

Certain Iranian Assets: The Judgment on Preliminary Objections and the Terrorism Exception to State Immunity

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The legality under international law of the terrorism exception to state immunity is a long-standing and highly controversial issue. The International Court of Justice (ICJ or the Court) had the chance to answer this question in the Certain Iranian Assets case, but the Court decided in its Judgment on Preliminary Objections that the legality of the U.S. terrorism exception is outside the Court's jurisdiction, and the Court's judgment was criticized as Solomonic. This paper tackles this issue in two parts: The first part reviews the ICJ's Judgment and shows that the said Solomonic approach was not adopted and the Court is right in deciding that the disputes concerning state immunity are outside the Court's jurisdiction. The second part assesses the legality under international law of the terrorism exception. Taking consideration of the jurisdiction principle, the restrictive theory of the state immunity, and the law of state responsibility, this paper concludes that the terrorism exception is not compatible with the current rules of international law in the above-mentioned fields.

Keywords: Certain Iranian Assets, International Court of Justice, terrorism exception, state immunity

Introduction

On 13 February 2019, the International Court of Justice (ICJ or the Court) issued its Judgment on preliminary objections in the Certain Iranian Assets (Islamic Republic of Iran v. United States of America) case,¹ which is among the five cases between Iran and the United States before the ICJ revolving around the Treaty of Amity, Economic Relations, and Consular Rights (hereinafter the "Treaty of Amity") signed by the two states in 1955.² The Court rejected one as well as upheld one preliminary objection to jurisdiction raised by the United States and declared that the third one does not possess an exclusively preliminary character. In addition, the Court rejected the preliminary objections to admissibility raised by the United States.³

According to Iran, who filed its application in the Court on 14 June 2016, this case arises from the implementation of a policy of the United States that strips Iranian companies of respect for their rights including

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¹ See International Court of Justice, Judgment on Preliminary Objections of Certain Iranian Assets (hereinafter as "Judgment"), 13 February 2019.

² The other four cases are United States Diplomatic and Consular Staff in Tehran, Aerial Incident of 3 July 1988, Oil Platforms and Alleged Violations of the Treaty of Amity, Economic Relations, and Consular Rights.

³ The United States raised two objections to the admissibility, namely, first, that Iran's reliance on the Treaty to find the Court's jurisdiction in this case is an abuse of process and, secondly, that Iran's "unclean hands" preclude the Court from proceeding with this case. The Court rejected the two objections.

respect for their separate corporate personality, and violates the immunities and property rights of the State of Iran and Iranian entities.⁴ More specifically, the direct cause of this case is a U.S. judicial proceeding, namely, the Peterson enforcement proceeding, which would pose a great threat to the funds owned by Bank Markazi which is Iran's central bank.

The basis of the challenged U.S. measures against Iran is the terrorism exception to state immunity which was created in 1996 by an amendment to the 1976 Foreign Sovereign Immunities Act (FSIA). After that, the spread enlargement of that exception has usually been criticized as a violation of well-established rules of state immunity under international law (Franchini, 2020). Therefore, the Court's answer to the legal validity of this Exception had been widely expected.

However, the Court's Judgment excluded the applications concerning state immunity from its jurisdiction and the U.S. saw it as a significant victory (Palladino, 2019). As Iran's core arguments were rejected in the preliminary proceeding by the Court, the question of the legality of the terrorism exception will still leave unanswered. This uncertainty suggests that there is little chance that the dispute between the two states can be settled by the Court. What is more, the boundaries of the law of state immunity would still be unclear in the foreseeable future.

As the Court's Judgment on preliminary objection is not beyond doubt and raises the pressing questions of the limits of the anti-terrorism measures in light of state immunity, this paper first assesses the Judgment and then analyzes the debate over the terrorism exception. This paper consists of five parts. Part II introduces the background to the dispute and the Judgment on preliminary objections; Part III assesses the Judgment and makes the conclusion that it is not a Solomonian one. Part IV examines the legality under international law of the terrorism exception and Part V concludes with some final remarks.

Background to the Dispute and the Judgment on Preliminary Objections to Jurisdiction

Iran and the United States signed a "Treaty of Amity, Economic Relations, and Consular Rights" in 1955 to maintain their "firm and enduring peace and sincere friendship".⁵ However, the two states ceased diplomatic relations in 1980 following the Iranian revolution. In 1984, Iran was designated as a "state sponsor of terrorism" by the United States. In 1996, the FSIA was amended so that the "state sponsors of terrorism" cannot invoke immunity from suits before the U.S. courts in certain cases. Then, lots of lawsuits against Iran were brought before the U.S. courts and Iran refused to appear declaring that the legislation violated international law. And the default judgments against Iran cannot be entertained lacking enforcement measures.

Afterwards, the United States adopted the following measures to enforce judgments entered following the 1996 amendment to the FSIA: In 2002, the United States adopted the Terrorism Risk Insurance Act which provides as a general rule that the assets of a "terrorist party" which includes the designated "state sponsors of terrorism" previously blocked by the United States government shall be subject to execution or attachment in aid of execution. In 2008, the United States further amended the FSIA, enlarging, *inter alia*, the categories of assets available for the satisfaction of judgment creditors, in particular to include all property of Iranian state-owned

⁴ Memorial of the Islamic Republic of Iran, case concerning Certain Iranian Assets, p. 1.

⁵ United States of America and Iran Treaty of Amity, Economic Relations, and Consular Rights (the United Nations, Treaty Series, Vol. 284, pp. 93-137), Art. 1.

entities. And in 2012, the president of the United States issued Executive Order 13599, which blocked all assets of the Government of Iran, including those of the Central Bank of Iran (Bank Markazi) and of financial institutions owned or controlled by Iran, where such assets are within United States territory or “within the possession or control of any United States person, including any foreign branch”.⁶ Also, in 2012, the United States adopted the Iran Threat Reduction and Syria Human Rights Act, which made the assets of Bank Markazi subject to execution in order to satisfy default judgments against Iran in the Peterson case.⁷

Following the above-mentioned measures, the assets of Iran and Bank Markazi are at risk of being executed or have already been executed, and therefore Iran instituted proceedings before the ICJ alleging the United States’ actions against Iran amounted to serious violations of international law, especially the Treaty of Amity.

In its application, Iran invoked Article XXI, Paragraph 2, of the Treaty of Amity as the basis of the Court’s Jurisdiction, which provides:

Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.⁸

However, the Parties disagree on the question whether the dispute in the present case is a dispute “as to the interpretation or application” of the Treaty of Amity.⁹ The United States thus raised three preliminary objections to the Court’s jurisdiction and this paper will only examine the second objection to jurisdiction, which is based on Iran’s state immunity plea and is related with the subject of this paper.¹⁰

As to the second objection to jurisdiction, the United States requested the Court to dismiss as outside the Court’s jurisdiction all claims, brought under any provision of the Treaty of Amity, that are predicated on the United States’ purported failure to accord sovereign immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian state-owned entities. The United States argued that the Treaty of Amity does not confer immunity on the states parties themselves or on any of their state entities. Iran did not dispute that the Treaty of Amity contains no clause directly and expressly granting immunity to the states parties or their state entities. However, it maintained that consideration of the immunities conferred on states and certain state entities by general international law is a necessary condition for the interpretation of the Treaty of Amity.

Specifically, Iran relied on several provisions in the Treaty. First, Iran relied on the explicit mention of the “require[ments of] international law” contained in Article IV, Paragraph 2 of the Treaty to argue that this provision incorporates the rules of customary international law on sovereign immunity.¹¹ The Court observed

⁶ Blocking Property of the Government of Iran and Iranian Financial Institutions, Executive Order 13599 of February 5, 2012.

⁷ See *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 49 (2003). The applicants are said to be victims of Iran-sponsored acts of terrorism.

⁸ Reproduced by the Court in the Judgment at Para. 29.

⁹ Judgment, Para. 31.

¹⁰ The first objection to jurisdiction concerns Article XX, paragraph 1, subparagraph (c) and (d) of the Treaty of Amity, while the third objection is about whether Bank Markazi is a company.

¹¹ Article IV, Paragraph 2, of the Treaty of Amity provides: “Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that *required by international law* [emphasis added]. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof”.

that Iran's interpretation is not consistent with the object and purpose of the Treaty of Amity which is to encourage mutually beneficial trade and investments and closer economic intercourse as well as regulate consular relations. In addition, both the title of the Treaty and the context of Article IV cannot suggest that immunities fall within the Treaty.

Second, Iran inferred from Article XI, Paragraph 4 of the Treaty that the immunity enjoyed by state entities engaging in activities *jure imperii* has been upheld by the Treaty. The provision at issue provides:

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.¹²

The Court noted that Iran adopts a *contrario* reading of the Treaty provision. Although a *contrario* reading had been employed by the Court before, the Court refused to adopt the interpretation in the present case by noting that

it is one thing for Article XI, Paragraph 4, to leave intact, by not barring them, the immunities enjoyed under customary law by state entities when they engage in activities *jure imperii*. It is quite another for it to have the effect, as Iran claims it does, of transforming compliance with such immunities into a treaty obligation, a view not supported by the text or context of the provision.¹³

Third, according to Iran, as Article III, Paragraph 2 of the Treaty provides that "Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party...", the Court should determine whether the denial under United States law of the right of the Iranian entities concerned to avail themselves in judicial proceedings of a defence based on sovereign immunity is consistent with customary international law.¹⁴ However, the Court is not convinced that a link of the nature alleged by Iran exists between the question of sovereign immunities and the right guaranteed by Article III, Paragraph 2.¹⁵ On the contrary, the Court noted that the provision at issue only seeks to protect the possibility for a company to have access to courts.

Forth, Iran also relied on Article IV, Paragraph 1 of the Treaty, which provides that "each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises". Iran submitted that the denial by the United States of the sovereign immunities is capable of constituting a breach of the obligation to "accord fair and equitable treatment". The Court concluded that the requirements of the provision at issue do not include an obligation to respect the sovereign immunities for reasons similar to those set out above.¹⁶

Fifth, Iran submitted that, according to Article X, Paragraph 1, of the Treaty, which provides that "between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation", the Court has the jurisdiction to pronounce on whether the United States respected the "freedom of commerce", implying that the Court also has the jurisdiction to determine whether the sovereign immunities have been respected so as

¹² Reproduced by the Court in the Judgment at Para. 59.

¹³ Judgment, Para. 65.

¹⁴ Judgment, Para. 67.

¹⁵ Judgment, Para. 70.

¹⁶ Judgment, Para. 74.

to examine whether the freedom of commerce might have been impeded. The Court stated that though the word “commerce” refers to commercial exchanges in general, it cannot cover sovereign immunities since which has no connection with the commercial relations between the two states.

Consequently, the Courts concluded that none of the provisions relied by Iran are capable of bringing within the jurisdiction of the Court as to the question of the United States’ respect for the immunities. Thus, the Court upheld the second objection to jurisdiction raised by the United States¹⁷.

Assessments of the Judgment

According to the Court, Iran’s main claims and the most sensitive issues at stake that the United States failed to accord sovereign immunity from jurisdiction and/or enforcement to the Government of Iran, Bank Markazi, or Iranian state-owned entities are outside the Court’s jurisdiction. Therefore, the Court can only exercise jurisdiction over the claims that the U.S. measures that block the property and interests in property of the Government of Iran or Iranian financial institutions and the treatment of Iranian entities violate certain provisions of the Treaty of Amity.

It has been criticized that the Court adopted a Solomonic approach in this case, namely, the Court split the matter in two and allowed only part of Iran’s claims which concern the U.S. treatment of certain Iranian entities to proceed to the merits stage (Franchini, 2020). The term “Solomonic” dates back to the Biblical story of King Solomon. Two women claimed to be the mother of the same infant, and the king declared it should be cut in half. Though King Solomon’s intention is to find the real mother, his approach is usually depicted as the “split-the-baby” provisional approach. Obviously, Solomonic provisional approaches are not the currently popular winner-take-all approach. Rather than recognizing legal rights or duties as belonging to one party alone, a Solomonic court finds ways to split the issues or allocate remedies somewhat evenly (Grossman, 2018).

However, this paper finds that the said Solomonic approach was not adopted in the present case. Although there are some errors in the judgment, the major findings of the Court hold up. The Court indeed lacks jurisdiction over issues concerning the alleged violations of state immunity, though expected by many that the Court would give an answer to the controversial question of the legality of the terrorism exception.

First, the jurisdiction of the Court is based on the consent of states, under the conditions expressed therein¹⁸. According to Article 36, Paragraph 1 of the Statute of the Court, such consent may result from an explicit agreement of the parties, or from the compromissory clause in the Charter of the United Nations or in treaties and conventions in force.¹⁹ In the present case, the Court established its jurisdiction on the basis of the compromissory clause of the Treaty of Amity and accordingly the Court had to exercise its jurisdiction only over disputes in relation with the Treaty of Amity, or else the principle of the consent of states would be violated.

Second, the disputes between the two states over the issues of state immunity are not those “as to the interpretation or application” of the Treaty of Amity. As its name and content manifested, the Treaty of Amity governs only two areas of Iran-US relations: economic relations and consular rights. The fact that no provision of

¹⁷ Judgment, Para. 80.

¹⁸ Certain questions to Mutual Assistance in Criminal Matters (Djibouti v. France), I.C.J. Reports 2008.

¹⁹ Article 36, Paragraph 1 of the Statute of the International Court of Justice provides that, 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 United Nations or in treaties and conventions in force.

the 1955 Treaty mentioned expressly the protection of foreign state immunities proves that the two states had not chosen to codify state immunity protections in a commercial and consular treaty, or else “they would have done so simply and directly”.²⁰ Vague and indirect references to general international law in the Treaty of Amity’s articles on economic relations are insufficient to remedy the complete absence of express provisions conferring immunities on state entities²¹. Consequently, the disputes concerning state immunity are not capable of falling within the scope of the compromissory clause of the Treaty of Amity.

Third, as the present case is the fourth case between the two states invoking the compromissory clause, namely, Article 21, Paragraph 2 of the Treaty of Amity as the basis of the Court’s jurisdiction, the Court mainly followed the standards adopted in other cases between the two states to examine whether the disputes fall within the scope of its jurisdiction *ratione materiae*. That is, in accordance with the rules of treaty interpretation stipulated in the Vienna Convention on the Law of Treaties, the Court explained the relevant clauses, and then determined whether there was a lack of contact or too weak contact between the disputed issue and the scope of the clause. The fact that the Court strictly applied the rules of treaty interpretation and the reasoning of previous cases in the present case further proved that the Court had not adopted the Solomonic approach particularly.

To conclude, the Judgment is right in deciding that the disputes concerning state immunity are without the Court’s jurisdiction. Nevertheless, the Court would not assess the legality of the terrorism exception to state immunity is regrettable since the terrorism exception is one of the most controversial problems before the international community.

The Legality Under International Law of the Terrorism Exception

As noted above, the present case arose from the terrorism exception to state immunity. This particular exception is almost unique to the United States, since to date only one other country²² has adopted a comparable limitation to the general rule of sovereign immunity (Federal Judicial Center, 2018). It has been said that the reason why the United States restricted the immunity of state sponsors of terrorism is that more and more U.S. citizens had become the targets of terrorist activities, and the victims cannot obtain compensation from U.S. Courts due to the state immunity plea. Especially after the significant terrorist incidents in the 1980s and 1990s, victims failed to obtain favorable results from the U.S. Courts, causing fierce public complaints.²³ Therefore, the Congress passed the Anti-Terrorism Activities and Effective Death Penalty Act in 1996 to amend the Foreign Sovereign Immunities Act by adding a terrorism exception, so that U.S. courts can have jurisdiction over foreign governments engaged in terrorist activities. However, since there are no similar provisions in national legislations and international treaties, the U.S. Department showed a negative attitude towards the above amendment.²⁴

According to terrorism exception, a foreign state shall not be immune from the jurisdiction of the U.S. courts in any case in which

²⁰ Separate Opinion of Judge Ad Hoc Brower, Judgment on Preliminary Objections of Certain Iranian Assets, Para. 16.

²¹ Separate Opinion of Judge Ad Hoc Brower, Para. 16.

²² Canada amended its State Immunity Act to permit victims of terrorism to seek redress against designated state sponsors in 2012.

²³ For example, the kidnapping of Joseph Cicciopio in Beirut and the destruction of Pan Am Flight 103 over Lockerbie, Scotland.

²⁴ Statement of Jamison Borek, Hearings on S. 825 before the Subcomm. on Courts & Adm. Practice of the Sen. Comm. on the Judiciary, 103d Cong., 2d Sess. 10, 1994.

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 the foreign state is designated as a state sponsor of terrorism.²⁵

This Exception includes a very broad approach to jurisdiction; the jurisdictional nexus is simply that the victim be an American Citizen (Dellapenna, 2003). This is an application of the passive personality principle that the United States has historically opposed as a violation of international law (Dellapenna, 2003).²⁶

To determine whether the terrorism exception complied with international law, the principle of jurisdiction must be the first factor to be examined, because state immunity means that when the court of one state decides whether another state can be immune from suits, it must first determine that it has jurisdiction over the suit.²⁷

As Professor Bowett (1982) stated,

where the civil jurisdiction of the state is an instrument of state policy, used as a means of exercising control over activities or resources in the interests of the state, then in principle such jurisdiction ought to be subject to the same governing rules of international law. (p. 4)

The civil jurisdiction of the state in state immunity cases is definitely an instrument of state policy; thus to determine whether jurisdiction is proper, one must first examine the rules of jurisdiction in international law. Jurisdiction principles in international law mainly include four categories: the territorial principle; the nationality principle; the protective principle, and the universality principle. Jurisdiction based on acts within the territory of the state is accepted everywhere as the primary form of jurisdiction (Dellapenna, 2003). The Lotus case gave an authoritative explanation to the above conclusion,

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 its territory except by virtue of a permissive rule derived from international custom or from a convention.²⁸

The U.S. Supreme Court had also clarified the territoriality of jurisdiction. Its judgment in the *Schooner Exchange* case was frequently cited by courts in the United States and other countries, and is considered to be one of the most classic early cases of state immunity. Marshall, Ch. J., at the outset of his opinion, underscored the principle of the plenitude of territorial jurisdiction for the local state in the following terms (Badr, 1984): The Jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction²⁹. Therefore, the starting point of state immunity cases should be the local state's exclusive territorial jurisdiction.

²⁵ Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891, Sec. 1605(A)(a)(1).

²⁶ What turned the government's attitude around is that often the victims were targeted precisely because they were American citizens and the American victims would have no recourse outside of an American court.

²⁷ The U.S. courts have shown in many cases that there is a sequential relationship between jurisdiction and immunity. The jurisdiction should be determined first, and then the issue of immunity should be considered. See *Lybia American Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175(1980); *Perez et al. v. The Bahams*, 482 F. Supp. 1208(1980); *Texas Trading and Milling Corp. v. Federal Republic of Nigeria*, 500 F. Supp. 320(1980).

²⁸ The Lotus Case, *France v. Turkey* (1927), P.C.I.J. Reports, Series A, No. 10.

²⁹ U.S. Supreme Court Reports, Vol. VII, 1812, p. 287.

When passive personal jurisdiction conflicts with territorial jurisdiction, the latter shall take precedence, unless treaties or international customs provide otherwise or the local States waive its jurisdiction. The application of the passive personality principle by the U.S. courts in cases against state sponsors of terrorism is in conflict with the priority of territorial jurisdiction under international law.

After jurisdiction is determined, the courts of the forum state will determine whether another state can be exempt from jurisdiction in judicial proceedings. In this regard, the question that the extent to which the courts of the forum state should grant immunity to another state is a long-standing dispute. Before World War I, the mainstream position on state immunity was the absolute immunity theory, which believes that a state enjoys absolute immunity in other states, and after World War II, the mainstream gradually evolved into the restricted immunity theory, by which a foreign state is allowed immunity for *acts iure imperii* only (Harris, 2010)³⁰. Adoption of the restrictive immunity approach introduces the problem of classifying acts as *iure imperii* or *iure gestionis*. And the ICJ had reviewed the relevant issues of state immunity in the Jurisdictional Immunity of the state case (Germany v. Italy).

The background of the case was that the Italian courts affirmed some claims for compensation for Germany's tortious acts in World War II, confirmed that the Greek judgments against Germany can be enforced in Italy, and took measures of constraint against "Villa Vigoni", which is a part of German State property used for non-commercial purposes. The above-mentioned measures triggered a wave of lawsuits in Italian courts against Germany. Therefore, Germany filed an application to the ICJ, requesting the Court to determine that the above-mentioned actions of Italy failed to respect the jurisdictional immunity which Germany enjoys under international law.

In that case, Italy referred to the 1996 amendment to the United States Foreign Sovereign Immunities Act to demonstrate that international law does not accord immunity to a state, or at least restricts its right to immunity, when that state has committed serious violations of the international law. However, the Court noted that this amendment has no counterpart in the legislation of other states. None of the states which has enacted legislation on the subject of state immunity has made provision for the limitation of immunity on the grounds of the gravity of the acts alleged.³¹ Thus, The Court concluded that, under customary international law, as it presently stands, a state is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict.³²

In addition, the Court accepted the proposition that state immunity for *acts iure imperii* continued to extend to civil proceedings for tortious acts. Therefore, the Court still followed the theory of restrictive immunity, that is, the standard for granting immunity is based on the distinction between *acts iure imperii* and *acts iure gestionis*.

In judicial practice, the distinction between the two kinds of acts can be defined either objectively or subjectively. The objective definition is based on the nature of the act: those acts which a state, but not a private person, can do are *acts iure imperii* (Badr, 1984). Whereas, the subjective definition is based on the purpose of the act: not only the public acts of the foreign state but also its highest authorities for specific state reasons as seen

³⁰ Since the 1920s, socialist states and others have come to engage in trading activities (*acts iure gestionis*) as well as exercising the public functions traditionally associated with states (*acts iure imperii*). In response, many states have moved in their practice to the doctrine of restrictive immunity.

³¹ Jurisdictional Immunities of the State (Germany v. Italy), Judgment, I.C.J. Reports 2012, Para. 88.

³² Ibid, Para. 91.

by the foreign state are *acts iure imperii* (Badr, 1984). It is quite clear that the scope of latter category would be larger than the former.

However, regardless of the two definitions, if a foreign government adopts policy to engage in terrorist activities, then the acts should be decided as *acts iure imperii*, because the standard of the two definitions lies in public purpose or nature, not good or evil, justice or injustice. Just like in the Jurisdiction Immunity case, the Court considered Germany's forced labor acts in World War II as *acts iure imperii*.

Therefore, judging from the judgment of the ICJ, the theory of restricted immunity still prevails, and the terrorism exception has gone beyond that theory. Thus, it seems that the legislations and practices of the terrorism exception is not consistent with the current rules of customary international law on state immunity described by the ICJ.

In addition, the terrorism exception reveals to some extent the interaction between the international law of state immunity and state responsibility which is a complex and under-explored topic. As the International Law Commission's Draft articles on Responsibility of states for Internationally Wrongful Acts provides, "every internationally wrongful act of a state entails the international responsibility of that state"³³. Therefore, when a state commits an internationally wrongful act against another state, international responsibility is established immediately as between the two states as ICJ affirmed on several occasions.³⁴ A state's support for terrorism is obviously a serious violation of the basic principles of the UN Charter and the relevant resolutions of the UN Security Council and therefore definitely constitutes an internationally wrongful act and state responsibility entails thereof. According to the Draft articles, an injured state is entitled to invoke the responsibility of another state. Thus, it is self-evident that the invoking of state responsibility concerns inter-state relations mainly through diplomatic channels, not by individual litigations in domestic courts.

The Judgment of the *Al-Adsani v. the United Kingdom* case delivered by the European Court of Human Right implied the complex relationship between state responsibility and state immunity. The applicant, Mr. Al-Adasni, is a dual British/Kuwaiti national who alleged that the English courts, by granting immunity from suit to the State of Kuwait, failed to secure enjoyment of his right not to be tortured and denied him access to a court, contrary to the European Convention on Human Rights. The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, did not accordingly find it established that there is yet acceptance in international law of the proposition that states are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum state.³⁵

In this case, Kuwait had tortured citizens of its own nationality within its territory. As the International Criminal Tribunal for the Former Yugoslavia observed,

It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency.... These treaty provisions impose upon states the obligation

³³ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Article 1, Yearbook of the International Law Commission, 2001, Vol. II, Part Two.

³⁴ *Corfu Channel*, Merits, Judgment, I.C.J. Reports 1949, at p. 23. *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986, p. 142, Para. 283, and p. 149, Para. 292. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Second Phase, Advisory Opinion, I.C.J. Reports 1950, p. 221.

³⁵ *Case of Al-Adsani v. the United Kingdom* (Application No. 35763/97), 21 November 2001, Para. 66.

to prohibit and punish torture, as well as to refrain from engaging in torture through their officials.³⁶

It is clear that torture, as an international crime that seriously violates human rights, is of course a violation of international law, and a state's violation of an international obligation constitutes an internationally wrongful act and leads to international responsibility. In this way, Kuwait should assume state responsibility for its torture as violations of international law, but whether state responsibility can be invoked by bringing lawsuits against Kuwait in a domestic court is questionable. In this case, the European Court of Human Rights decided that since states are entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum state and the application by the English courts of the provisions of the 1978 Act to uphold Kuwait's claim to immunity is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of state immunity, here has been no violation of the European Convention on Human Rights. The judgment implied that state immunity cannot provide a legal basis for a state to try another state's violation of its obligations under international law through its domestic courts. States' violations of international law are resolved by the regime of state responsibility, not through the extension of the extraterritorial jurisdiction of the domestic courts.

Concluding Remarks

In its Judgment on preliminary objections in the Certain Iranian Assets, the ICJ decided it lacked jurisdiction over the most sensitive issue, namely, the legality of the U.S. terrorism exception. Though it is regrettable that the ICJ did not seize the opportunity to clarify the disputed matter, the ICJ was right in that the disputes between the two states did not fall within the scope of its jurisdiction *ratione materiae*. Thus, the debates over the legality of the terrorism exception to state immunity still linger on.

The legislative history of the terrorism exception reveals the opposition of the U.S. Department to the Exception's introduction (Sealing, 2003). Much of this hostility came from the state department's awareness that a similar exception to state immunity was a novelty in international law (Franchini, 2020).

After analysis, it is found that the worries of the state department are justified; the legitimacy under international law of the terrorism exception cannot be justified. First of all, regardless of the priority of territorial jurisdiction, the Exception relies on passive personal jurisdiction which, historically, the United States had regarded as a violation of international law. Second, the Exception is not consistent with the customary international law on state immunity as manifested by the Judgment delivered by the ICJ in the Jurisdiction Immunity case. Third, the responsibilities of the state sponsors of terrorism should be invoked via international channels by the regime of state responsibility, not through the extension of the extraterritorial jurisdiction of the domestic courts.

However, the evolution of state immunity should be noted: Often a new exception to state immunity had begun to appear in the judicial practices of one or several countries, and some other countries may follow suit and finally the new exception became the mainstream. Thus, the former alien may become the norm. Therefore, the future of the terrorism exception needs time to test.

³⁶ Prosecutor v. Furundzija (10 December 1998), Case No. IT-95-17/I-T, (1999) 38 International Legal Materials 317, Para. 144, 145.

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