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JASTA Violation of the Sovereignty of States and Its Jurisdictional Immunity

Mohammed Ahmed Eisa
Assistant Professor of Public International Law College of Science and Humanities at alghat Majmaah University,Kingdom of Saudi Arabia, P.O. Box 445, 11914, Ghat

Abstract
On 27 September 2016, the United States Congress overrode the presidential veto to pass the Justice Against Sponsors of Terrorism Act (JASTA), the culmination of lengthy efforts to facilitate lawsuits by victims of terrorism against foreign states and officials supporting terrorism. Until JASTA, under the 'terrorism exception' in the US Foreign Sovereign Immunities Act, sovereign immunity could only be denied to foreign states officially designated by the USA as sponsors of terrorism at the time or as a result of the terrorist act. JASTA extends the scope of the terrorism exception to the jurisdictional immunity of foreign states so as to allow US courts to exercise jurisdiction over civil claims regarding injuries, death or damages that occur inside the USA as result of a tort, including an act of terrorism committed anywhere by a foreign state or official. The bill has generated significant debate within and outside the USA. State or sovereign immunity is a recognised principle of customary international law and, for that reason, JASTA has been denounced as potentially violating international law and foreign states' sovereignty
Keywords: JASTA- violation of the sovereignty of States- jurisdictional –immunity

1- Introduction

The Justice Act against the sponsors of terrorism universally known as “the JASTA Act”, is a law approved by the Congress of the United States, that limits the legal scope of foreign sovereign immunity.

It allows U.S. citizens to sue foreign states and their claims for civil damages for injuries, death or damage caused by terrorist acts.It also permits to the Federal Courts to exercise jurisdiction against the foreign states and their representatives if they have supported the acts of international terrorism that caused damage against American citizens or their property, regardless of whether the State designated as a state sponsor of terrorism or not.

This law is a violation of the fundamental principle of international law, it also raises international responsibility. The following points can explain this:

2- Sovereignty of States in international law:

Sovereignty in the legal sense is a set of rights and obligations that apply equally to all States, and means that all members of the international community are equal before international law, and that was clear in the Charter of the United Nations itself. In Article 2/7 of the Charter of the United Nations That “The Organization is based on the principle of the sovereign equality of all its Members”.

The principle of non-interference in the affairs of other States is an important principle of the fundamental principles of international law, which derives from the notion of sovereignty. As the international law prohibits any State intervention in the internal affairs of another State, as each state is free to choose and develop its political, economic, social and cultural system without any interference from the other side.

The General Assembly of the United Nations issued several resolutions affirming this principle, including resolution 2131 on 21 December 1965, entitled "Non-interference in the internal affairs of States and the protection of their independence and sovereignty." The resolution included several principles, as the prohibition of all forms of interference, and the failure to allow, assist or finance all armed and terrorist activities to change the regimes in another State.[2]

The resolution (A/RES/2625) of 24 October 1970, "Declaration of the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations", is one of the most important resolutions of the General Assembly, which contribute greatly to the enrichment of international law. The resolution has encompassed the principles of international law concerning Friendly Relations and Cooperation among States, in conformity with the principles and purposes of the United Nations. This work is part of the valuable achievements made for the international peace and security, the development of equal democratic relations between States.[3]

The resolution includes a set of provisions, including:

The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

The principle that States shall settle their international disputes by peaceful means in such a manner that

international peace and security and justice are not endangered,

The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter,

The duty of States to co-operate with one another in accordance with the Charter,

The principle of equal rights and self-determination of peoples,

The principle of sovereign equality of States,

The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter,

Accordingly, no State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal and external affairs of any other State.

Consequently, all forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements are in violation of international law.[4]

The Organization of American States [5] has followed the principle of "Monroe"[6], the principle of non-interference, Which The Treaty of Montevideo in 1933 made it a principle for the American continent, and the cornerstone for the reorganization of the American system which already achieved by the pact of "bogota"[7] in 30/4/1948. In which the participants approved the charter of the organization of American states. This Charter has adopted a basic provision relating to the duty to refrain from interfering in the internal affairs of States as referred to in Articles 16.15 of the Charter.[8]

2-1 JASTA violate of the principle of Sovereignty:

The Act "JASTA" (Justice Against Sponsors of Terrorism Act) allows examining issues related to claims cases brought against any foreign State about injury or homicide or damage occurring Within the United States, as a result of a terrorist act committed anywhere by a State or a foreign official.

Because of this, a civil claims can be filed against any foreign state or foreign official, in the issues arising from international terrorism. JASTA empowers the federal courts to exercise personal jurisdiction and to hold anyone who commits such acts, provides assistance, incites or attempts to commit any act of international terrorism against any American citizen. Inasmuch as section2, paragraph 6, "Persons, entities, or countries 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 that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities."

As well as article 3 (b) "A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States."

Along those lines, the American administration considered all the countries of the world as its own states and acted from the position of hegemony, especially the abolition of sovereign immunity that protect the states as a entities of civil or criminal cases, which is contrary to the Charter of the United Nations, based on respect for the sovereign equality and rights.

The principle of jurisdictional immunities of States and their property in international law:

The judicial immunity of States is a fundamental principle of international law, where the State not allowed to be subjected to a foreign judiciary. This principle depend upon the legal equality between the fully sovereign States, this means that the countries are not subject to the jurisdiction and the courts of a foreign State in their actions and deeds because there is a mutual respect for the sovereignty of independent States.

Moreover, this principle depends on a stable base in international law namely "The inadmissibility of interference in the internal affairs of States", a State could not get a judgment against a State, or their representatives and force the state to implement it, Whether in the territory of the State in which the judgment was pronounced or even in the territory of the State against which the judgment was pronounced, Because this interferes in the internal affairs of the state.

Customary international law fortifies the sovereignty against judicial proceedings, and perhaps this has led Charles Rousseau to say: the basis of the judicial immunity is one of the conditions for the performance of the international community and its characteristics, as immunity is necessary to facilitate its work."

You can see that the principle of jurisdictional immunity of the State has stabilized in the legal and judicial relations between States through the enactment of national legislation provides it. particularly the procedure for the motion before the national courts of the jurisdictional immunity of States, including the American legislation in 1976, English law in 1978 and the Canadian in 1982, And the Australian in 1986.

Therefore, the States agreed on holding international conventions to organize the jurisdictional immunities of States, including the European Convention signed in 1972, and the convention of the Organization of American countries in 1983. Moreover, in order to reach to a general international convention, an International

Law Commission had studied the subject in 1978.

This Commission ended to the United Nations Convention on jurisdictional immunities of States and their property by decision of the General Assembly of the United Nations No.38/59 in 2 December 2004. Noting in its preamble that the existence of an international convention on this subject would enhance the rule of law and legal certainty, particularly in dealings of States with private persons.

Article II defined the terms used, noting that the "Court" means any organ of a State, however named, entitled to exercise judicial functions and expanded the concept of the State to include the State and its various organs of government, units of a federal State or political subdivisions of the State, agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State.

Article V stipulates that a State enjoy immunity, in respect of itself and its property, from the jurisdiction of the courts of another State. [9]

Article VI of the Convention obliges States to refrain from exercising jurisdiction in a proceeding in a case before its courts and that its courts determine on their own initiative that the immunity of that other State. [10]

The International Court of Justice (ICJ) considered that Italy had failed to fulfil its obligations toward Germany when it allowed a lawsuit aimed at Berlin's claim compensations for the victims of the Nazi crimes. [11]

3- JASTA violate the principle of jurisdictional immunity of States

No doubt that in the American Act JASTA a clear violation of a fundamental international legal rule, it is the immunity of States from the foreign jurisdiction. Article 2/6 of the law clarifies that Persons, entities, or countries that contribute support to persons or organizations that pose a significant risk that threaten the security of nationals of the United States or the national security, foreign policy, or its economy, should reasonably anticipate being brought to the American courts to answer for such activities. [12]

As stated in paragraph (b) of article 3 of the law that "A foreign state shall not be immune from the jurisdiction of the courts of the United States" [13].

Thus, under JASTA Act, states will not be able to invoke their immunity judiciary in US courts, and the motion of lack of jurisdiction of US courts in the its trial on the lawsuits filed against it by the families and relatives of the victims of 11th September, or from some U.S. companies and other institutions that wish to sue some of the states, and to obtaining compensation .

This means that JASTA Act will abolishes the principles and standards in force regarding the judicial immunity of States and runs counter all international charters and conventions that laid the foundations of the pillars of the principle of immunity.

The principle of the immunity of State officials from foreign jurisdiction in international law

In international law, certain holders of high-ranking office in a State, such as the president, the Prime Minister and the Minister for Foreign Affairs, and diplomatic and consular personnel, enjoyed immunity both civil and criminal from the jurisdiction of other States.

Vienna Convention and he immunity of the president:

Vienna Convention did not organize the Diplomatic Relations and the immunity of the presidents but organized the permanent missions, [14] because the task of the head of state abroad is usually temporary. Therefore, he enjoys legal immunity according to the rules of customary international law[15]. The Judicial immunity is not an exception to the application of the law, but is a procedural exemption only to disable the competent judicial authorities in the face of the representatives of foreign States[16].

Immunity has several types, including judicial immunity namely, the non-subordination of persons holding legal and functional positions, such as heads of State, heads of government and ministers, as well as those who hold diplomatic post in the country where they work, to the law and the regional judiciary for their behavior during his stay abroad.

There should be a difference between his immunity before criminal courts and his judicial immunity before civil courts:

A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State means that it may not be tried for a criminal offense in this state and the maximum that can be done is to consider him as a persona non grata, and request from his country to withdraw and prosecute him for acts he has committed in violation of the law of the host State.

It should be noted that in 2002, The International Court of Justice issued a judgment in the case of "Arrest Warrant of 11 April 2000" which dealt with the legal study of Belgium's demand for the trial of the Minister for Foreign Affairs of the Congo as a perpetrator of crimes against humanity. The International Court of Justice decided that the immunity might not be lifted for him because the legal rules that organize the immunity override the rules adopted by Belgium in an attempt for his trial

He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

A real action relating to private immovable property situated in the territory of the receiving State, unless he

holds it on behalf of the sending State for the purposes of the mission;

An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

In confirmation of this principle, the Supreme Court of Appeals of the United States of America issued in 2004 the final judgments in two cases involving President Robert Mugabe, President of Zimbabwe, and Chinese former leader Jiang Zemin in which the case was dismissed for lack of jurisdiction for the enjoyment of judicial immunity according to article 31 of the Vienna Convention on the Law of Treaties (VCLT). [17]

3-1 JASTA violated the principle of immunity of State officials from foreign jurisdiction:

There is a grate violation of the basic legal rule "Immunity of State officials from foreign jurisdiction", in the American Act "JASTA", where the law allows for cases involving "claims against any foreign State in respect of injury, death or damage occurring within the United States as a result of A terrorist committed anywhere by a State or a foreign official ".[18]

Therefore, a civil suit can be brought against any foreign state or foreign official in the aforementioned issues arising from international terrorism, where JASTA empowers the federal courts to exercise personal jurisdiction and to hold responsible any person committing such acts, or provide assistance or incites or attempts to commit any of the acts of international terrorism against any US citizen.

4- JASTA raises international responsibility against the United States:

The State, with its sovereignty over its territory, has the authority to issue various legislation and laws within the limits of its domestic legal system. However, the State is responsible for the acts of its legislative authority in three cases:

The first case: If it failed or abstained from issuing a law necessary for the fulfillment of its international obligations, if the application of the State to its international obligations requires the enactment of legislation.

For example, the Alabama claims of the United States of America against Britain, which the arbitration court has adjudicated it in Geneva in 1872.[19]

The second case: the case of the omission of the repeal of the legislation is contrary to the international obligations.

The Third case: The Case of legislation incompatible with international obligations.

As is the case if the legislative authority issued a law to disarm foreign ownership without granted compensation. This confirmed in the judgment of the International Court of Justice in 1952 in the case of the Anglo-Iranian Oil company. [20]

The opinion of the Judge Lery carnéro in that same case was different, he said: "The laws of insurance, sometimes not conducive to the attention of international law, but international law means with it within the scope of international responsibility for acts arising from legislative responsibility and which Which requires the payment of equitable compensation for the foreign capital that has been nationalized. This compensation is governed by the rules of international law governing international cooperation in the economic and financial fields. What should be noted here that the responsibility of the State in such cases do not result from the mere issuance of legislation, but also on the implementation of its occurrence, and the damage as a result of this implementation. The State's responsibility for the acts of its legislative authority is that the State is obliged to bring its domestic legislation into conformity with international law, and it may not rely on its national constitution or legislation to dispose of its international obligations.

In the history of international relations, the JASTA Act is the first violation of the Vienna Convention on the Law of Treaties of 1969, the Vienna Conventions on Diplomatic Relations of 1961 and the Vienna conventions on consular relations of 1963, which did not allow any foreign courts to prosecute another State. Which makes the JASTA Act a blatant violation of international law in addition to the flagrant inconsistency with the convention of the United States, signed with the United Nations in 2004, regarding the immunity of States and Their Property in 2004, which is the continuation of previous conventions in this regard.

Also, JASTA Act exceed also the international legitimacy of human rights, which prohibits the extension of the crime to its non-perpetrators. Crime and punishment are the personal responsibility of those who committed the unlawful actions. accordingly, the State as an entity may not be held any criminal responsibility on the pretext that one of its citizens committed an offense. Therefore, lack of jurisdiction of US courts can be sued on the basis of JASTA oppose with the rules of international law and the Vienna Convention on the sovereign immunity of the United States itself.

5- Conclusion

The research concluded with a number of results and recommendations:

First: Results

1. The JASTA Act is a violation of the international conventions.
2. The JASTA Act is a clear violation of the sovereignty of States.
3. The JASTA Act raises international responsibility.

Second: Recommendations

1. American courts must refuse the cases brought before it under the JASTA Act in pursuance of the principle of the immunity of the judicial state of states and official persons.
2. Report on the responsibility of the United States for the issuance of legislation contrary to its international obligations.
3. Cancellation of the JASTA Act.

References

1- See: Sameh Abdel-Qawy El Sayed, International Interference between Legitimacy and Illegality and its Implications on the International Scene, Alexandria, New University House, 2012, pp. 12-11
2- See: Talib Khira, "the prohibition of the use of force in international relations", projects provided to the Master's Programme in Legal and Administrative Sciences, (specialization in public international law), Department of legal and Administrative Sciences, Ibn Khaldoun university, 2006-2007, P.37.
3- For more detail see:
- The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, issued by resolution 2131 in 1965.
- The Declaration on Principles of International Law concerning Friendly Relations among States, issued by resolution 2652 in 1970.
- The Charter of Economic Rights and Duties of States, issued by Decree No. 3281 in 1974
- The Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, issued by resolution No. 103/36 in 1981.

4- The Organization of American States (OAS) is a regional international organization on the American continent. Founded in 30 April 1948, in Bogotá, headquartered in Washington DC, the organization has 35 members from independent countries in North and South America.
5- The second morning of December 1823, in his speech to Congress, President "James Monroe" launched his first doctrine in foreign policy, called "The Monroe Doctrine", which prohibits the non- interference of the United States in the affairs of other states, and on state had the right to interfere in the affairs of the American world. Monroe Doctrine focused on two things:
- Conveys that European countries cannot colonize in any of the Americas.
- United States is committed not to interfere in European problems or relations.

6- See: Sameh Abdel-Qawy El Sayed, International Interference between Legitimacy and Illegality and its Implications on the International Scene, op. Cit., P. 80
7- See: The charter of the organization of American states:
ARTICLE 15 No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits riot only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.
ARTICLE 16 No State may use or encourage the use of coercive measures of au economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.
8- Article 5: State immunity
"A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention."
9- Article 6: Modalities for giving effect to State immunity
"A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected."
10- These lawsuits submitted by the families of civilian victims and Italian heirs, emigrated from Germany between 1943 and 1945, when Italy was under German occupation, following the fall of the alliance between them.
The representative of the Italian side in this case responded to the position of the International Court of Justice, saying, "I agree on some points of this provision, especially the first point concerning the invitation of the Supreme Court for the resumption of negotiations. If we knew that the negotiations will resume between Germany and Italy, in my opinion this is a good thing".
On December 23, 2008, Germany filed a complaint to the highest judicial forum of the United Nations, after the increasing in issues of the families of the victims of the Nazi crimes in the Italian courts. Berlin believes that allowing Italy to lift these civil cases against Germany, did not respect the principle of judicial immunity granted

to it by international law.

11- Article 2/6

"Persons, entities, or countries 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 that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities"

12- Article 3/b: Responsibility of foreign states.—

"A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by—

(1) an act of international terrorism in the United States; and

(2) A tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign ste while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred."

13- See article 31 of the Vienna Convention on Diplomatic Relations, 1961 and article 43 of the Vienna Convention on Consular Relations, 1963

14- See: Hussein Al-Fatlawi, Diplomatic Immunity of the Diplomatic Envoy, Comparative Legal Study, Egyptian Office for the Distribution of Publications, 2002, p. 360.

15- Premier rapport préliminaire du Rapporteur spécial M. Roman A. Kolodkin devant la C.D.I. "L' immunité de juridiction pénale étrangére des représentants de l'Etat" , Op ,Cit ,274.

16- Tachiona v. United States, 386 F.3d 205, 2004 U.S . App. LEXIS 20879 (2d Cir., 6 October 2004) (Tachiona II); Wei Ye v.

Jiang Zemin, 383 F.3d 620, 2004 U.S. App. LEXIS 18944 (7th Cir., 8 .September 2004).

For comments on these two issues, see:

S. Andrews, "U.S. courts rule on absolute immunity and inviolability of foreign Heads of State: the cases against Robert Mugabe and Jiang Zemin", The American Society of International Law, .Insights (November 2004), www.asil.org/insights.cfm

17- Article 2/6 of the Act stipulates:

"Persons, entities, or countries 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 that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities".

Article 2/7 of the Act stipulates:

"The United States has a vital interest in providing persons and entities injured as a result of terrorist attacks committed within the United States with full access to the court system in order to pursue civil claims against persons, entities, or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries."

18- The elements of the case was that during the American Civil War between the states of the North and the States of the South in 1865, Britain allowed the states of the South to use the English ports to build and supply the ships that was used in the war against the Northern States. Among those ships was the Alabama ship, which successfully flooded a large number of ships in the northern states. After the end of the war, the United States has asked Britain to pay compensation for damage suffered because of their conduct during the war. Which constitutes a violation of the rules of Neutrality that Britain should have taken into consideration during that war. Britain defended its stance on the pretext that there is no domestic legislation to prevent the use of its Ports as the port of ships of a belligerent, but the arbitral tribunal rejected this argument and said that it was Britain's duty to issue a law to ensure the implementation of its international obligations, and the inaction to issue such a law entails international responsibility .

19- The elements of the case was that The Iranian government has concluded a contract with the Anglo-Iranian company included the granting of several concessions in the exploration and exploitation of oil. The British government was one of the largest stockholders in this company. In 1951, The Iranian parliament passed a law for the nationalization of the Iranian Oil. Under this law ,Iran nationalize the oil industry in the country, the British government and the company objected to the legitimacy of this law on the basis that it violates the obligations of the Iranian government in accordance with the contract concluded in 1933.

The case was submitted to the International Court of Justice in 1951 and the court issued a ruling in 1952 stating that "nationalization is the right of every sovereign state and it is regulated by internal law and the International law does not interfere with it except in terms of foreign capital where there must be Fair , adequate and prompt compensation."