by simply resigning only to the distinction between acts jure imperii and acts jure gestionis. There is the need, therefore, that the law is carefully managed since there is a considerable divergence on state practice in respect to state immunity and moreover, restrictive immunity is an unsettled legal proposition.

A commercial transaction can easily be transformed into a sovereign act either through legislation or perhaps through an executive order, and it is difficult to come up with a sound approach in demarcating commercial activities from the public activities of states since, in reality, the public activities of states have become albeit intertwined with commercial activities of states. In this respect, the application of restrictive immunity remains patently problematic, coupled with the continuing problems of territorial jurisdiction and the quest by some states to take measures of constraint or enforcement action against state property. These snags have created a herculean task for judges in so far as states cannot be sued against their will, for consent is necessary for the settlement of disputes in international law. Hence, the best approach in resolving these problems respecting state immunity may be through a multilateral treaty regime (i.e. *opinio obligationis conventionalis*), or possibly through arbitration or the contextual approach.

Ever since the year 2000 to date, litigating parties have faced each other on issues of immunity before national courts, international tribunals, European courts of human rights and the ICJ, but it would appear that in a majority of these cases, some of these courts have ruled on the side of absolute immunity. The ICJ recently ruled in Germany v Italy, ICJ Rep 2012, that state immunity has attained the status of *usus* duly supported by *opinio juris* and, therefore, rejected the normative hierarchy theory. The argument posited in the last edition remains the same but arbitration and comparative dominant theory be instead explored as a supplemental aid to the UN

convention on state immunity if it comes into effect, in order to resolve the attendant problems facing the world. This does not mean that custom be left on the side of the road. It is instructive to note that state immunity will continue to be a controversial subject because international law is patently predicated on the legitimate expectation of equality before the law, wherein states basically act as their own legislators, judges and law enforcement agents on the international plane, coupled with the need for public order objectives.

The force of social conditions, ethics, ideology and the interest of states normally converge to shape or influence state practice, and if aided by *opinio juris* duly creates international custom, which may regulate the behaviour of states. Thus, any rule that is not supported by *opinio juris* is considered rejected or modified. An effective protest from states against a rule neutralises the value of that rule in respect to customary international law. Furthermore, there are permissive and duty-bound rules in international law; see the SS Lotus case. Thus, the parallel existence of permissive rules and a rule imposing duties on states would continue to militate against the quest to find practical solutions to sovereign immunity problems in modern international law.

The continuing acceptance of these permissible rules and duty-bound rules readily supports the consent theory which in turn creates a persistent source of fragmentation and a regional divide in regard to restrictive immunity or absolute immunity. The restrictive immunity theory is well entrenched in Western Europe, North America, parts of Asia and Oceana, whereas absolute immunity is still well received in greater parts of Africa, Latin America, China (Hong Kong), Russia and possibly in countries of the former USSR. The position of the Caribbean region is not clear-cut but Cuba still supports absolute immunity. Indeed there is an agenda of problems in the light of the fact that the position of some states seems to be obscure and certain important countries still adhere to the doctrine of absolute immunity, coupled with the persistent tension between state immunity and the law of human rights, e.g. the recent diplomatic stand off between the United States and India.

In recent times, President Al Bashir of Sudan and President Uhura Kenyatta and his Vice President have been indicted by the ICC and these have admittedly created an acrimony and a bitter disagreement between the ICC and the African Union; because of the tension or conflict between Article 27(2) and Article 98(1) of the ICC statute. The whole controversy is centred on whether a sitting head of state (immunity *ratione personae*) can be indicted by the ICC? This unfortunate controversy has prompted the African Union to call on African countries not to cooperate with the ICC and there is evidence that some African countries have also demanded that all African states should withdraw from the ICC en masse, due specifically to the unreasonable selective indictment of African leaders. One is hopeful that these problems could be resolved amicably through Article (16) of the ICC or through a diplomatic conference.

A careful reading of the 1998 Rome Statute shows that it requires a careful treaty interpretation in order to balance the underlying force of Articles 27 and 98 of the Rome Treaty.

It is submitted that the problem may be resolved by resorting to the application of the principle of effectiveness, i.e. *utres magis valent quam pereat* (a contextual analysis mainly derived from Article 31 of VCLT) and the concept of *in dubio mitius*, a supplemental approach whereby deference is fully accorded to the *superanus* of the state (sovereignty). The tension between the AU and the ICC had subsided somewhat in view of the fact that the charges against President Kenyatta have been dropped on 05 December, 2014.

The Second Edition covers the above issues and has also been expanded considerably to cover nine more chapters on international criminal law and the prosecution of heads of state.

The book maintains its well-grounded analysis of state immunity and further explores other principles of international law in great detail, e.g. international criminal justice, vulture funds, *jus cogens*, persistent objector rule and the profile of international tribunals.

Dallas, TX, USA Ernest K. Bankas

Acknowledgements

I owe a great deal of thanks and gratitude to emeritus professor of law, Colin John Warbrick, BA LLB MA LLM, who was very kind as to persuade me to research on the law of state immunity in October 1995, whilst a post-doctoral student at Durham University, UK. The recommendation that professor Warbrick wrote on my behalf in 1997 also paved the way for me to be awarded the Boutros Boutros Ghali UN scholarship into the Haque academy of international law. Professor Colin Warbrick has been made a Companion of the Order of St. Michael and St. George by Queen Elizabeth II for services to international law on the 11th June, 2016. This is without doubt a great achievement. He is now a CMG. Congratulations for a well-deserved honour from the Crown—Bravo, Professor Warbrick.

I would like to thank Krystle Mawuse Abrah Bankas for her support, and it is a joy that I now have a granddaughter—Kynley Nukunya Evans and a grandson, and twins who are a blessing to all of us. Many thanks to my son-in-law, Mr. Edward Evans for his support as well.

Latasha Nukunya A. Bankas must be congratulated for her newborn baby girl named McKenna Noelle Nalani Metcalf. It is a joy that I now have six grandchildren, including Alison Bankas' daughter Brookyn. Bravo to Latasha and her husband for their friendship. Many thanks to everybody in the family for their encouragement and love.

Let me also take this opportunity to thank Mrs. Betty Leeper, for typing the nine chapters of the second edition with kindness and patience. I am also grateful to Springer for their kind consideration, particularly Dr. Brigitte Reschke.

My thanks must also go to both prof. and Dr. Joseph Jude Norton, SJD DPhil and LLD for introducing me to International Business Transactions law and the late prof. and Dr. Covey T. Oliver, LLM SJD and LLD, a former Assistant Secretary of State of the United States for introducing me to Public International Law.

18 April 2021; UK

In Memoriam

Sir Ian Brownlie—19th September, 1932—Liverpool, UK—3rd January, 2010, in Cairo, the Capital of Egypt. Kt, CBE QC, BA (Oxon), MA, DPhil (Oxon) and DCL (Oxon) FBA.

Bencher of Gray's Inn: took a Silk in 1979. Chichele Professor of Public International Law in the University of Oxford (Emeritus), Distinguished Fellow of All Souls College, Member of the Institute of International Law; member and former Chairman of the International Law Commission; Holder of a chair in Public International Law, London School of Economics and Political Science.

Sir Ian Brownlie died tragically on the 3rd of January, 2010, as a result of an unfortunate accident that occurred in Cairo Egypt (Africa).

Professor Ian Brownlie read law at the University of Oxford from 1950 to 1953 at Hartford College. He obtained a first in his law studies and was awarded the Vinerian Scholarship. In 1955, Professor Brownlie was elected as a Humanitarian Trust Student in Public International Law and, therefore, spent a year at Cambridge University (Kings College) studying international law where he met leading international lawyers of his generation.

Sir Ian Brownlie returned to Oxford to complete his DPhil in Public International Law in 1961. Chichele Professor of Public International Law, Sir Humphrey, at that time acted as his supervisor and over the years Sir Ian had spoken very kindly of his supervisor. Professor Brownlie wrote a thesis entitled *International Law and the Use of Force by States*, which was published in 1963. Sir Ian was called to the Bar in 1958, but deferred his pupillage to a later time. He was awarded an Oxford Senior Doctorate in Law, i.e. the DCL in 1976. As a matter of fact, his career lasted over 45 years and was deservingly knighted by the British Crown in 2009.

Furthermore, Professor Brownlie was awarded a "Certificate of Merit" by the American Society of International Law for his "Principles of Public International Law" 2nd ed. (1973): CBE for Services to International Law (Queen's birthday honours, 1993), Commander of the Order of Merit of the Norwegian Crown 1993 for services in the International Court.

Sir Ian had appeared as counsel in over 40 proceedings before the International Court of Justice (the Hague), and one is inclined to predict that this unprecedented record in the common law world will stand unbroken for a long time.

In his lifetime, he made a great contribution to the development of international law and he had trained leading international lawyers who are currently holding leading professional and professorial positions throughout the world. Sir Ian was a fountainhead authority on public international law and his book, which is popularly known as Brownlie's Principles, has been acclaimed the world over as *magnum opus*.

In the southwest African case (Second Phase), the ICJ held that Ethiopia and Liberia did not have *locus standi* to institute a legal action against South Africa for violating the mandate and the UN Charter. There, the ICJ in its reasoning reached a controversial conclusion whereby the casting vote of the President of the Court, Sir Stephen Spencer, South Africa was given the winning goal notwithstanding a prior vote of 7 to 7 in respect of the judgment. The court specifically concluded that the argument that *actio popularis* be allowed was premature and that such "a right was not known to international law as it stood at present". The decision was criticised by a great majority of the member states of the UN. The said decision undoubtedly reduced the reputation of the ICJ to its nadir. In fact, developing countries undoubtedly lost confidence in the ICJ.

The reasoning of the ICJ in the Southwest African case (Second Phase) did conflict with civilized values and thus certainly undermined the quest by the Africans of Southwest Africa (now Namibia) to attain independence and it is highly possible that the Southwest African case (judgment) would have attracted a rejoinder from F. de Vitoria, F. Saurez, G. Vasquez (the *Iberian Seconda Scholastics*), i.e. the Medieval Schoolmen. The Southwest African judgment (1966) did also run counter to the principles of *magna communistas humani generis*, i.e. the great society of mankind.

Arguably, although the decision in the Barcelona Traction Light and Power Company case; ICJ Rep 1970 p. 3.32; somewhat restored the reputation of the ICJ, still countries of the developing world were disappointed and apprehensive at that time as to whether the ICJ can be trusted to promote peace and international justice since the judgment in the Southwest African case *prima facie* destroyed the confidence they have had in the ICJ.

However, sir Ian Brownlie restored their confidence in the ICJ when he used his long-standing experience, legal skills, verve and determination to score a victory in the Nicaraguan case against the United States, i.e. military and paramilitary activities in and against Nicaragua, ICJ Rep 1986, 14,47. Here Professor Brownlie used his vast knowledge on public international law to convince the ICJ that it had jurisdiction and that the Republic of Nicaragua's claims were admissible. The United States disagreed with the court's decision on jurisdiction and admissibility and therefore, took a drastic measure by refusing to appear before the court for the merits of the case. Nevertheless, based on the force of the statute of the ICJ, and Professor Brownlie's arguments, a judgment was handed down in favour of Nicaragua. Prior to this famous case, Sir Ian had acted as an adviser to President Jimmy Carter.

According to H.E. Judge Hisashi Owada, a former president of the ICJ,

Sir Ian was indeed a towering figure among the giants of eminent international lawyers from all corners of the world.

Professor James Crawford, now a judge at the ICJ, the Hague, who studied international law under Professor Brownlie as a graduate student said that,

He was not flamboyant but he was nonetheless a formidable opponent. As a general international lawyer in his generation, he had few equals, no superior. He left his subject richer, more complex, more diverse and more resilient for his work and service.

His Excellency, Judge Hisashi Owada of Japan and Professor and his Excellency, James Crawford of Australia, are absolutely right for their observations are weighty and candid and thus ex hypothesi cannot be disputed because Sir Ian was truly a formidable international lawyer of high order and integrity.

Sir Ian Brownlie was a great teacher, legal researcher and a lawyers' lawyer, who was ever ready to defend any client no matter what their backgrounds may be. In this regard, I crave the indulgence of students, legal scholars, judges and diplomats to read his classic books on public international law and some of his legal arguments forcefully presented before the ICJ.

In my legal studies, I have been influenced by American legal scholars and English legal scholars, particularly Professor Ian Brownlie. Certainly we lost a great scholar. To paraphrase the words of Mark Anthony in Julius Caesar (Shakespeare), I conclude this tribute by saying that, here was Sir Ian Brownlie, a fountainhead authority, a lawyers' lawyer and a great law teacher! And for that matter, "When comes such another". May he rest in peace.

Contents

Abbreviations

(Texas) ILJ	Texas International Law Journal
(Virginia) Virg JIL	Virginia Journal of International Law
Brownlie's	Brownlie, Principles of Public International Law 7th Edn 2008
"F" (or Fed)	Federal Reporter
Af JICL	African Journal of International and Comparative Law
AJIL	American Journal of International Law
ASIL Proc	American Society of International Law Proceedings
AU	African Union
BJIL	Berkeley Journal of International Law
BPIL	British Practice in International Law
BYIL	British Year Book of International Law
Calif L R	California Law Review
Chic LR	Chicago Law Review
CLJ	Cambridge Law Journal
Col LR	Columbia Law Review
Com LR	Commonwealth Law Reports
Cornell LQR	Cornell Law Quarterly Review
CYIL	Canadian Yearbook of International Law
Dods	Dodson's Admiralty Reports (1811–22)
E.Ct.H.R.R.	European Court of Human Rights Reports
ECOWAS	Economic Community of West African States
ECR	European Court of Justice Reports
ELR	European Law Review
F Supp	Federal Supplement
F2d	Federal Reporter (Second Series)
Hackworth	Hackworth, Digest of International Law, 8 vols 1940–1944
Harv HRJ	Harvard Human Rights Journal
HLR	Harvard Law Review
ICC	International Criminal Court
ICJ	International Court of Justice

ICLQ	International and Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribune for Former Yugoslavia
IHRR	International Human Rights Reports
ILA Report	Report of the International Law Association
ILCR	International Law Commission Report
ILM	International Legal Materials
ILQ	International Law Quarterly
ILR	International Law Reports (Lauterpacht)
Ind JIL	Indian Journal of International Law
Int. Affairs	International Affairs
J African Law	Journal of African Law
LL New R	Lloyd's List Newspaper Reports
LQR	Law Quarterly Review
Max Planck Ybk	Max Planck Yearbook of UN Law
Mich LR	Michigan Law Review
Minn LR	Minnesota Law Review
MLR	Modern Law Review
NATO	North Atlantic Treaty Organization
NYIL	Netherlands Yearbook of International Law
NYULQR	New York University Law Quarterly Review
OAS	Organization of American States
OAU	Organization of African Unity
Penn LR	Pennsylvania Law Review
QB (or QBD)	Queen's Bench Division of the English High Court of Justice
Stan LR	Stanford Law Review
TLR	Times Law Reports
UNCLOS	United Nations Conference on the Law of the Sea
US	United States Reporter (Supreme Court)
USCA	United States Code Annotated
Vand JTL	Vanderbilt Journal of Transnational Law
WLR	Weekly Law Reports
YLJ	Yale Law Journal
ZAORV	Zeitschrift fur auslandiches Offentliches Recht und Volkerrecht

Part I

Chapter 1
A General Perspective on the Historical Development of International Law

1.1 Prologue

Most people are agreed that it is useful and wise to live in the present rather than in the past. Their logical position is understandable. However, it is equally important to understand that without the past we will not have the necessary storehouse of tools to clear the unbeaten path to the present. Thus, without the knowledge of important and crucial historical facts, we are bound to be left in the wilderness totally wallowing in confusion without any road map or a definite direction to follow into the present. History is therefore indispensable because it gives us the ability to procure and analyse historical evidence, coupled with the added knowledge to assess historical events and the needed tool box required to resolve the conflicting problems of the modern state, city-states, empires, institutions and to explain certain crucial trends. It also gives us the capacity to assess how polities, political units and nation states had behaved in the past and the legal effects thereto. Plato, e.g. in the fourth century BC stated that in order to have an effective government, good men be given the power to rule. Plato thus preferred the rule of good men to 'the rule through law' but according to him where good men cannot be found then it will be appropriate to follow the rule of law. Aristotle, on the other hand preferred the rule of law to the rule of good men; but before long the 'divine rights of Kings' completely overshadowed the said two propositions and thus brought in the concept of absolute rule or absolute monarchical rule, e.g. 'Potestas Absoluta' and 'Potestas Ordinate' or Rex Socius.

It is, therefore, the purpose of this part of the book to explore in outline some aspects of the history of international law because it has attracted little attention. To that end, one is inclined to argue that studying the history of a subject such as international law is important and beneficial to humanity in view of the fact that it can readily shape and significantly pave the way for the diplomat, statesmen and the student to get a better understanding of the character and force of the subject (international law), its legal implications, limits and the general and specific rules of engagement and operation.

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The study of the histories of the ancient Egyptian polity and practices, Phoenician civilization, the Greek city states, the influence of the Stoics, Roman civilization and *ratio scripta*, for example, will certainly give the student of international law a good grounding and a better understanding of its foundational principles, identity, rules of validation and how international law had developed over the years.[1]

Furthermore, a careful study of the historical epochs of the *Seconda Scholastica* (i.e., the Medieval Schoolmen), the position of the Pope, Emperor and the Prince would be a source of knowledge to international law scholars and all and sundry.

A serious student of international law may also acquire a lot of knowledge from "the recovery of the Holy Land," circa 1305, in which Pierre Dubois proposed that international arbitration and international judiciary be established for the sake of humanity. The study of the epochal periods of Erasmus and his letters in regard to the establishment of a league of peace, the writings of Gentilis, Hugo de Groot, Thomas Hobbes and Vattel to mention a few, the Persian Age, Spanish Age and the French Age will undoubtedly be very helpful in getting a good grounding in the study of public international law.

Last but not the least is the need to study the history of the Thirty Years War and the legal implications of the Peace Treaty of Westphalia (1648), which would be essential and insightful in preparing the diplomat and statesmen to get a good grasp of the classical western historiography and the principles of public international law in respect to the development and the establishment of the modern state, which is duly based on the maxim *superiorem non recognoscentes*.[2] It is also important to suggest that the study of such historical milestones as the Peace Treaty of Westphalia, the Final Act of Congress of Vienna (1815), which brought about the peaceful settlement of the Napoleonic Wars, the rationale behind the formation of the League of Nations and the establishment of the United Nations after the Second World War will certainly lay bare or possibly give a good insight into the underlying principles, which gave birth to peaceful cooperation and inter-state relations to flourish until today. It is vital to understand that historical events and trends do give birth to political and legal dynamics and the links between history, politics and law offer a better understanding of international law and the fundamental theme of legal principles.

[1] Grewe (2000); Preiser (2008); Brownlie (2019), pp. 4–17; Neff (2010b), pp. 30–55; Bederman (2001); Nussbaum (1954); Starke (1994), pp. 3–27; Keen (1965) explores the work of Hugo Grotius on the laws and usages of war; Tooke (1965); Koskenniemi (2002); Brierly (1963), pp. 1–25.

[2] Nussbaum (1954); Ward (1725); Brownlie (2019), pp. 4–17; Oppenheim (1921), pp. 1–7; Lawrence (1915), pp. 17–51; Henken et al. (2001), pp. xxvii–xxxvi; Verzijl et al. (1968) 11 vols.

1.2 Some Basic Principles

True, it is a generally held view in international law that foreign states, certain special classes of persons, e.g., kings, queens, heads of state, ambassadors, e.g., diplomats, international organizations and their personnel and other important officials of states cannot be impleaded before foreign courts. This means that the state and its officials enjoy absolute immunity before foreign courts and this privilege is undoubtedly derived from the principles of public international law (customary international law).

The origin of the concept of the state may be traced back to the theory of Divine Origin of Kings and then later reinforced by the social contract theory, the theory of force and in modern times, by general international law, that is the principles underlying the creation of states or the attainment of independence (sovereignty). This modern concept is duly supported by the legal position of the state under Article 2(1) of the U.N. Charter and the maxim *par in parem non habet imperium* coupled with the concept of *superiorem non recognoscentes* in modern international law.

It is here submitted that *par in parem non habet jurisdictionem* is primarily concerned with the principle of equality of states which is linked to the independence of states. This maxim is essentially imperative in promoting equality before the law, comity among states and stability on the international plane and for that matter cannot be construed as facultative. The aim of this book is to illuminate the contours of the nature of sovereign immunity and its legal implications in respect to inter-state relations, coupled with certain exceptions being proposed by some important states to limit absolute immunity in respect to commercial activities and human rights law. But before we throw our efforts unto the uncharted seas in the study of this elusive subject, it is apposite that public international law and private international law be explained, since these subjects interact positively in the explanation of connecting factors which must be determined by the *lex fori*, and it is crucial that one must get a good grasp of the true meaning of the principle of sovereign immunity and diplomatic immunity, inasmuch as forum law is vertical and thus a creature of the sovereign, coupled with the need also to understand that one STATE CANNOT LORD IT OVER THE OTHER in view of the fact that the international legal system is horizontal in structure. The aim here is to help the reader or student to understand the general principles on which international law rests.

1.3 What Is the Meaning of International Law?

The first question which must be answered *in limine* is what is the definition of public international law? According to Emmerich Vattel:

> The law of Nations is the science which teaches the rights subsisting between nations or states and the obligations correspondent to those rights.[3]

Professor W. E. Hall, in his treatise noted that:

> International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the law of his country, and which they also regard as being enforceable by appropriate means in case of infringement.[4]

Professor Clive Parry defines international law as follows:

> International law is a strict term of art, connoting that system of law whose primary function it is to regulate the relations of states with one another.[5]

It is also defined as "the system of law regulating the interrelationship of sovereign states and their rights and duties with regard to one another." It may also be regarded as the law that principally governs the day-to-day relations between sovereign states. It may thus be asserted that whatever benefits are conferred on individuals and other entities must be accepted as derivative through the sovereign state or through nation-states. These are of course traditional definitions of the subject, which means that states are the only subjects of international law duly endowed with legal personality and thus the only actors recognised to make claims.

Although contemporary international law still supports the view that States are the principal actors or players in international law, deference is now being accorded to international organizations and individuals whether they be natural or juridical. Thus, the idea that international law is exclusively based on the relations of states is no more the prevailing view for individuals and organizations have acquired to some extent a limited degree of personality under the law, and this may be due to the effect of certain important ICJ judgments.[6] Thus the role of human actors in committing serious international law crimes, such as war crimes, genocide and crimes against humanity after the great war and most recently has created room or paved the way for individuals to acquire certain rights and obligations under international law.[7]

Furthermore, the rapid development of human rights law after the second world war may also be considered as an important factor, since the world has now recognised that liberty is the faculty of willing and doing what has been willed without any force from within and from without. In short, human rights law has clearly acquired legal potency coupled with legal and political resonance around the

[3] Vattel (1758).

[4] Hall (1924), p. 1.

[5] Parry (1965), pp. 1–2.

[6] Germany v US (2001) ICJ 466, 494. para 77. Advisory opinion on reparation for injuries suffered in the service of the United Nations (1949) ICJ reports 174 (Apr 11); Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict (1996) ICJ Reports, 66 at 75 July 8.

[7] Buergenthal and Murphy (2007), pp. 2–3; Sohn (1982), pp. 2–6; Lauterpacht (1950), pp. 68–72; Universal Declaration of Human Rights, General Assembly Resolution (1948) 217A (111).