SOME LEGAL ASPECTS OF THE JUSTICE AGAINST SPONSORS OF TERRORISM ACT

WALID FAHMY,

Pharos University (Alexandria, Egypt)

DOI: 10.21684/2412-2343-2017-4-1-40-57

Following the lead of the U.S. Senate on May 17, 2016, the House of Representatives of the United States of America unanimously adopted the Justice Against Sponsors of Terrorism Act (JASTA), which will allow victims of terrorism to bring class actions against any state directly or indirectly involved in terrorist acts against American citizens. U.S. president Barack Obama attempted to impose his veto against this legislation, but was overridden by both houses in September, 2016. As a result, the Act entered into law, risking a real revolution in international law with potentially very serious political consequences.

While it may be anticipated that those countries directly complicit in terrorism will see their assets – including their sovereign assets in the United States – seized to finance the compensation of the victims, such prosecutions will undoubtedly also involve European countries, many of which have themselves been targeted by terrorism. This is especially likely when their nationals are involved in terrorist acts.

There is now a great risk that U.S. law will unilaterally modify several fundamental principles of international law, such as the sovereign immunity of states, creating genuine legal conflict in which victims of terrorism will seek redress from all states, including allied nations or countries that have themselves been victims of terror.

Keywords: the Justice Against Sponsors of Terrorism Act (JASTA); the Foreign Sovereign Immunities Act (FSIA); jus cogens; sovereign immunity; foreign state; terrorism; Vienna Convention on the Law of Treaties; territoriality; state immunity principle; principles of law.

Recommended citation: Walid Fahmy, *Some Legal Aspects of the Justice Against Sponsors of Terrorism Act*, 4(1) BRICS Law Journal 40–57 (2017).

Table of Contents

Introduction

International law may be divided into two periods: before and after the establishment of the United Nations. During the first period, states made agreements with each other, and sought to resolve disputes on the basis on customary law. In the second era, international mechanisms under the umbrella of the UN play a crucial role in dispute resolution. The UN Charter is based on three fundamental principles: the immunity of states, the immunity of international institutions, and diplomatic and consular immunity. It is "an instrument by which members both assert their sovereignty."[1] Also, the doctrine emphasizes: "An equal has no power over an equal… sovereigns are equal as juridical bodies and have no authority to use their own courts to sue other sovereigns without the consent of the latter."[2]

The draft law was prepared by two senators, one Republican, one Democrat. It enables the families of people killed in the September 11 attacks to bring legal action against the states held liable for these terrorist attacks. It was adopted in the U.S. Senate in May 2016. After that adoption, it was submitted to the House of Representatives and was also adopted there. The Draft was voted in for a second time

---

1 *See* Winston P. Nagan & Aitza M. Haddad, *Sovereignty in Theory and Practice*, 13 San Diego International Law Journal 451 (2012).

2 *See* Winston P. Nagan & Joshua L. Root, *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, 38 North Carolina Journal of International Law 376 (2013).

and adopted by majority to become an act of U.S. law. By this act, the U.S. recognizes the right of its citizens to bring remedial action against those states and statesmen held responsible for the September 11 terrorist attacks.[3] This situation could cause a domino effect and powerful states are likely to bring legal action against weak states in their own jurisdiction. It is important to bring JASTA on to the international legal agenda, assess all aspects of the legislation and influence public opinion to ensure the U.S. cannot operate in contravention of international law.

In this study, we will examine JASTA from the perspective of general legal principles.

The Justice Against Sponsors of Terrorism Act (JASTA) violates the fundamental principles of international law and is a result of the substitution of law with power. This Act will have a negative effect on the United States of America and the Kingdom of Saudi Arabia, and could also trigger a domino effect that will unfortunately affect other states. JASTA opens the way for powerful states to exercise control over other states and attempt to take what they want.

1. About JASTA

JASTA is a law passed by the United States Congress that amends the federal judicial code to narrow the scope of foreign sovereign immunity. Specifically, it authorizes federal court jurisdiction over a civil claim against a foreign state for death or physical injury to a person, or damage to a property that occurs within the United States as a result of: (1) an act of international terrorism, and (2) a tort committed anywhere by an official, agent or employee of a foreign state acting within the scope of that employment.

1.1. From FSIA to JASTA

JASTA was recently passed by the U.S. Congress and became part of U.S. law. The United States' existing Foreign Sovereign Immunities Act (FSIA) has included an exception relating to terrorism since 1976.[4] Sec. 1605A of the FSIA states that a foreign state shall not be immune from suits seeking money damages for personal injury or death caused by certain acts of a foreign government.[5] However, the Act posts several exceptions to this rule, which, *inter alia*, include cases where:

– The foreign state has waived its immunity;

– The claim is a specific type of admiralty claim;

---

[3] *See* Tobias Ackermann, *New U.S. Legislation Allows Lawsuits Against States Allegedly Involved in Terrorism: Implications for the International Law on State Immunity*, Bofaxe, Nr. 490E, September 30, 2016; Patricia Zengerle, *Senate passes bill allowing 9/11 victims to sue Saudi Arabia*, Reuters, May 17, 2016 (Mar. 10, 2017), available at http://www.reuters.com/article/us-saudi-usa-congress-idUSKCN0Y8239.

[4] Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, § 1602 et seq.

[5] 28 U.S. Code § 1604.

– The claim involves commercial activities;
– The claim implicates property rights connected with the United States;
– The claim arises from tortious conduct that occurred in the United States;
– The claim is made pursuant to an arbitration agreement;
– The claim seeks money damages against a designated state sponsor of terrorism for injuries arising from a terrorist act.

In the FSIA, this provision is limited to countries that the United States designated as state sponsors of terrorism (currently Iran, Sudan, and Syria).

The exception that is most relevant to our purposes is the exception of state-sponsored terrorism. This exception was introduced into the FSIA and it was amended in 2008. It reads:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case… in which money damages are Sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by and official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.[6]

The conditions of these exceptions can be formulated as follows:

1. the foreign state had been formally designated as a state sponsor of terrorism at the time of (or as a result of) the act in question;

2. the claimant or victim was a U.S. national, a member of the armed forces, or an employee or contractor of the United States government acting within the scope of that employment; and

3. for acts occurring in the foreign state concerned, the state was given a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.[7]

Among other things, JASTA amends the FSIA by adding a new terrorism exception that is not limited to designated state sponsors of terrorism. A tort action seeking money damages may be brought against a foreign state because of international terror acts occurring in the U.S. or of a tortious act of this state (or its agents) occurring abroad but creating damage in the U.S.

JASTA now removes this limitation, making it possible for U.S. Citizens to sue any foreign state for its support of terrorism, regardless of whether that state is

---

6 28 U.S. Code § 1605A.

7 *The Foreign Sovereign Immunities Act: A Guide for Judges*, Federal Judicial Center, International Litigation Guide (2013), at 63 (Mar. 20, 2017), available at http://www2.fjc.gov/sites/default/files/2014/FSIAGuide2013.pdf.

a designated sponsor of terrorism. This also strips foreign governments of their Sovereign Immunity in U.S. courts, even if they are not designated state sponsors of terrorism. Furthermore, this legislation would permit litigation against countries that have neither been designated by the executive branch as state sponsors of terrorism, nor taken direct actions in the United States to carry out an attack there. The consequence of JASTA most probably will, if one considers the structural elements of U.S. tort law, strip all foreign governments of immunity from judicial process in the United States, based solely upon allegations by private litigants that a foreign government bears responsibility for a terrorist attack inside the United States. This would literally override customary international law with U.S. law in U.S. Courts. However, it contains a limitation: it excludes tort claims based on an omission or an act that is merely negligent. Congress makes mention of this limitation, *argumentum a contrario*, in the official reasoning of JASTA when it refers to "persons, entities, or countries that knowingly or recklessly contribute material support or resources."[8]

1.2. The Implications of JASTA for the U.S.

The key problem with JASTA lies in its enforcement. Since the assumption of immunity would continue to be the predominant principle elsewhere, any court decision in the U.S. would not be recognized in other countries. As a result, the judgments could be carried out only within the U.S. This will prompt prudent countries to avoid potential liability by removing their assets and investments from the U.S. to prevent their confiscation. This could cause enormous economic damage to the U.S.[9]

If the U.S. limits the immunity of other sovereign states, it will become vulnerable to a reciprocal loss of immunity in those same countries. However, we should not forget that nowadays the U.S. is among the nations with the biggest presence worldwide. First and foremost, in recent decades it has had a huge active military presence in the Middle East. Under the same definition of terrorism used by JASTA, it is not difficult to frame some of the actions taken by the U.S. – e.g. drone attacks – as acts of terror, and make the U.S. government vulnerable to civil claims.[10]

2. From the Standpoint of International Law

Problems and disputes between states are settled by the well-established principles of *jus cogens*. Professor Lassa Oppenheim stated that there exist a number

---

[8] S. 2040 – Justice Against Sponsors of Terrorism Act, 14th Congress (2015–2016), Sec. 2, paras. 6, 7 (Mar. 10, 2017), available at https://www.congress.gov/114/plaws/publ222/PLAW-114publ222.htm.

[9] *See* Albi Kocibelli, *State Immunity, JASTA and Its Implications to the U.S.*, Michigan Journal of International Law, October 27, 2016 (Mar. 10, 2017), available at http://www.mjilonline.org/state-immunity-jasta-and-its-implications-to-the-us/.

[10] *Id*.

of "universally recognized principles" of international law that rendered any conflicting treaty void, and therefore, the peremptory effect of such principles was itself a "unanimously recognized customary rule of International Law."[11] States do not violate these fundamental international rules of law because they are peremptory. In the late 1960s, the Vienna Convention on the Law of Treaties was adopted. The definition of peremptory rules is given in Art. 53 of the Convention: "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." That means a treaty is no longer an international legal document, if, at the time of its conclusion, it conflicts with the norms of *jus cogens*, which are peremptory in nature.[12] If states ignore or violate those principles, they are violating the general principles of international law.

2.1. Territoriality and the State Immunity Principle

Until the end of the 19th century, immunity was absolute, and proceedings could not be instituted against a foreign state under any circumstances. Since the early 20th century, a distinction has arisen between sovereign activities (*acta jure imperii*), for which States enjoy jurisdictional immunities.[13]

Immunity from the jurisdiction of foreign states is a complex and sensitive issue. It affects the right of access to a legal judgment, the equality of individuals in the exercise of this right, the sovereignty of states, and public international law.[14]

The Lotus case enshrined the very basic principle of international customary law: the principle of territoriality. The first principle of the Lotus case stated that jurisdiction is territorial: a state cannot exercise its jurisdiction outside its territory, unless an international treaty or customary law allows it to do so.

> Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside

---

11 *See Oppenheim's International Law. Vol. 1: Peace, Introduction & Part I* (R. Jennings & A. Watts, eds., 9th ed., Harlow, Essex, England: Longman, 1992).

12 *See* Kamrul Hossain, *The Concept of Jus Cogens and the Obligation under the U.N. Charter*, 3 Santa Clara Journal of International Law 75, 76 (2005).

13 *See* Ian Sinclair, *The Law of Sovereign Immunity. Recent Developments*, 167 Collected Courses of the Hague Academy of International Law 113, 133 (1980).

14 Régis de Gouttes, *L'évolution de l'immunité de juridiction des Etats étrangers* in *Rapport de la Cour de cassation 2003* (Mar. 10, 2017), available at https://www.courdecassation.fr/IMG/pdf/Rapport_2003_optimise.pdf.

> its territory except by virtue of a permissive rule derived from international custom or from a convention.[15]

A state may exercise its jurisdiction within its territory, on any matter, even if there is no explicit rule of international law allowing it to do so. In this context, states have a broad measure of discretion, which is only limited by the prohibitive rules of international law. This is the second principle of the Lotus case.

> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. This discretion left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States… In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.[16]

According to the principle of territoriality, a foreign state cannot impose its jurisdiction outside its territory. When it comes to national territory, a foreign state meets another obstacle of international law: state immunity in cases arising from breaches of *jus cogens* comes from a personal-jurisdiction-type immunity which absolutely prevents one state from involuntary subjugation to the jurisdiction of another state, even for *jus cogens* violations.[17]

According to the principle of foreign state immunity, one state is not subject to the full force of the rules applicable in another state; the principle bars a national

---

[15] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), at 45.

[16] *Id*. at 46, 47.

[17] *See* Thomas Watherall, *Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 Georgetown Journal of International Law 1202 (2015).

court from adjudicating or enforcing certain claims against foreign states. This immunity is applied to legal proceedings against the foreign state itself, its organs and companies, and its agents.[18]

State immunity, while being forum dependent, has long been recognized as an obligation under customary international law. The International Law Commission first undertook to identify and codify state practice on sovereign immunity in 1977.[19] Also, it is worth mentioning that sovereign immunity had two dimensions at both national and international levels. The international community has pursued various endeavors to codify the law on sovereign immunity, but until now only the European Convention on State Immunity (ECSI) has entered into force.[20] The UN adopted the UN Convention on Jurisdictional Immunities of States and Their Property in 2004. The Convention, which is not yet in force, adopts a restrictive theory of immunity. This restrictive theory is adhered to by most countries, with only a few exceptions.[21]

Generally, the commercial activities of states have been the most significant exceptions to the rule. However, there has been controversy over the extent of this application, especially in cases where the extent of damages is substantial. In this regard, one of the most recent cases adjudicated by the ICJ in 2012 is Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening). Between 2004 and 2008, in multiple civil suits, Italian courts found Germany responsible for crimes against humanity during World War II, thus ordering Germany to pay compensation to Italian victims.[22] Germany brought a claim to the ICJ alleging it was a "territorial tort

---

18 *See* Neringa Toleikytė, *The Concept of State and the Main Challenges* in *The Interaction of National Legal System: Convergence or Divergence*, International conference of PhD students and young researchers, Vilnius University Faculty of Law, April 25–26, 2013 (Mar. 10, 2017), available at http://www12007.vu.lt/dokumentai/Admin/Doktorantų_konferencija/Toleikyte.pdf.

19 The UN General Assembly decided in 1977 to include the topic in the work programme of the International Law Commission. *See* Burkhard Heb, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 European Journal of International Law 270 (1993).

20 *See* Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 4 European Journal of International Law 857 (2011).

21 The Convention was adopted by General Assembly Resolution 59/38, December 2, 2004. Even though 28 states have signed the treaty, only 21 have ratified it so far. In accordance with Art. 30 which reads as follows: "1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. 2. For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession" (Mar. 10, 2017) available at https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-13&chapter=3&lang=en.

22 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99, para. 45. *See also* Alberto Costi, *L'arrêt de la Cour internationale de justice dans l'affaire des immunités juridictionnelles de l'État* in *Hors-série juin 2015 – Mélanges en l'honneur de Jacques-Yvan Morin* 268 (Montréal: Société québécoise de droit international, 2015); Nagan & Root 2013, at 379; Finke 2011, at 857; Sevrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 Northwestern Journal of International Human Rights 156 (2011).

exception in international customary law that excludes state acts from jurisdictional immunity if they breach *jus cogens* norms and held that the judgments ordering Germany to pay compensation violated international law."[23]

As the ICJ noted

> this amendment has no counterpart in the legislation of other States. None of the States which have enacted legislation on the subject of State immunity has made provisions for the limitation of immunity on the grounds of the gravity of the acts alleged.[24]

Indeed, the ICJ made following significant remarks in its judgment:

> In the Court's opinion, state practice in the form of judicial decisions supports the proposition that state immunity for acts *jure imperii* continues to extend to civil proceedings for acts occasioning death, personal injury or damage to property committed by the armed forces and other organs of a state in the conduct of armed conflict, even if the relevant acts take place on the territory of the forum state.[25]

2.2. Does JASTA Conform to International Law?

The former version of the FSIA can be said to fit into the framework prescribed by customary law. It provides exceptions for waivers, commercial activity and insurable personal risk described by international law. Actually, the FSIA went beyond the framework given by international law; it provided no state immunity for money damages sought for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."[26] However, this exception was limited. It applied only to states designated as a state sponsor of terrorism at the time of or as a result of the act in question. Further, for acts that occurred in the foreign state concerned, that state was to be given a "reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration."[27]

---

[23] *See* Kocibelli, *supra* note 9.

[24] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), *supra* note 22, para. 88.

[25] *Id*. at 77.

[26] United States Code, 2012 Edition, Vol. 4, Title 8, Aliens and Nationality, to Title 10, Armed Forces, Section 101–1414, at 650.

[27] Foreign Sovereign Immunities Act, *supra* note 4, § 1605.

With the enactment of JASTA, the U.S. adopted a radical exception to the principle of state immunity. Actually, the United States argued that the state immunity rule pertains essentially to international comity, and does not constitute truly binding law. The U.S. Supreme Court removed the rule of state immunity from the realm of legal order in some of its decisions. In the leading case of Verlinden B.V. v. Central Bank of Nigeria, the Supreme Court stated that the granting of immunity is "a matter of grace and comity on the part of the United States."[28] Similar language is also found in later decisions. In Altman, the Supreme Court again held that the practice of barring suits against foreign governments on jurisdictional grounds was "a matter of comity."[29]

This is not a persuasive argument since this immunity is derived from the basic principle of the sovereign immunity of states, a proposition that belongs to the fundamental axioms of the entire edifice of international law and is also reflected in Art. 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; accordingly, most writers view the jurisdictional immunity of states as a genuine rule of positive customary law.[30]

According to these explanations, JASTA is not fit for international law. Hence, the European Union declared that it considers JASTA contrary to international law.

3. From the Standpoint of General Legal Principles

JASTA not only fails to conform with the general principles of international law, it also fails to comply with general legal principles, such as the prohibition on the abuse of rights, and principles of non-discrimination, fairness and vested interests. Hereinafter, we will examine JASTA in the light of these general legal principles (the good faith principle, liability rules, criminal law, procedural law and Enforcement law).

3.1. Concerning the Principle of Good Faith

Good faith is one of the fundamental principles of law. It obliges to parties agree to use their rights within a framework of good faith. JASTA explicitly violates the principles of sovereignty, equality principle, peaceful settlement, non-interference in domestic affairs, individual criminal liability, and the right to a fair trial.

---

[28] *See* Carlos Manuel Vázquez, *Altmann v. Austria and the Retroactivity of the Foreign Sovereign Immunities Act*, 3 Journal of International Criminal Justice 212 (2005).

[29] *Id*.

[30] *See* Christian Tomuschat, *National Institutions and State Immunity*, 4 Vanderbilt Journal of Transnational Law 1117 (2011).

3.2. In Terms of Criminal Responsibility

The principle of individual criminal responsibility is one the fundamental principles of criminal law. This principle applies not only to criminal liability but also to remedial actions. The September 11 attacks were not a military attack by one state on another. It is obvious that it was a terrorist attack. Terrorist attacks take place in almost every country in the world (the civilized world faces a grave threat from terrorism[31]). However, up to now, states have not attempted to prosecute other states in their jurisdiction. If a statesman representing any other state was involved in this attack, that country would be liable for the damages caused by this act of terrorism. However, there is no evidence or allegation in respect of any statesman.

3.3. In Terms of Liability

In terms of international responsibility, an internationally wrongful act is considered to be imputable to a state only if it is the action of an individual or group that is recognized under that state's domestic legal system as an agent of the state, a public institution, an autonomous public institution or a territorial public authority, and which acts in that capacity. The internationally wrongful act of an organ acting *qualitative qua* is thus considered to be attributable to the state, even where it is not possible to confirm either the position of the organ in that state's division of powers or internal hierarchy or, in the case of manifest incompetence, an excess of power in a broader sense that would be reflected in the actions of the organ of state. Moreover, the same principle means that the conduct of an individual or a group of individuals acting outside of the legally recognized framework of a state's activities cannot be attached to any state on the basis of the international legal order, of internationally wrongful actions conducted by one of its organs, nor on the occasion of any act of a private individual.[32] It is worth pointing out that international law does not distinguish between contractual and tortious, so that any violation by the state of any obligation, from whatever origin, leads to state responsibility, and therefore a duty of compensation.[33]

The International Court of Justice in the Corfu Channel case considered the question of Albanian civil liability for the mining of the Corfu Channel and the subsequent damage to two British naval vessels that struck those mines. In discussing whether the United Kingdom could demonstrate that Albania was responsible for laying the mines, the Court ruled:

---

[31] *See* Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 European Journal of International Law 210 (2003).

[32] Jacques Lenoble, *Responsabilité Internationale des Etats et Controle Territorial*, 16 Revue Belge du Droit International 96 (1981–1982).

[33] Milka Dimitrovska, *The Concept of International Responsibility of State in the International Public Law System*, 1 Journal of Liberty and International Affairs 8 (2015).

> The fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.[34]

JASTA violates the general principles of liability law. It sets forth rules that order other states to compensate losses suffered by victims. However, states impose and collect taxes in order to provide for the security of their own country. If they fail to fulfill that fundamental duty, they alone shall be responsible. As a result, the U.S., regardless of the nationality of the terrorists, is the only state liable in respect of the September 11 attacks.

3.4. In Terms of Procedural Law

In JASTA, no states are identified by name. On the other hand, it is obvious that this act was adopted by the U.S. to put pressure on states implicated in the September 11 attacks. An American citizen, who lost his/her partner through a terrorist act, has brought legal action in a U.S. court. According to JASTA, U.S. victims may bring legal action against another state before a U.S. court. However, bringing legal action against a foreign state in another state's jurisdiction violates the general principles of procedural law.

Jurisdiction: The jurisdictions of courts over international issues are determined by international contracts. In these contracts, parties are only limited to legally recognized bodies and individuals; the legal capacity of states is not accepted.[35]

Furthermore, under the principle of universal jurisdiction, a state can sue the perpetrators of certain crimes, regardless of where the crime was committed and regardless of the nationality of the perpetrators or victims. This kind of legal provision serves to prevent serious crimes, such as war crimes or crimes against humanity,

---

[34] Corfu Channel case, Judgment on Preliminary Objection, I.C.J. Reports 1948, p. 15, at 18.

[35] Under State contract, State could have a legal capacity. According UNCTAD, the state contract is defined "as a contract made between the State, or an entity of the State, which, for present purposes, may be defined as any organization created by statute within a State that is given control over an economic activity, and a foreign national or a legal person of foreign nationality. State contract contains a forum selection clause that refers disputes exclusively to domestic courts and tribunals." *See* UNCTAD Series on Issues in International Investment Agreements, States Contracts, at 3, 39 (New York and Geneva: United Nations, 2004).

going unpunished. In particular, it aims to ensure that inhabitants of the most unstable areas of the world can still enjoy legal protection. Universal jurisdiction is mandatory under international law, but it is limited in its extent and applies only to certain crimes: genocide, crimes against humanity, extrajudicial executions, war crimes, torture and forced disappearances. Indeed, countries which have acceded to various conventions to protect fundamental rights are obliged by these same conventions to repress the most serious crimes.[36] The fact is that, where there is no regulation on the matter in question, it requires the consent of all parties in the case to determine which court has jurisdiction. It is obvious that a defendant state would not accept the sovereignty and the jurisdiction of a U.S. court. Thus, without all parties clearly consenting to the jurisdiction of the court, any proceedings could easily be regarded as illegal.

Impartiality: First of all, the Oxford English Dictionary defines "impartial" as "not partial; not favouring one party or side more than another; unprejudiced, unbiased, fair, just, equitable."[37] In judicial procedural law, one precondition for any case is an impartial and independent court. If a court has any connection to an interested party that could influence subsequent proceedings, that court cannot be regarded as impartial.[38] In concrete cases brought under JASTA, it is obvious that the competent court would side with the plaintiff. In such cases, courts should not start any proceedings because these would be faulty from the beginning.

Equality: Equality before the law is one of essential principles of the legal system. It is enshrined in international and domestic law through declarations and conventions. Common law (as in the U.S.) also recognizes the principle of equality as fundamental to the rule of law.[39] In the case of Green v. the Queen, Britain's High Court characterized the pivotal nature of the principle of equality before the law, recognizing that "equal justice embodies the norm expressed in the term equality before the law."[40] The principle of equality of arms has come to mean that parties should have the same rights and obligations under the law of jurisdiction. In concrete cases, when one of the parties (the plaintiff) is directly under the auspices of the

---

[36] Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, 88 International Review of the Red Cross 377, 387 (2006).

[37] Oxford English Dictionary 700 (J. Simpson, E. Weiner, eds., 2nd ed., Oxford: Clarendon Press, 1989). *Cited in* Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 Florida Law Review 498 (2013).

[38] The judicial partiality, is derived from four categories, which can be organized: 1) judges who have personal interests in case outcomes; 2) judges who have relational interests in case outcomes; 3) judges who have political interests in case outcomes; 4) judges who have personal biases for or against case participants that are unattributable to the judges' personal, relational, or political interests. *See Id*. at 499.

[39] Anthony Hopkins, *Equality before Law: The Importance of Understanding the Experience of "Others" in the Criminal Justice System* 17 (Thesis, Canberra: University of Canberra, 2015).

[40] Green v. the Queen (2011) 244 CLR 462, 472–73. *Cited in Id*.

United States, the other party (the defendant) is declared guilty by the United States even before the commencement of any action. In these circumstances, it is impossible to speak of any equality between the parties of the case.

The presence of parties to be heard by a competent court: The right to be present is a fundamental principle of the law in civilized societies. It states that the accused must be present at the trial, and the imposition of sentence must also be announced in the presence of the defendant. Anyone accused of a crime must be present at the trial so that he or she can participate in a meaningful and informed manner in the criminal proceedings.[41] This becomes problematic when it is not clear to how to inform defendant nor how to arrange the presence of defendants in concrete cases.

Defense: One of the main elements of a fair trial is defense. The rights of the defendant are part of the core of fundamental rights.[42] Affording the defense these rights is not intended to automatically deter the legislator, because where there is no provision for a defense, there can be no fair proceedings. But how can a local court sit in judgment on a foreign state that has equal sovereign rights? Assuming that a defendant would not surrender its own sovereignty, how would a court hear a case if it was impossible to hear the submissions of one party? To do so would be a severe violation of the principle of equality of the parties.

The law of evidence: The common-law system, as used in the United States, has certain requirements about the standard of evidence.[43] Federal Rules prohibit "the introduction at trial of other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith."[44]

Also, consider the likelihood that a defendant (e.g., a head of state) is notified of a case and responds by declaring that the court does not have jurisdiction in this matter and, thus, there is no reason to bring a case for the defense before that court. In this eventuality, the defendant will be deemed to deny the plaintiff's claims. Since it is not possible to prove a negative case, the plaintiff would be obliged to demonstrate that the September 11 terrorist attacks were carried out by the state apparatus of the Kingdom of Saudi Arabia. How would the plaintiff prove this? Will the court examine all records, including those of the security forces of the Saudi Arabian state in order to determine their role? When it is necessary to have expert

---

41 Fawzia Cassim, *The Right to Meaningful and Informed Participation in the Criminal Process* (Thesis, Pretoria: University of South Africa, 2009).

42 Henri Roussillon, *Contrôle de constitutionnalité et droit fondamentaux, l'efficacité des droit fondamentaux* in *L'effectivité des droits fondamentaux dans les pays de la communauté francophone* 371, 379 (Paris: EDICEF-AUPELF, 1998).

43 James B. Jacobs, *Admissibility of the Defendant's Criminal Records at Trial*, 4 Beijing Law Review 120 (2013).

44 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* (2006), § 404.21[1][a]; Advisory Comm. Note to 1991 404(b); Fed. R. Evid. 403. *Cited in Id*. at 121.

contributions, from which country will those experts be appointed? Would these experts only be chosen from other U.S. citizens?

In conclusion, any attempt to use these provisions to resolve a dispute between two equal states using the legal system of one state alone would be seen as null and void in terms of international law.

3.5. With Regard to the Execution of a Verdict

At the end of any proceedings brought under JASTA, the judgment of a U.S. court would also encounter several problems. First of all, the execution of any court decision requires the use of legal powers – including the use of force – against the guilty party. In common-law legal systems, administrative divisions such as provinces, territories, or federated states regulate the enforcement of any judgment. For example, in California, a party which does not receive prompt payment of damages awarded must begin a judgment enforcement process in order to collect the money or property that it is entitled to under the judgment.[45] If a U.S. court orders that Saudi Arabia must pay compensation, the execution of the court order requires the use of legal powers against Saudi Arabia, in accordance with the rules. Executive offices in charge of the execution of court decisions may request assistance from local security officers (policemen) if the debtor refuses to pay. In this case, though, the "debtor" is a state, and it is impossible to use any legal powers against a debtor state because the principle of territoriality limits the authority of any local security organization to the territory of its country. In matters relating to foreign states, international rules of law must be applied. And in international law, except for a limited number of exceptions, it is forbidden for a state to use force against another state.

4. Examples of Application

In UK, in the case of Regina v. Horseferry Road Magistrates' Court (*Ex parte Bennett*), Bennett claimed that he was brought to UK from South Africa in contravention of the Return of Criminals code 1989, and in breach of international law. The House of Lords ruled that the court verdict was unauthorized because the government broke international law to bring Bennett before an English court.[46] The Lords' ruling also engender several other issues. The Law Lords were vague as to whether there is a duty to refuse to exercise jurisdiction over an individual who has been brought unlawfully before a court or whether that court merely has the discretion to do so.[47]

---

[45] The Superior Court of California, County of Orange, Collecting the Judgment – Plaintiff (Mar. 20, 2017), available at http://www.occourts.org/self-help/smallclaims/collectingthejudgment.html.

[46] Regina v. Horseferry Rd. Magis. Ct. (Ex parte Bennett), [1994] 1 App. Cas. 42 (Eng. H.L. 1993). *See* Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction after Alvarez-Machain*, 29 Cornell International Law Journal 383 (1996).

[47] *Id*. at 471.

It should be noted that JASTA is not the first piece of legislation that permits a plaintiff to file a case against another state before U.S. courts. It is not unusual for a U.S. court to reach a ruling that runs counter to the principles of international law. For example, in the Alvarez-Machain case,[48] a U.S. court decided that the illegal abduction of a suspect (a citizen of Mexico) from Mexico to the USA did not affect the jurisdiction of the court.[49]

Where a state breaches international law, other states may refuse to recognize this breach. For example, in 1931, Japan occupied Manchuria and established a new government named Manchuko under its control. Japan called for other states to recognize Manchuko. However, the U.S. declared that it would not recognize this because of the Paris Treaty of 1928, which forbids the use of force in the service of national interests. This stance is known as the "Stimson Doctrine."[50]

JASTA could set an example to other nations and the U.S. may be vulnerable to the greatest losses from this. It is known that the U.S. is responsible for several coups in many countries. For example, there is no doubt that U.S. is behind the coups of 1960, 1980, and February 28 coups, and it is rumored that the U.S. is behind the July 15 coup attempt. If the U.S. implements JASTA, then it must accept that the other counties have the right to promote comparable regulations that would enable their citizens to file actions against the U.S. before their own courts. This Act, which is against the fundamental principles of law, has the potential to cause chaos all over the world in the near future.

---

[48] "On April 2, 1990, around 7:45 p.m., Dr. Humberto Alvarez-Machain was relaxing in his office in Guadalajara, Mexico, having just finished treating a patient. Suddenly, five or six armed men burst into his office. One showed him a badge that appeared to be that of the Mexican federal police. Another placed a gun to Dr. Alvarez-Machain's head and told him to cooperate 'or he would be shot.' The men then took Dr. Alvarez-Machain to a house where he was forced to lie on the floor face down for two or three hours. His captors shocked him several times with an 'electric shock apparatus' and injected him twice with a substance that made him feel 'light-headed and dizzy.' Later, Dr. Alvarez-Machain was transported by car to Leon, where he and his captors boarded a plane headed for El Paso, Texas. When they arrived in El Paso on April 3, agents of the U.S. Drug Enforcement Agency (DEA) were waiting to arrest Dr. Alvarez-Machain for his alleged involvement in the 1986 torture and murder of DEA agent Enrique Camarena. The kidnapping of Dr. Alvarez-Machain from Mexico was a state-sponsored international abduction. The United States, through its paid agents, removed a foreign national from his country and brought him to the United States to stand trial." *See* Jonathan A. Gluck, *The Customary International Law of State-Sponsored International Abduction and United States Courts*, 44 Duke Law Journal 612, 613 (1994).

[49] Derek C. Smith, *Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation in U.S. v. Alvarez-Machain*, 6 European Journal of International Law 6 (1995).

[50] The Stimson Doctrine was named for United States Secretary of State Henry Stimson. Stimson had conflicting impulses towards idealism and acute pragmatism. The Stimson Doctrine was an expression of his restricted idealism. The Stimson Doctrine emerged as the response of the United States and the League of Nations to Japanese Conquest of Chinese Territory in 1931. This conquest was in breach of Japan's Obligations under the Kellogg-Briand Pact (Pact of Paris), the League of Nations Covenant and the Nine Power Treaty. *See* John Trone, *The Stimson Doctrine of Non-recognition of Territorial Conquest*, 9 Queen Law Journal 160 (1996).

Conclusion

By amending the FSIA, JASTA authorizes the U.S. courts to judge foreign governments based on allegations that the actions of those governments make them responsible for terrorism-related injuries on U.S. soil. This threatens international relations, which is why many countries disapprove of the legislation and have raised their concerns.

With its large international presence – greater than any other country – the U.S. benefits from sovereign immunity more than most. JASTA could have indirect consequences for the U.S. if other countries pass similar laws.

Terrorism is an international threat that now faces the entire world. It is essential that international diplomacy promotes new discussions and develops updated international principles to reflect this reality. But JASTA neither helps to bring the perpetrators to the justice nor improves the effectiveness of counter-terrorism. It merely seeks to pin the actions of terrorists on individual states. Trying to hold a foreign government accountable before American private courts is a politically motivated gesture. Rather than serving the aim of peace or finding genuine solutions, it merely results in international law becoming politicized.

References

Caplan L. *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 American Journal of International Law (2003).

Cassim F. *The Right to Meaningful and Informed Participation in the Criminal Process* (Thesis, Pretoria: University of South Africa, 2009).

Currat P. *Les crimes contre l'humanité dans le statut de la cour pénale internationale* (Paris: Harmattan, 2006).

Dimitrovska M. *The Concept of International Responsibility of States in the International Public Law System*, 1 Journal of Liberty and International Affairs (2015).

Finke J. *Sovereign Immunity: Rule, Comity or Something Else?*, 4 European Journal of International Law (2011).

Gluck J.A. *The Customary International Law of State-Sponsored International Abduction and United States Courts*, 44 Duke Law Journal (1994).

Heb B. *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 European Journal of International Law (1993).

Hossain K. *The Concept of Jus Cogens and the Obligation under the U.N. Charter*, 3 Santa Clara Journal of International Law (2005).

Jacobs J.B. *Admissibility of the Defendant's Criminal Records at Trial*, 4 Beijing Law Review (2013).

Knuchel S. *State Immunity and the Promise of Jus Cogens*, 9 Northwestern Journal of International Human Rights (2011).

Kolb R. *La bonne foi en droit international: Contribution à l'étude des principes généraux de droit* (Genève: Graduate Institute Publications, 2000).

Lenoble J. *Responsabilité Internationale des Etats et Controle Territorial*, 16 Revue Belge du Droit International (1981–1982).

Michell P. *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction after Alvarez-Machain*, 29 Cornell International Law Journal (1996).

Nagan W.P. & Haddad A.M. *Sovereignty in Theory and Practice*, 13 San Diego Journal of International Law (2012).

Nagan W.P. & Root J.L. *The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory*, 38 North Carolina Journal of International Law (2013).

Philippe X. *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, 88 International Review of the Red Cross (2006).

Roussillon H. *Contrôle de constitutionnalité et droit fondamentaux, l'efficacité des droit fondamentaux* in *L'effectivité des droits fondamentaux dans les pays de la communauté francophone* (Paris: EDICEF-AUPELF, 1998).

Sinclair I. *The Law of Sovereign Immunity. Recent Developments*, 167 Collected Courses of the Hague Academy of International Law (1980).

Smith D.C. *Beyond Indeterminacy and Self-Contradiction in Law: Transnational Abductions and Treaty Interpretation in U.S. v. Alvarez-Machain*, 6 European Journal of International Law (1995).

Sofaer A.D. *On the Necessity of Pre-emption*, 14 European Journal of International Law (2003).

Tomuschat C. *National Institutions and State Immunity*, 4 Vanderbilt Journal of Transnational Law (2011).

Trone J. *The Stimson Doctrine of Non-recognition of Territorial Conquest*, 9 Queensland Law Journal (1996).

Vázquez C.M. *Altmann v. Austria and the Retroactivity of the Foreign Sovereign Immunities Act*, 3 Journal of International Criminal Justice (2005).

Watherall T. *Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 Georgetown Journal of International Law (2015).

Information about the author

Walid Fahmy (Alexandria, Egypt) – Senior Lecturer, Head of the Department of Public International Law, Faculty of Legal Studies and International Relations, Pharos University (Canal El Mahmoudia St., Alexandria, 21311, Egypt; e-mail: walid.Fahmy@pua.edu.eg).