Law Review • vol. XI, issue 1, January-June 2021, pp. 2-25

State Immunity, the ICJ and Customary International Law

Zia Akhtar [1]

Abstract

The concept of state immunity has governed norms of discourse of states as part of customary international law. It implies that states are not liable in the domestic courts of another state for any wrongdoing committed within their own jurisdiction. In Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening) No 143, (3 February 2012) the International Court of Justice (ICJ) ruled that the immunity from litigation and enforcement enjoyed by states in regard to their property situated on foreign territory goes further than the jurisdictional immunity and that this is overriding even over human rights breaches. There can be no claim of damage suffered in another state that could be compensated by the respondent state. However, the ICJ has diverged from this principle in its ruling in Certain Iranian Assets (Iran v. United States) (2019) No. 2019/51 in which it denied the Iranian claim that the US had no right to seize its property within the federal jurisdiction. This paper enquires if the implications are the reduced scope of its jurisdiction in such matters, and if the ICJ should revert to its established principle that the customary international law takes precedence over domestic statutes that dilute state immunity.

Keywords: *State immunity, Treaty of Amity, Economic Relations, and Consular Rights 1955, customary international law, Executive Order 13599, jus cogens, Bank Markazi v. Peterson, Alien Tort litigation, International Law Commission, UN Convention on Jurisdictional Immunities of States and Their Property.*

Introduction

The ICJ has the power to hear „all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force"[2]. The State Parties which claim an injustice through their contact with another state apply to the Court to hear disputes in order to reach a settlement. Its jurisdiction has also been invoked to adjudicate on the interpretation of disputes based on state

[1] LLB (Lon), LLM (Lon), Gray's Inn, Barrister. The author is a specialist in public international law journal and his articles have appeared in leading law journals. List available on request.

[2] Article 36.

immunity which is a concept that evolved from *par in parem no habet imperium* that implies: between equals no power[3]. This is a principle that was sacrosanct but it appears to be undermined by the developments in the jurisdiction in the US and its litigation against foreign entities to recover compensation and recent litigation at the ICJ needs examination under the principles of public international law.

The „Principal Judicial Organ" of the United Nations, as the ICJ is known was established under the UN Charter, and is governed by its Statute and the Rules of Court procedure adopted by judges, and the Practice Directions of October, 2001[4]. Article 38 lists the sources of law set out in the Statute of the Court that applies to a dispute between states which are (i) international Conventions, (ii) international Customs and (iii) general principles of law recognised by civilised nations. It has two primary judicial functions, namely, to assist in the resolution of disputes between states and to provide advisory opinion to specialised international organisations and only „compelling reasons" should prevent from giving its opinion[5].

Under Article 59 it may also refer to academic writings by the most qualified scholars of various nations and its own previous judicial decisions called Reports, which though not binding are of persuasive value. On 13 April 1978 the ICJ streamlined its rules of functioning after having regard to Chapter XIV of the Charter of the UN, and further having regard to the Statute of the Court annexed to the Social Charter and exercising powers under Article 30 framed exhaustive Rules of Court (1978)[6]. This established the procedure to invoke the jurisdiction of the ICJ and Article 73 and 74 of the 1978 Rules that provide the basis for the judges to make their orders binding on any of the state parties.

The ICJ has to consider its competence when to admit a case for adjudication when pleaded by one of the parties or both parties to the dispute. Article 36 of the Statute (Chapter -11-Competence of the Court) lays down the jurisdiction of the Court as follows:

---

[3] Thomas Weatherall, Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence, 46 GEO J. INT'L L. 1151, 1152 (2015).

[4] Rules of Court. ICJ. http:www.ic-cjj.org/documents/index.php?p1=4&p2=3.

[5] Legality of the Use by a State of Nuclear Weapons in Armed Conflict Advisory Opinion, I. C. J. Reports 1996, Para 14, p. 235.

[6] The object of the changes made — at a time when the Court's activity had un- deniably fallen off — was to increase the flexibility of proceedings, making them as simple and rapid as possible, and to help reduce the costs to the parties, in so far as these matters depended upon the Court. On 5 December 2000, the Court amended two articles : Article 79 on preliminary objections and Article 80 concerning counter-claims. The purpose of the new amendments was to shorten the duration of these incidental proceedings and to clarify the rules in force so as to reflect more faithfully the Court's practice. International Court of Justice, p. 18: Handbook, www.icj-cjj.org/files/publications/handbook-of-the-court-en-pdf.

„The Jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the UN or in the Treaties and Conventions in force"[7].

The ICJ may exercise Compulsory jurisdiction which usually results in an objection by the Respondent State, that could then result in non-compliance with the final judgment[8]. This is the subject under which most cases are heard in the Court rather than by special agreement between the parties[9]. It must also be noted that the Court is considered as of declining importance in terms of impact because most members of the Security Council have withdrawn from its mandatory jurisdiction. The Court is facing numerous challenges because it has been the forum for disputes that it has had to adjudicate concerning „environmental protection, terrorism, and human trafficking" and there is an argument that it is „ill-equipped to tackle modern international disputes" because of its „jurisdictional and compositional problems"[10]. This also includes the state immunity which has been the subject of dispute between states and which has caused parties to raise the matter in the ICJ.

The issue of state immunity has been litigated in the ICJ to determine the liability of states when there has been an issue that concerns the exception to the principle of sovereign immunity and it has defined its scope when a claim has been raised for seizure of property in foreign territory[11]. The concept of state immunity is based on an exercise of judicial restraint but even though the

---

[7] Under the terms of the Article 93 of the UN Charter all members of the UN are automatically parties to the Court's statute. The Non UN members can also be bound by the Court's Statute under its Charter, and once a State is a party to this instrument it is entitled to participate in cases before the Court subject to certain conditions States who are not parties to the UN Charter may also become parties to the Statute, as decided by the Security Council Resolution 9 (1946) of 15/10/46.

[8] This may occur in two ways: first, under Art. 36(2) of the ICJ Statute ('Optional Clause'), whereby each party reciprocally accepts, in advance, the jurisdiction of the ICJ to resolve certain international disputes; or, secondly, through Art. 36(1) of the Statute, whereby a dispute settlement clause in a bilateral or multilateral treaty to which both States are party exists, conferring, jurisdiction over the dispute arising from the treaty to the ICJ referred to as 'compromissory clauses'.

[9] Of the 105 cases filed before the ICJ until 1 December 2004, only 19 were instituted by special agreement. 11 cases did not have a basis for jurisdiction asserted. The remaining 75 cases invoked the Court's compulsory jurisdiction. See generally Ginsburg and McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution', 45 *William & Mary L Rev* (2004) 1229.

[10] Ogbodo, S. Gozie „An Overview of the Challenges Facing the International Court of Justice in the 21st Century," *Annual Survey of International & Comparative Law*: Vol. 18: Iss. 1, Article 7. (2012) Available at: https://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/7.

[11] In the Jurisdictional Immunities (Germany v. Italy) I.C.J. No.143 (2012) case, the principle was established that the jurisdictional immunity of a state is not absolute…"and that "…in cases of crimes under international law, the jurisdictional immunity of States should be set aside." paras 55 – 56 The ICJ's judgment established that State immunity derives from the principle of sovereign equality found in Article 2(1) of the UN Charter and is "one of the fundamental pillars of the international legal order". para 57.

doctrine is governed by principles of international law in the domestic courts there is a lack of consensus underlying its application'[12]. It has been criticised for not providing a uniform set of judicial standards because of the lack of concrete barrier in preventing litigation in courts in all circumstances[13]. The nation's failure to respect state immunity is a violation of international law[14].

This paper considers the principle of state immunity by examining the US framework that is now robust in terms of its application of domestic jurisdiction to acts that have an international dimension. This has led to the domestic courts intervening in cases where the rights have been breached of US entities in foreign jurisdiction or where international actors are involved in causing damage leading to material and human loss within the US. It will also evaluate the scope of the Alien Tort Claims Act (ACTA) that permits foreign nationals to litigate in the federal courts. The breach of state immunity that has been raised at the ICJ on the freezing of assets of the Iranian national bank in the US that had been litigated in domestic courts as a breach of the Treaty of Amity, Economic Relations and Consular Rights 1955. The ICJ can review the bilateral treaties signed between states and bind them to the principle of the comity of nation states. The argument in this paper is that the ICJ should protect state immunity by reference to customary international law that upholds the application and which it has protected in its previous jurisprudence.

State immunity and justiciability

State immunity, or sovereign immunity is a concept that derives from common law and is often referred to as part of the international customary law that one sovereign state cannot be sued before the courts of another sovereign state without its consent[15]. The sovereign immunity of states is also referred to as „jurisdictional immunity" or „immunity from jurisdiction" and since there are different types of legal proceedings that may be brought against foreign states, sometimes courts find it necessary to refer to jurisdictional immunities of states. It has been determined by the International Law Commission (ILC) on jurisdictional immunities of states „that foreign governments are immune from

[12] Matthew Alderton, 'The Act of State Doctrine: Question of Validity and Abstention from Underhill to Habib' (2011) 12(1) Melbourne Journal of International Law 1.

[13] Michael J Bazyler, 'Abolishing the Act of State Doctrine' (1986) 134(2) University of Pennsylvania Law Review 325.

[14] See Jurisdictional Immunities of the State, I.C.J. No 143 (2012) at 123–24.

[15] The fact that the law of state immunity is primarily judge-made law gives judicial decisions a prominent position among the possible sources of international law as contemplated by Article 38 (1) of the Statute of the International Court of Justice; instead of being a "subsidiary means for the determination of rules of law," they are now a main source of legal rules.

suits in the domestic courts of another nation' which includes „action that effects the property, rights, interests or activities of a foreign state"[16].

There is an absolute immunity that applies in some jurisdictions, such as China under which any proceedings against foreign states are inadmissible unless the state expressly agrees to waive immunity. In the UK and the US there is a restrictive doctrine of state immunity that applies and it is accepted by the courts. [17] In the UK the increasing involvement of states in world trade activities led to the development of a more restrictive approach to state immunity, where a distinction is drawn between acts of a sovereign nature and acts of a commercial nature[18]. The restrictive theory of immunity of foreign states does not extend to their private and commercial acts (acta jure gestionis), which are „acts of state that any person in their individual capacity can person can perform" but generally does extend to their governmental acts (acta jure imperii)[19].

The restrictive immunity is only available in respect of acts resulting from the exercise of a sovereign power. As such, states may not claim immunity in respect of commercial activities or over assets which are considered to be distinct from the executive organs of the government of the state and are not capable of suing or being sued. Those entities are not entitled to claim immunity unless the proceedings relate to anything done by them in which they exercise of sovereign authority[20].

The US has afforded protections to foreign states under the FSIA 1976 that has ingrained common law principles into its framework[21]. The US has

---

[16] International Law Commission Report on the Work of its 43 Session, UN Doc A/46/10 (1991) at p 24.

[17] The primary source of English law on state immunity is the State Immunity Act 1978 (SIA), which gives effect to the restrictive doctrine and in the United States the Foreign Sovereign Immunities Act (FSIA) has the same effect.

[18] Section 14(1) SIA. A certificate signed by the Secretary of State is conclusive evidence as to whether a particular country is a state or a person is to be regarded as the head or government of a state (section 21 SIA). The definition of **state** applies to any foreign or commonwealth state – apart from the United Kingdom – and includes the sovereign/head of that state, the government of the state and any department of the government.

[19] Eric T. Kohan, Comment, A Natural Progression of Restrictive Immunity: Why the JASTA Amendment Does Not Violate International Law, 92 Wash. L. Rev. 1515 (2017). Available at: https://digitalcommons.law.uw.edu/wlr/vol92/iss3/8.

[20] Sections 14(1) and 14(2) SIA.

[21] The Foreign Sovereign Immunities Act of 1976 does not affect the application of the Act of State doctrine. In W. S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400 (1990) the U.S. Supreme Court held that the doctrine applies 'exceptionally' and only when an action requires a declaration of invalidity of a foreign governmental act performed within its territory and does not preclude inquiry into the motivations of a foreign government. Scalia, J. held "The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." Id. at 409. It implies that the courts do have a reviewing

incorporated a Supremacy clause in its constitution which allows the treaties to assume overriding status as the law in the federal courts[22]. This implies that the courts should not construe a statute to violate international law if there is an international Convention to which the US is a party[23]. There is a restricted application of the FSIA in terms of damages that can be claimed as a consequence of acts committed abroad. It had no direct application on the content of any litigation but lists a narrow exception in which it can be invoked against foreign countries in the federal courts[24].

There is a terrorism exception that was limited to designated state sponsors of terrorism. Section 1605A provides that a foreign state shall not be immune from suits seeking money damages for personal injury or death caused by certain acts like torture and extrajudicial killing, or material support for such acts, by foreign government officials. This provision is limited to countries designated by the US as state sponsors of terrorism (currently Iran, Sudan, and Syria). Under § 2337 the federal courts will be able to hear claims against any sovereign nation that "knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism"[25].

There are eminent scholars who have argued that acts such as terrorism, which if a state has committed, are not deserving of state immunity because these acts violate jus cogens norms from whom no derogation by a state is permitted[26]. However domestic, foreign, and international courts have consistently rejected

---

power to the extent that a case involves the "official act of a foreign sovereign," the Act of State doctrine applies only when a U.S. court must declare such an official act "invalid, and thus ineffective as a rule of decision for the courts of this country." Id. at 410.

[22] Article VI, clause. 2 of the United States Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land".

[23] In Murray v. Schooner Charming Betsy, 6 U.S. 64, (1804). Chief Justice Marshall wrote that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." at 118.

[24] See Republic of Austria v. Altmann, 541 U.S. 677(2004) where the Supreme Court held while the FSIA's framework always applies, the executive's views merit great deference). 689, 701-02

[25] In Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989), the Supreme Court interpreted the tort exception as applying only where both the tort was committed in the United States and the resulting injury also occurred within the federal jurisdiction. This "entire tort rule" was applied to dismiss actions brought against certain foreign state instrumentalities that the plaintiffs alleged had assisted with the September 11th attacks. The entire tort rule in § 2337 precluded the law suit in this case.

[26] Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (explaining the definition of peremptory norms, known as jus cogens norms); see also, e.g., Thora A. Johnson, A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity Under the Federal Sovereign Immunities Act, 19 MD. J. INT'L L. 259 (1995) (arguing for a jus cogens waiver of foreign sovereign immunity).

this contention. argument[27]. The International Court of Justice (ICJ) has considered the application of jus cogens in recent litigation[28] and affirmed that there was no reason to integrate „sovereign immunity and potential jus cogens violations because sovereign immunity was procedural, whereas jus cogens was substantive" which meant that the two were separate concepts[29].

The immunity of a state and its specific actions in question should never influence the treatment of another state in a court of law[30]. However, the ICJ has held the armed forces had immunity based on "an almost unbroken practice of judicial decisions extending such immunity, even when the acts were committed on a state's own territory"[31]. The only certainty is related to „armed forces during war", leaving open the question whether other governmental acts such as support for terrorism may not be covered by immunity[32].

The enhanced scope of the FSIA has been tested in the courts recently when for terrorism related offences the Iranian government's assets have been seized because the country has been deemed to have been a sponsor of terrorism. In *Rubin v. Islamic Republic of Iran* [33] the legal proceedings were based on a ruling that the petitioners had obtained against the respondent Islamic Republic of Iran under the §1605A of the Act as a designated state sponsor of terrorism and had locus standi with respect to claims arising out of acts of terrorism. To enforce that judgment, they filed an action in the district court to seize and appropriate certain Iranian assets, namely antiques housed at the University of Chicago. This was rejected at first instance based on the immunity granted to a foreign state and the Seventh Circuit affirmed this decision[34]. The Supreme Court upheld the ruling and stated unanimously that there was "no freestanding exception to property immunity in the context of a FSIA exception under the Section 1610(g) to attach and execute against the property of a foreign state"[35].

The Terrorism Risk Insurance Act of 2002 (TRIA) reflects Congress's efforts to reduce the protections afforded to foreign assets under the FSIA[36]. It establishes a

[27] See, e.g., Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992); See, e.g., Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992); Jurisdictional Immunities of the State, 2012 I.C.J. at 141–42.

[28] Jurisdictional Immunities of the State, I.C.J. no 143 (2012) at 140.

[29] Ibid at 113.

[30] Ibid. at 113–14.

[31] In Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Rep. Rep. 99 (2012) ICJ p. 73-77.

[32] P. 65.

[33] 583 U.S. _ (2018).

[34] 101 830 F.3d 470 (7th Cir. 2017).

[35] No. 16–534, slip op. at 12-15 (Feb. 21, 2018).

[36] See Terrorism Risk Insurance Act (TRIA), Pub. L. 107–297, 116 Stat. 2322 (2002) (providing for the attachment of assets in order to satisfy judgments to the extent of damages a terrorist party has been adjudged liable).

cause of action that claims assets from a foreign state to satisfy a successful judgment against it for damages arising from an act of terrorism[37]. This completely prohibits the President from categorically prevents foreign assets for attachment through Executive Order , and requires him to make an "asset-by-asset" determination[38]. The framework is designed in part to provide commercial disincentive to foreign states that sponsor terrorist attacks[39].

It achieves this objective by using foreign assets to cover the costs of insurance that it provides. [40] However, it is only certain assets are exempted from waiver[41]. The majority of the foreign states' assets are protected by the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, that allow the President to waive the attachment of assets to a court judgment to uphold the foreign policy objectives[42]. This process of whether assets can be attached or not creates an imbalance issue with the TRIA and the FSIA in general and some plaintiffs will be able to collect while similarly situated plaintiffs will not[43]. There is also the need to bear in mind that on litigating against foreign states the state party that is being sued may not have sufficient assets to cover the compensation awarded[44].

The enactment of the Justice Against Sponsors of Terrorism Act (JASTA) 2016 has amended FSIA and created a subject matter jurisdiction for courts to hear

---

[37] § 201(a) (providing a means for litigants to seek damages from a foreign state notwithstanding the immunities afforded to the attachment of assets under FSIA).

[38] § 201(b) (preserving a waiver for national security reasons, but making it harder for the president to utilize the waiver).

[39] 18 U.S.C. § 2333(a) (1992) (providing civil remedies in treble as well as attorney's fees to successful plaintiffs).

[40] TRIA § 107 (attempting to satisfy judgments for tortious claims arising out of terrorism by the liable state's assets).

[41] at § 201(b)(1) (allowing the President to waive the required attachment of assets against any property subject to the Vienna Convention on Diplomatic or Consular Relations).

[42] The Vienna Convention is a pre-existing treaty obligation, breach of which would most certainly be seen as a violation of international law.

[43] See Jeewon Kim, Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act, 22 BERKELEY J. INT'L See Jeewon Kim, Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse Under the Foreign Sovereign Immunities Act, 22 Berkeley Journal of International Law 513, 523 (2004) (which the author contends that the FSIA and amendments like TRIA are flawed because they frustrate victims and pits the executive against plaintiffs).

[44] At the time of TRIA's passage, Iran, which is the defendant in most such cases had only $251.9 million in frozen assets, which was an insufficient amount to cover compensatory damages for existing judgments. In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 37 (D.D.C. 2009) it was held that the amount of Iranian assets within the United States is approximately $45 million, while outstanding judgments against Iran stand at $10 billion dollars). 158. See Gates v. Syrian Arab Republic, 580 F. Supp. 2d 53, 75 (D.C. Cir. 2008) (noting that Syria feared that successful plaintiffs who had won judgments in federal court would seek to attach ancient artifacts belonging to Syria on loan to the Metropolitan Museum of Art).

cases that involve alleged wrongdoing by other countries. It provides a means to litigate civil claims based on tort for acts related to any sovereign nation that "knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism"[45]. The amendment included by JASTA under § 1605B provides that a foreign state shall not be immune from suits seeking monetary compensation for personal injury or death, or for damage to property, occurring in the US that is caused by (1) an act of international terrorism in the US; and (2) a tortious act of a foreign state or its officials "regardless where the tortious act or acts of the foreign state occurred"[46].

The tortious act of a foreign state may not, however, be an omission or "constitute mere negligence"[47]. The effect is has to be pending on, or commenced on or after, the date of enactment of JASTA; and arising out of an injury to a person, property, or business subsequent to 11, September 11, 2001. Section 5(b) permits the U.S. Attorney General to intervene in any action being taken against a foreign state "for the purpose of seeking a stay of the civil action, in whole or in part." The U.S. court "may stay a proceeding against a foreign state if the Secretary of State certifies that the federal government is engaged in good faith discussions with the foreign state defendant concerning the resolution of the claims against the foreign state, or any other parties as to whom a stay of claims is sought." Section 7 empowers the courts to apply the provisions of the Act retrospectively.

Prior to JASTA, a US national could not commence any action based on an act of international terrorism against "a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority"[48]. The courts had adopted an "entire tort" interpretation of the FSIA territorial tort exception under s 1605(a)(5), stipulating that not just the injury but also all of the tortious conduct should have occurred in the US before the private party could sue for compensation. The legal framework overrides the „presumption of immunity" that has been implemented by the FSIA[49]. This provision has enabled a U.S. national to bring an action in federal courts for claims against a foreign state seeking money damages for physical injury to a person or property or death that occurs inside the US caused by an act of international terrorism; „the tortious act

[45] 18 U.S.C. § 2337.

[46] 28 U.S.C. § 1605B(b)(2).

[47] 18 U.S.C.A. § 2337(2).

[48] 18 U.S.C.A. § 2337(2).

[49] Katherine Holcombe, JASTA Straw Man? How the Justice against Sponsors of Terrorism Act Undermines Our Security and its Stated Purpose American University Journal of Gender, Social Policy and the Law, Vol 76, (2018) 359-390.

or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occur[50]. The act or acts have to be more than mere negligence[51].

The powers available to the courts under JASTA may even be counterproductive to the US because of the diplomatic implications and demands made upon the US for its personnel causing damage abroad in the execution of their duties[52]. There is also now the possibility of litigation by foreign parties who have suffered personal injury by acts committed by federal entities in other countries whose nationals can then sue in US courts. JASTA specifically revokes state immunity for states alleged to have committed international acts of terrorism which is a development in international law[53]. The lack of support for this type of exception to state immunity reveals that it may lack the state practice and opinio juris required to prescribe this as a principle of customary international law[54].

State immunity and international jurisdiction

The US jurisdiction permits the claimants who are sufficiently „aliens" for the sole purpose of invoking jurisdiction of the U.S. courts. This is by means of invoking Alien Tort Claims Act (ATCA) or Alien Tort Statute (ATS) promulgated in 1789 which provides in its preamble: „The district courts shall have original jurisdiction 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"[55]. There is civil redress in tort for a violation of established customary international law for foreign nationals against U.S. and this has involved legal proceedings in the American

[50] 28 U.S.C. § 1605B(d).

[51] 18 U.S.C.A. § 2337(2)

[52] Paul B. Stephan, Professor of Law, University of Virginia Law School) (stating JASTA derogates from international law principles of sovereign immunity that are viewed as illegal internationally). (He also stated that it „undermines the authority given to the executive to conduct foreign relations") See Justice Against Sponsors of Terrorism Act: Hearing on S. 2040 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 114th Cong. 64 (2016) (statement of At 63)) 24/7/16 *https://lawfare.s3-us-west-2.amazonaws.com/staging/.../Testimony%20on%20JASTA.*

[53] Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, 140 (Feb. 3) (holding there is no jus cogens violations exception to state immunity).

[54] Jurisdictional Immunities at 141–42 (examining state practice and opinio juris to determine whether a jus cogens- violations exception to state immunity exists).

[55] This Act was originally drafted within the framework of the Judiciary Act that established the court structures in the federal system. The Judiciary Act ch. 20, § 9, 1 Stat. 73, at 77, codified as amended as 'Alien's Action for Tort (Alien Tort Statute (ATS), Alien Tort Claims Act, (ATCA))' 28 U.S.C. § 1350, 25 June 1948 (United States).

courts that have concentrated on legislative intent, international law and human rights violations[56].

The federal courts recognize any tort that infringes on individual rights granted by international law that addresses a set of justiciable torts, but restricted to those defined as prohibited norms under either the law of nations or treaties adopted by the US. In *Kiobel v. Royal Dutch Petroleum Co*[57]. Justice Roberts ruling for the majority held that all the relevant conduct took place outside the United States, and that even where the claims affected the territory of the United States, they did not impact with "sufficient force to displace the presumption against extraterritorial application"[58]. However the plaintiff could only override the presumption with the proof that it "touches and concerns" the US with "sufficient force"[59].

Justice Breyer provided the minority opinion stating that there should be jurisdiction under the act where „(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the US from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind"[60].

Since the plaintiffs did not meet that standard, the Court upheld the Second Circuit's decision affirming dismissal of the case. The Supreme Court had not answered the question of corporate liability under the ATS and instead, it held that the presumption against extraterritorial application of US law applies to ATS claims. There is a presumption against extraterritoriality and the claim will be barred unless the domestic conduct is sufficient to violate an international law norm that satisfies requirements of definiteness and acceptance among 'civilized' nations[61].

In *Order Granting Petition for Certiorari, Jesner v Arab Bank*[62] the petitioners in *Jesner* were survivors, family members, and estate representatives of victims of

---

[56] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) where the Supreme Court affirmed that "only conduct that satisfies Sosa's requirements of definiteness and acceptance among civilized nations can be said to have been "the 'focus' of congressional concern". At 732.

[57] 569 U.S. 108 (2013).

[58] at 124.

[59] at 126.

[60] at 127.

[61] Paul Hoffman, argues that "it is unclear how the Kiobel majority views the relationship between the new presumption and existing limiting doctrines (e.g. forum non conveniens, political questions, international comity)" commonly litigated in ACTA cases. Paul L. Hoffman, Kiobel v. Royal Dutch Petroleum Company: First Impressions, Journal of Transnational Legal Theory at l l. 28, 41 (2013) p 52; David Sloss, Kiobel and Extraterritoriality: A Rule Without a Rationale, 28 Md. Journal of International Law 241 (2013). 84 Id. at 126.

[62] PLC 137 s. Ct 1432 (April 3, 2017) (No 16-499).

terrorist attacks that occurred in Israel, the West Bank, and the Gaza Strip between 1995 and July 2005. They filed an ATS suit against Arab Bank in New York federal court alleging that the bank, incorporated and based in Jordan had provided funds to the terrorists who had carried out the attacks. This included sending transfers through the New York branch to terrorist groups. The trial court dismissed the ATS claims based on the Second Circuit's holding in *Kiobel* and they then appealed to the Supreme Court.

The Supreme Court observed that the "relatively minor connection between the terrorist attacks and the alleged conduct in the United States illustrates the perils of extending the scope of ATS liability to foreign multinational corporations[.]"[63]. The Court also held that Jordan, had objected to the ATS litigation on sovereignty grounds, and had submitted an Amicus Curiae which had had raised the issue of the bank's inviolability[64]. Finally, the Court expressed doubt over the ability of courts to make judgments that established foreign corporate liability, and held that judicial deference requires that any imposition of „corporate liability on foreign corporations for violations of international law must be determined „ in the first instance by the political branches of the Government"[65].

The foreign corporations are no longer at risk of being made defendants in ATS suits and the decision in Jenner demonstrates the Court's continued unwillingness to expand the ATS and the Court's deference to Congress regarding liability for human rights abuses. Under both international law and U.S. law, a government and its "instrumentalities" (such as a central bank or a state-owned company) are ordinarily immune from suit in the courts of another country[66]. However, as the Congress has enacted various laws removing immunity from foreign governments involved in 'terrorist' activity this has allowed victims of those attacks to sue the governments and their instrumentalities and to enforce judgments against their assets held in the US. This has had a profound impact on state immunities and how courts deal with the assets of foreign states and the enforcement of the judgments in the domestic courts.

President Obama's Executive Order 13599[67], issued in 2012, froze all Iranian assets within U.S. jurisdiction. The economic relationship that this treaty

[63] Page 24.

[64] At page 7.

[65] At page 33.

[66] See, e.g., Ian Brownlie, Principles of Public International Law 330-32 (5th ed. 1998) (discussing international law of sovereign immunity); 28 U.S.C. §§ 1604, 1609 (establishing default rule of sovereign immunity under U.S. law).

[67] Executive Order 13599 of February 5, 2012, Blocking Property of the Government of Iran and Iranian Financial Institutionshttps://obamawhitehouse.archives.gov/the-press-office/2012/02/06/executive-order-blocking-property-government-iran-and-iranian-financial-

engenders has been called into question of the US position in relation to Iran that led to the freezing of assets that were held in that country. This confiscation was an act of the state where the money was deposited and the act was perpetrated because of actions that had allegedly taken place outside the US that were attributed to the Iranian government. The US-Iran had a bilateral investment treaty (BIT) within the framework of a Treaty of Amity, Economic Relations and Consular Rights 1955 and its implication are of a mutually binding agreement in which both parties abide by the rule of state immunity. The position of Iran was that the US, by enacting the sanctions, statutes and executive order and enabling private plaintiffs to enforce judgments against the assets of Iran and its state-owned companies, had violated both customary international law and the Treaty of Amity. The Iranians resorted to the U.S. litigation by arguing that the executive order denied Iran against its central bank and other companies was a breach legal immunity of its assets which should be un frozen and that it should pay reparations.

In *Bank Markazi v. Peterson*[68] the US Supreme Court by 6-2 majority upheld the claim and ordered the turnover of about $1.75 billion in Bank Markazi assets to families of victims of the 1983 Beirut barracks bombing, and the 1996 bombing of the Khobar Towers in Saudi Arabia. The federal government had enacted legislation while the claim was still pending before the courts. The Iran Threat Reduction and Syria Human Rights Act of 2012, which included a section that made $2 billion in frozen Iranian funds available for seizure in the Bank Markazi case, citing it by name.

The Second Circuit Court of Appeals, applying the law, awarded the families in 2014 to seize the funds. In its appeal, Iran asked the justices to intervene against Congress' alleged encroachment on the judicial branch's powers to decide cases. The previous Supreme Court rulings forbade Congress from forcing courts to hand down specific verdicts or reopen final judgments but on this occasion it decide otherwise. The US argued that the Petitioner (Band Markazi) under Section 8772 (provisions of the Iran Threat Reduction and Syria Human Rights Act of 2012,violated Article 1V.1 of the Treaty of Amity between the US and Iran, which requires the parties to „accord fair and equitable treatment" to each other's „nationals and companies". The petitioner is not a „national" of Iran as that term is used in the Treaty.

Justice Ruth Bader Ginsburg writing for the majority ruled "In accord with the courts below, we perceive in §8772 no violation of separation-of-powers principles, and no threat to the independence of the Judiciary"[69]. It „provides a new standard clarifying that, if Iran owns certain assets, the victims of Iran-sponsored terrorist

[68] 578 U.S. (2016).

[69] Page 19.

attacks will be permitted to execute against those assets"[70]. The textual meaning makes clear that the term includes only natural person...Nor is petitioner a „compan(y) within the meaning of the Treaty and the central bank of Iran is an agency of the state that carries out sovereign functions[71].

The Iranian government lodged an action at the ICJ as a consequence of this ruling. The Court had previously ruled on the application of the Treaty of Amity on sanctions [72] to the effect that the US is *„not required to pay reparations as a consequence of its economic actions against Iran as the internal law takes precedent and, secondly, the US and Iran should revise the Treaty based on their current relations and events that have transpired between both countries in recent decades. The court also observed that only the U.S. (at the time) recognized a terrorism exception to state immunity*"[73].

The ICJ had established that state immunity from post-judgment enforcement proceedings (or "measures of constraint") is even broader than jurisdictional immunity: It had made clear that "the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts"[74]. It stated that the US recognized a terrorism exception and "the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts"[75].

The preliminary question in *Certain Iranian Assets v United States*[76] was whether the ICJ would accept jurisdiction to hear this case under the Treaty of Amity that grants the Court jurisdiction over any dispute between the parties regarding its interpretation, and therefore the mere fact that the it presents questions of interpretation could persuade the Court to accept jurisdiction. This was based on the presumption that as the U.S. government maintained in *Bank Markazi v. Peterson,* the majority of the violations Iran alluded to in its application involve the Treaty.

---

[70] Page 20.

[71] The Supreme Court in *Bank Markazi* v *Peterson* ignored the Treaty of Amity altogether. Justice Ginsburg's majority opinion only briefly mentions Bank Markazi's argument that execution against its assets would violate U.S. treaty obligations to Iran, noting the District Court's finding that "treaty provisions interposed no bar to enforcement of §8772 because… §8772 displaced 'any' inconsistent provision of law, treaty obligations included". Footnote 13.

[72] See Case Concerning Oil Platforms (Iran v. United States) [1996] I.C.J. Rep. 803.Separate Opinion of Judge Rosalyn Higgins, p. 858, at 39 ("The key terms 'fair and equitable treatment to nationals and companies' and 'unreasonable and discriminatory measures' are legal terms of art well known in the field of overseas investment protection").

[73] Para 88.

[74] Para 113.

[75] Ibid.

[76] Preliminary hearing ICJ (14 June, 2016).

The Court accepted jurisdiction based on the provisions regarding commerce (X.1) or transfer of funds (VII.1), which are not limited to "companies" or "nationals", that might exclude the Article IV from application. Article IV "imports" international law into the Treaty, significantly expanding the scope of the applicable legal norms. This was in accordance with the ruling in the *Jurisdictional Immunities of the State* (*Germany v. Italy, Greece intervening)*[77] when the ICJ stated that "the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts". If this decision was applicable then the U.S. could have been found to have violated the international law of state immunity by taking the enforcement measures.

Furthermore, in its analysis of Jurisdictional Immunities case the Court had effectively relied on the relevant provisions of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property (which the U.S. has not signed) and which is not yet effective[78]. The ICJ stopped short of determining that its enforcement-related provisions reflect customary international law in their entirety[79]. The Court ruling accepted admissibility but did not proceed to grant state immunity to Iranian bank's assets and ruled it was outside its admissibility[80].

The issue was the claims with regard to the failure to accord immunities to Iranian State entities and it related to interpretation or application of the Treaty of Amity as provided in Article XXI (2) and for this purpose, the Court was called to determine the implications of Article XI (4) of the Treaty of Amity[81]. The parties disagreed as to whether this paragraph implies the incorporation of customary international law on state immunities. While Iran argued that the existence of an obligation that such immunity must be upheld confirmed by "strong implication"[82]. The United States claimed that "[h]ad the Parties chosen to codify sovereign immunity protections in this commercial treaty, they would have done so simply and directly."[83] The Court refused to admit the Article XI (4)

---

[77] No 143, (3 February 2012).

[78] The Convention explicitly provides that central banks enjoy immunity from post-judgment enforcement measures (see Articles 19 and 21(1)(c)), and the ICJ's references in Jurisdictional Immunities do not support the U.S. legally.

[79] Para 117.

[80] Para 65.

[81] "No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein".

[82] Para 5.13.

[83] Para. 8.7.

as falling within the customary rules on state immunity because by emphasizing that, in accordance with its previous decisions, an *a contrario* reading it was only necessitated if the object and purpose of the treaty so requires[84].

However, rather than considering the text and its object and purpose to determine what it implied as the ICJ did, for example, in *Delimitation of the Continental Shelf between Nicaragua and Colombia*[85] it rejected the *contrario* reading of the provision which provides for proceedings initiated prior to the transmission of the notification of denunciation and not after that submission[86]. In the instant case, however, the Court seems to use this argument as a sole ground to reject Iran's interpretation and found it sufficient to refer to the text in holding that it cannot adopt the interpretation put forward by Iran (that *a contrario* interpretation is part of the text), because this view is "not supported by the text or context of the provision" without making any attempt to determine its implications[87].

This is contrary to its approach in its previous cases in which the Court interpreted a treaty provision in terms of its spirit by reference to the nature of obligations at issue and the purpose the rule aims to serve. In *LaGrand* case[88], the Court went beyond the text to determine whether an individual right to consular assistance was implied in Article 36 of the Vienna Convention on Consular Relations 1963. Germany alleged that the failure of the US to inform its nationals the LaGrand brothers prior to their execution for homicide breached their right to contact the German authorities and „prevented Germany from exercising its rights under Art. 36 (1) (u) and (c) of the Convention" and violated „the various rights conferred upon the sending State vis-à-vis its nationals in prison, custody or detention as provided for in Art. 36 (1) (h) of the Convention".

Germany further alleged that by breaching its obligations to inform, the US also violated individual rights conferred on the detainees by Article 36, paragraph 1 (u), second sentence, and by Article 36, paragraph 1 (b). Germany accordingly claimed that it „was injured in the person of its two nationals", a claim it raised „as a matter of diplomatic protection on behalf of Walter and Karl LaGrand"[89]. The Court declared the US action of not providing access to German

[84] Para 64.

[85] In Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia) no 2016/9 the Court found that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the First Request put forward by Nicaragua in its Application, in which it requests the Court to determine "[t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012", and that that Request is admissible.

[86] Paras 35-46.

[87] Para 64.

[88] La Grand (Germany v United States of America) Judgment ICJ Report 2001, p 466.

[89] Para 38.

citizens who had committed murder was illegal under Article 36 (1) of the Convention. It ruled:

"Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection. It begins with the basic principle governing consular protection: the right of communication and access (Art. 36, para. 1 (a)). This clause is followed by the provision which spells out the modalities of consular notification (Art. 36, para. 1 (b)). Finally Article 36, paragraph 1 (c), sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State." (I.C.J. Reports 2001, p. 492, para. 74.)

The ICJ issued an Order for an injunction to prevent the execution of the German citizens[90] and, also, rejected the US argument that the right stemmed not from customary international law but arose from treaties and therefore could not give rise to individual rights such as Councillor access to convicted persons of foreign origins.[91] The claim based on the individual rights of the LaGrand brothers was not beyond the Court's jurisdiction because this fact does not prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty.

Therefore, the ICJ concluded that it „has jurisdiction with respect to the whole of Germany's first submission"[92]. It settled the issue that the right exists through the Vienna Convention and is based „not on diplomatic protection but to counsellor access"[93]. The Court criticised the procedural faults in the administration of justice in the US that led to the executions, although, not the concepts that underpinned them, and upheld all of Germany's claims in the

---

[90] In the LaGrand case by an Order of 3 March 1999 the ICJ found that the circumstances required it to indicate, as a matter of the greatest urgency and without any other proceedings, provisional measures in accordance with Article 41 of its Statute and with Article 75, paragraph 1, of its Rules (I. C.J. Reports lYYY (1), p. 15, para. 26); it indicated provisional measures in the following terms.

„(a) The United States of America should take al1 measures at its disposa1 to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of al1 the measures which it has taken in implementation of this Order:

(6) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona. Para 32.

[91] Para 40.

[92] Para 43.

[93] Customary international law is based on widespread state practice out of a sense of legal obligation. Once a rule of customary international law is established, it generally is binding on all states. For a different rule of customary international law to emerge, states would have to engage in a different practice; yet the necessary new state practice may be legally barred by the established rule of customary international law. This paradox explains the "stickiness" of customary international law. See Curtis A. Bradley & Mitu Gulati, Withdrawing from International Custom, 120 YALE L.J. 202, 245 (2010) (explaining that it is hard to change established rules of customary international law). See also.

case[94]. However, the US had admitted a breach of the Order by the Court, but argued that it was bound by its domestic law in carrying out the execution and deferring to the Court would be tantamount to grating it the status of an international criminal court of appeal.

Robbins observes that the ICJ has "never before addressed whether economic sanctions and national laws governing sovereign immunity are consistent with investment treaty requirements[95]. There are many "investment treaties (including the Treaty of Amity)" that "explicitly permit governments to take actions necessary to protect national security interests, not all do, and the issue has thus far not been extensively addressed by arbitral tribunals"[96]. Robbins argues that the "ICJ has also not considered whether a country's restriction on sovereign immunity and permission of lawsuits and judgment enforcement against state-owned companies may violate an investment treaty". This may be a plausible grounds of why the ICJ was reluctant to "extend sovereign immunity to Iranian assets" and these unusual claims are infrequent and there are more likely to be the claims of "denial of fair and equitable treatment" which are based on claims by state-owned companies which have a greater willingness refer to international arbitration to establish their rights[97].

However, the international arbitral tribunals have frequently cited the ICJ's decisions, and often even the individual opinions of its judges as authority on points of international law[98]. There are prior ICJ decisions in considering a

---

[94] The United States objected initially to Germany's second, third and fourth submissions. According to them these submissions are inadmissible because Germany seeks to have this Court „play the role of ultimate court of appeal in national criminal proceedings", a role which it is not empowered to perform. The United States maintains that many of Germany's arguments, in particular those regarding the rule of „procedural default", ask the Court „to address and correct . . . asserted violations of US law and errors of judgment by US judges" in criminal proceedings in national courts. Para 50.

[95] Joshua M Robbins, Iran's World Court Case Against the United States May Impact Investment Arbitration, Baker and Hosteler LLP, 8 July 2016.

[96] Although the ICJ has previously confronted a claim of violations of the "fair and equitable treatment" requirement (indeed, in Iran's previous case against the United States under the Treaty of Amity) and one of its judges has commented on that standard in a separate opinion. See Oil Platforms, Separate Opinion of Judge Rosalyn Higgins, p. 858, at ¶ 39 ("The key terms 'fair and equitable treatment to nationals and companies' and 'unreasonable and discriminatory measures' are legal terms of art well known in the field of overseas investment protection").

[97] Joshua M Robbins, Iran's World Court Case Against the United States May Impact Investment Arbitration, Baker & Hosteler, 8 July 2016.https://www.bakerlaw.com/alerts/irans-world-court-case-against-the-united-states-may-impact-investment-arbitration.

[98] See, e.g., Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶¶ 94-102 (citing ICJ decisions in Anglo-Iranian Oil Co. (United Kingdom v. Iran) [1952] ICJ Rep. 93; Rights of the Nationals of the United States of America in Morocco (France v. United States) [1952] ICJ Rep. 176; and Ambatielos (Greece v. United Kingdom) [1953] ICJ Rep. 10, regarding the application of a most-favored-nation clause in an investment treaty).

different treaty standard, the prohibition of "arbitrary" treatment, in interpreting the meaning of fair and equitable treatment[99].

The ruling in the *Certain Iranian Case* also seemed to contradict its reasoning in the case concerning the *Obligation to Prosecute or Extradite*[100], where the Court declared that notwithstanding the silence in Article 7(1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in regard to the time frame for performance of the obligation, "it is necessarily implicit in the text that it must be implemented within a reasonable time"[101]. In mitigation it can be stated that despite rejecting the implied meaning of Article XI (4), the Court found an objective "to preserve fair competition among economic actors" to be implied in the text of Article XI (4) as it held that "If Article XI, paragraph 4, mentions only publicly owned enterprises which engage in 'commercial, industrial, shipping or other business activities', this is because, in keeping with the object and purpose of the Treaty, it pertains only to state operating in the same market"[102].

However, the Court, did not determine the scope of sovereign immunity to extend to the banking institutions because it allowed the US argument as expressed in the Supreme Court's ruling that the property subject to attachment according to its regulations is not limited to commercial activity, but that the "only requirement is that it be 'the property of the foreign State or its instrumentality"[103]. The issue is if the enterprises of parties enjoy no immunity in case of engagement in activities mentioned in Article XI (4), and, as interpreted by the ICJ then there is no obligation on state parties to respect the immunity of those enterprises in other circumstance.

The ICJ has significantly narrowed what could have been a ruling that affirmed the international law of state immunity, which could likely have resulted in a decision against the US with respect to the breach of the Foreign Sovereign Immunities Act. However, Iran was allowed to move forward to the merits stage with its claims that there was a breach of XX(1) of the Treaty of

---

[99] In other cases, rulings and opinions in two prior ICJ cases concerning the United States and investment treaty agreements (the *Oil Platforms* case between Iran and the United States and the *ELSI* case between the United States and Italy) have been repeatedly invoked by arbitrators as to certain recurring issues. See Rumeli Telecom A.S. v. Kazakhstan, ICSID Case No. ARB/05/16, Award, July 29, 2008, at 672 (citing Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment of July 20, 1989, 1989.

[100] In Questions relating to obligations to prosecute or Extradite (Belgium v Senegal) 20/7/12 at p 242 the ICJ confirmed the obligation of states parties to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to either prosecute alleged perpetrators or extradite them to another country with jurisdiction for prosecution.

[101] Para 114.

[102] Para 65.

[103] Para 18.

Amity by the reimposition of sanctions based on its alleged nuclear programme for non peaceful purposes.

Customary international law and state immunities

The ICJ has to take into consideration the reservations and caveats enacted in its legislation that regards the state immunity as constituting absolute binding law[104]. However, its continued application to activities jure imperii remains unchallenged and even in civil law countries the adoption of the restrictive theory of state immunity has been recognised in their jurisdiction. In the Federal Republic of Germany, the Constitutional Court (which holds power to clarify the existence of general rules of international law) followed the trend with a judgment on April 30, 1963, finding that the absolute doctrine of immunity lost its general applicability as a universal norm and was to be replaced by the restrictive theory[105].

The US courts have a tendency to make a subjective interpretation that considers state immunity as dependent on the countries whose political systems it accepts as compliant. In the *Verlinden B.V. v. Central Bank of Nigeria*[106] the Supreme Court held only that the granting of immunity is a matter of grace and comity on the part of the US. This has been affirmed in later case law since its first appearance as a rule implying absolute immunity from any legal claims, the scope *ratione materiae* of jurisdictional immunity has condensed to some extent, particularly with regard to commercial activities[107].

Tomuschat postulates a contrary argument „ *since immunity is derived from the basic principle of sovereign immunity of states, a proposition that belongs to the ground axioms of the entire edifice of international law and is also reflected in Article 2(1) of the UN Charter. States are duty-bound to respect one another. No member of the international community is authorized to sit in judgment over another sovereign member; par in parem non habet imperium. Accordingly, most writers view jurisdictional immunity of states as a genuine rule of positive customary law*"[108].

---

[104] See Lee M. Caplan, State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory, 97 AM. J. INT'L L. 741, 751 (2003) (discussing Justice Marshall's statement that all exceptions to the full and complete.

[105] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 30, 1963, 16 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 27, translated in 1 DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT: INTERNATIONAL LAW AND LAW OF THE EUROPEAN COMMUNITIES 1952–1989, at 150 (1992).

[106] 461 U.S. 480, 486 (1983).

[107] See Dole Food v. Patrickson, 538 U.S. 468, 479 (2003) (citing Verlinden, 461 U.S. at 486) (noting that a grant of immunity is "a gesture of comity"). See also Republic of Austria v. Altmann, 541 U.S. 677, 694 (2004).

[108] Christian Tomuschat, The International Law of State Immunity and Its Development by National Institutions , Vanderbilt Journal of International Law, Vol 44, (2012) 1105 -1140.

The consensus among jurists is that jurisdictional immunity of states has emerged as customary international law[109]. At the time when the US enacted the Foreign Sovereign Immunities Act (FSIA)[110], the Report of the Committee of the Judiciary of the House of Representatives stated explicitly that „[s]overeign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state"[111]. There is also persuasive evidence to be found in the Restatement of the Foreign Relations Law of the US. Section 451 which details sovereign immunity as a binding proposition under international law[112]. There is further evidence that it is a rule of customary international law by its adoption of the UN Convention on Jurisdictional Immunities of States and Their Property 2004[113]. The Convention maintains the general rule of immunity (Article 5), but provides for a certain number of exceptions (Articles 10 to 17). It has yet to enter into force, but there is general agreement that as a reflection of the restrictive theory of state immunity its provisions reflect current customary international law[114].

The ICJ had the opportunity to apply the customary international law at the merits stage in the *Certain Iranian Assets* by characterizing the question about the issue of the seizure of Iranian assets by invoking the relevance as the matter related to the applicable law. Instead of relying on the implication that state immunity exists to protect Iranian assets the Court should have followed its reasoning in the *Oil Platforms (Islamic Republic of Iran v. United States of America)*,[115] case in which the applicability of customary rules on the use of force was discussed at the merit stage. This required an interpretation of the Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran.

The Iranian claim was based on the breach of Article X, paragraph 1, on an alleged infringement of freedom of commerce between the territories of the parties by the US attack on Iranian oil platforms. The US contention was that the Court should reject Iran's claims and refuse it the relief because of its allegedly

---

[109] Hazel Fox, The Law of State Immunity 13 (2d ed. 2008) ; Robert Jennings & Arthur Watts, 1 Oppenheim's International Law 343 (9th ed. 2002).

[110] Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1602–1611 (2006)).

[111] H.R. Rep. NO. 94-1487, at 3 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, p 6622–23.

[112] Restatement (Third) of the Foreign Relations Law of the United States § 451 (1987).

[113] United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc.A/RES/59/38 (Dec. 2, 2004) [hereinafter UN Convention on Jurisdictional Immunities] (convention not yet in force).

[114] See, e.g., Hazel Fox, In Defence of State Immunity: Why the UN Convention on State Immunity Is Important, 55 INT'L & COMP. L.Q. 399, 405 (2006) (arguing that state immunity is a necessary principle at the present stage of development of international law); Richard Gardiner, UN Convention on State Immunity: Form and Function, 55 INT'L & COMP. L.Q. 407, 407–09 (2006) (viewing the Convention as a necessary means of consolidating existing legal positions).

[115] Judgment, I. C. J. Reports 2003, p. 161.

unlawful conduct that ruled out admissibility. In response Iran stated that the US has itself committed „wrongful conduct" and in „State-to-State claims such principle may have legal significance only at the merits stage, and only at the stage of quantification of damages, but it does not deprive a State of locus standi in judicio"[116]. The US had proclaimed that it had „acted in self defence" and it could invoke Chapter 51 of the UN Statute that gives a right under Section 2 (1) to take action to destroy the platforms and could counter claim under Article XX of the Treaty of Amity[117].

The ICJ referred in its ruling in the case of *Military and Paramilitary Activities in and against Nicaragua (Nigaragua v United States)*[118] when the Court considered a provision in another treaty concluded by the US, of which the text is substantially identical to that of Article XX, paragraph 1 (d). This was Article XXI, paragraph 1 (d), of the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua. In its decision in that case, the Court observed that since that provision „contains a power for each of the parties to derogate from the other provisions of the Treaty, the possibility of invoking the clauses of that Article must be considered once it is apparent that certain forms of conduct by the United States would otherwise be in conflict with the relevant provisions of the Treaty"[119].

The Court reviewed the US v Nicaragua case where there were „comparable provision of the 1956 United States Nicaragua Treaty the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be 'necessary' for that purpose"; and whether a given measure is „necessary" is 'not purely a question for the subjective judgment of the party"[120], and may thus be assessed by the Court. The precedent was based on whether the measures taken were „necessary" which overlaps with the question of their validity as acts of self-defence. The ruling stated that there had to be a „criteria of necessity and proportionality must be observed if a measure is to be qualified as self-defence[121].

The ICJ decided that the US allegation that there were a hazard to „navigation in the Persian Gulf" was not sufficient for the Court to rule „that Article X, paragraph 1, of the 1955 Treaty was breached by Iran. It was for the US to show that there was an actual impediment to commerce or navigation between the territories" of the two parties. However, as the shipping and the commercial activities continued between Iran and the US during the war until the inception

[116] Para 28 .
[117] Para 37 .
[118] 1.C.J. Reports 1986, p. 103.
[119] 1 C. J. Reports 1986 p. 117, para. 225.
[120] Ibid para 282.
[121] Ibid para. 194.

of the embargo on 29 October 1987, the US had not „demonstrated that the alleged acts of Iran actually infringed the freedom of commerce or of navigation between the territories of the United States and Iran"[122].

The Court rejected the US argument that the use of force against the Iranian oil platforms can be justified as measures „necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1 (d), of the Treaty of Amity. It also rejected the Iranian claim that those actions constitute a „breach of the obligations" under the Article X, paragraph 1, regarding „freedom of commerce between the territories of the parties", and there were no damages awarded[123].

The decision in the Oil Platforms case is a reflection of the UN Charter and customary international law. It interpreted security as an imminent threat and connected to the danger that existed outside the commerce that existed between the two parties. The same principle could have been applied in the Certain Assets case whereby the Bank Markezi assets were frozen that it no bearing on the issue of conflict and could have been protected by state immunity. This has been established by customary international law and it deserves protection within the framework of the comity of nations that the ICJ needs to take into cognisance in its judgments.

Conclusion

The jurisdictional immunity of states is recognized as the rule from which exceptions are allowed under specific, precise and narrowly defined circumstances. It should be noted that a clear distinction must be drawn between the immunity ratione functionis or ratione personae of individual human beings, charged with having committed grave breaches of international law, and the jurisdictional immunity that protects states as collective entities. The latter serves as the reason for the ICJ to uphold the principles of domestic courts not being empowered to decide if the rights have been breached by a foreign government on its own or another country's territory.

The principle of restricted immunity is now recognised in common law and civil law jurisdictions. In the US section 1604 of the FSIA has incorporated the norm of a restricted immunity whereby the personal immunity is waived but state immunity is adjudicated upon. This enactment of JASTA allows the prosecution of foreign states as sponsors of terrorism which is a significant because a state can exercise powers over foreign entities and be able to freeze assets of foreign governments and distribute the funds to the victims of terrorist

[122] Ibid para 123.
[123] Ibid para 124.

acts. The freeze on the Iranian assets has been challenged in the ICJ which has the powers to oversee breaches of BITS and it has refused to grant relief to the Iranian party thereby diluting the principle of state immunity.

The ICJ has to be consistent in its rulings because there are legal and political restraints on the domestic courts and the state immunity may be overridden by statute and it should serve as the forum for dispute resolution. The articles formulated by the ILC and the emerging limitations on jurisdictional immunities must be the relied upon by states, international courts, and domestic courts on state immunity, their property and state responsibility. They represent a codified set of recognized international concepts and doctrines relating to state immunity and the comity of nations.