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Jurisdiction of Iranian Courts to Deal with Civil Lawsuits Against Foreign States

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ABSTRACT

The principle of immunity of state and their property from foreign state courts is a natural consequence of the adoption of the principle of equal sovereignty of states in the International law and the international community. The principle, except with the consent of a state and outside the exceptions generally accepted in international practice, prevents domestic courts to exercise jurisdiction over a foreign state or their property. However, some countries contrary to the exceptions have taken some steps to violate the principle of state immunity through legislative and judicial measures. In this regard, the Iranian government has been the subject of numerous lawsuits in Federal courts of the United States through which it has been sentenced in absentia to pay more than \$ 12 billion. "*The law of Jurisdiction of the Justice of the Islamic Republic of Iran to Deal with Civil Lawsuits against Foreign States*" is countermeasures to deal with the government violated the immunity of the Iranian government or its officials. Regardless of the many conceptual objections on this law, the act is in place to respond to a political rival with strong political incentives and without approaching to the foundations and the concepts of immunity of the state and adopting a clear stance against it. Thus, despite the adoption of this countermeasure, unfortunately, the Iranian government lacks a coherent formulated policy on the subject of the state immunity and in particular on how to deal with the governments violated its immunity.

Keywords: juridical immunity; immunity of high-ranking officials; foreign state; civil lawsuits; Iran's judiciary

1. INTRODUCTION

The principle of sovereign equality of states requires that the sovereignty of other states shall be respected and any of the states are not allowed to exercise jurisdiction against other states. The principle of state immunity as a customary principle in international law has had ongoing developments. Classical changes to this principle have been the subject of numerous papers and documents. Today, it is believed that the state immunity is not absolute and is associated with some exceptions. The exceptions that have customary values include: actions that are commercial with respect to the nature or the purpose, the state ignorance of the immunity, the occurrence of territorial tort including damage to life or property of the individual and is closely and inevitably interconnected to the territorial jurisdiction of the State where the harmful act has been taken place.

But recent developments of the principle, particularly in relation to international terrorism and admission of claims for losses and damages to individuals against a foreign

state in national courts of other states for international terrorism charges, opens a new perspective on the state immunity principle. It seems that the mutation of the principle of "absolute immunity" of the state in domestic courts of other states toward "limited immunity" has not ended and limited immunity is presented using a new and limited meaning and thus covers more examples. This process can to empty the principle of the state Immunity from the inside and actually leave a skin lacking content of it in international relations. However, if this movement is viewed as part of a larger movement that emerged in international relations whereby the sovereignty of states (in favor of international, regional and national authority) is reduced every day, then perhaps the trend would not be considered unusual.

A new exception emerged in legislative and juridical procedures in some states, including the United States of America, will arise many questions. For example, if the exception is compatible with the existing customary principle? Is this exception to the immunity of state can be established over time as part of the common law? Are the new practices so equalized that they can bring the same material element of a international custom (customary norms against former and current norms)? Answering some of these questions is not considered in this article. Answering to some others require the passage of time and the response of other states to this exception.

Despite the emergence of these exceptions, the principle of state immunity with respect to the *acta jure imperii* is still a principle of international custom that is addressed in regional and international conventions, and domestic law of states and there is no exception in that. Violation of this principle may result in violations of international law and consequently follows the international responsibility of the state (Brownlie, 2008).

Continued violation of the principle of state immunity and also of high-ranking officials by the United States which can be objected in numerous ways, has led the Iranian parliament, according to the principle of countermeasure to legislate a law, which allows Iranian judiciary to deal with civil lawsuits against foreign states violated the immunity of the Iranian government or its officials.

The present paper analyzes the aforementioned law.

2. LEGISLATIVE HISTORY OF THE STATE IMMUNITY IN IRANIAN LEGAL SYSTEM

For the first time in 1999 and in the framework of the " *The law of Jurisdiction of the Justice of the Islamic Republic of Iran to Deal with Civil Lawsuits against Foreign States*", Iranian government did not know some foreign states immune from the jurisdiction of the courts of the Islamic Republic of Iran. The law requires that the jurisdiction is awarded through countermeasure. The law was amended in 2000 and finally, in 2012 the new law with the same name " *The law of Jurisdiction of the Justice of the Islamic Republic of Iran to Deal with Civil Lawsuits against Foreign States* " was passed by the Iranian Parliament and replaced the previous law.

The United Nations Convention on jurisdictional immunity of states and their property of 2004, which was signed in 1999 by representatives of the Iranian government, was passed by the Iranian Parliament and approved by the Guardian Council in 2008 and published in an official newspaper dated 6/23/2008. According to Article 9 of the Iranian Civil Code the provisions of the Convention are as Law and the Iranian courts are bound to enforce them.

3. LAWSUITS TO BE RAISED

3.1. Lawsuits against foreign states

Article 1: "Under this law to combat and prevent violations of the regulations and principles of the international law, natural and legal persons can proceed against actions of foreign states that violate jurisdictional immunity of the State of Islamic Republic of Iran or its officials in Tehran Court. In this case, the court is obliged to as a countermeasure handle to the lawsuits and issue the appropriate judgment under the law. List of states subject to countermeasure are provided by the Ministry of Foreign Affairs and announced to the Judiciary.

The subjects of this article are:

A) Damage arising from any action by foreign governments inside or outside Iran which are inconsistent with international law and may lead to death or physical or psychological harm or financial loss of individuals.

B) Damage caused by acts or activities of terrorist individuals or groups inside or outside Iran in which foreign governments are encourage or supporting or provide them with the permit of residence, traffic or activity on their own sovereign territory and these actions led to the death or physical or psychological harm or financial loss.

Note - The list of terrorist individuals or groups will be provided by the Ministry of Intelligence and announced to the judiciary.

Although the purpose of the law proclaimed in the article is to combat and prevent violations of international law, however, the legislator does not mean to support all the rules of international law. The words "actions of foreign states that violate jurisdictional immunity of the State of Islamic Republic of Iran or its officials" and also the words "as countermeasure" can be inferred so that the purpose is to combat and prevent the violation of the principle of jurisdictional immunity of the state and also the principle of immunity of officials by some states, particularly the United States of America. In other words, the action of Parliament in enacting the legislation and also the action of the Iranian courts in admission of lawsuits against particular states, is in order to apply the rule of countermeasure in within of the international responsibility system.

From article 1 can be inferred that the government of the Islamic Republic of Iran is committed to the principle of immunity of state and officials. Membership in the United Nations Convention on jurisdictional immunities of states and their property in 2004, confirms this. Therefore, the Iranian government acts only in the context of countermeasure. The Iranian government has always protested the violation of the principle of jurisdictional immunity by the United States government, and has been present in none of the lawsuits against the government in the courts of this country and treats the legislations, adoption of proceedings and judgments as violation of international law. Therefore, according to Iranian government, the exceptions to the principle of state immunity should be searched only within the framework of the Convention rules or general customary international law.

However, since the Iranian government accepts proceedings against foreign governments in its court in the form of countermeasure, it must adhere to the rules governing the resort to countermeasures expected in the international responsibility system of the state.

Article 1 recognizes two types of civil lawsuit against a foreign state by individuals:

First, the proceedings for damage arising from any action by foreign governments inside or outside Iran which are inconsistent with international law and may lead to death or physical or psychological harm or financial loss of individuals.

Torts committed by a foreign government that resulted in damage to natural or legal persons are among, non-commercial functions of the governments and constitute one of the exceptions of states immunity. Accordingly, the government should be responsible for compensation for damage caused by its behavior in the territory of another state, since any loss should be compensated and no harm should remain uncompensated. That is why the state immunity is inexcusable. (Lauterpacht, 1951)

According to Article 12 of the UN Convention on Jurisdictional Immunities of States and their Property, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission

According to Article 12 and the jurisprudences of State (Hafner, Kohen, Breau, 2006), conditions for the exercise of jurisdiction in torts committed by the government, are territorial relation and the presence of the perpetrator at the time when the tort is committed.

In comparison with Article 12 of the UN Convention on Jurisdictional Immunities of States and their Property, Article 1 of Iranian code narrows the scope of the government's actions and considers only violating acts according to international law that lead to the aforementioned damage. However, Article 12 of the Convention does not have such condition, and it is not necessary the government action be wrongful in terms of international law.

Basically civil responsibility arising from the tort is the outcome of inadvertent or unintentional actions which results in damage to persons or property. However, none of local documents and laws and jurisprudence relating to tort, separate tort arising from the exercise of *acta jure imperii* and the tort arising from the exercise of *acta jure gestionis* and has emphasized on the jurisdiction of the courts of the states in tort committed by foreign governments (Trooboff, 1987).

International Court of Justice in the case of Germany against Italy has stated that none of national legislatures enacted a provision on territorial tort exception have distinguished explicitly the exercising of *acta jure imperii* from that of *acta jure gestionis* (ICJ Reports, 2012). Article 11 of the European Convention on State Immunity in 1972 and Article 12 of the UN Convention on Jurisdictional Immunities of States and their property have not anticipated such a distinguishing. However, the International Law Commission on the interpretation of Article 12 has stated that this was a conscious choice, and the purpose of this regulation is not to be limited to *acta jure gestionis* (YILC, 1991). However, some countries, including Germany and USA have believed that Article 12 does not reflect the common law. (ICJ Reports, 2012)

On the other hand, the Article 1 of the Iranian law says that the damage caused by internationally wrongful acts outside of Iran can be prosecuted by the court, that means according to the Iranian law conditions of the territorial relation and the presence of the perpetrator at the time of the commission of a tort are not necessary. As the article 1 of Iranian law is expressing the countermeasure, failure to comply with these conditions will be acceptable. In fact, the state that take countermeasure can non-perform its international obligations in accordance with the conditions to resort to countermeasures against the offender. In Article 50 of the Draft of State Responsibility only diplomatic and consular immunity will not be affected by countermeasures.

Unlike Article 12 of the UN Convention on Jurisdictional Immunities of States and their Property and also domestic regulations of the states that only material damages can be sought against a foreign state in the court, under Iranian law, psychological and moral damage can also be received. The rejection of moral damage in the international documents is due to the fact that the accepting of the possibility of a lawsuit to claim moral damage will mainly make the foreign governments the target of non-real claims which is against independence, courtesy and good international relations. On the other hand, one should avoid providing broad interpretation increasing the scope of the exceptions to the principle of immunity. (Abdullahi and Shafi'i)

Second, the proceedings for damage caused by acts or activities of terrorist individuals or groups inside or outside Iran in which foreign governments are encourage or supporting or provide them with the permit of residence, traffic or activity on their own sovereign territory and these actions led to the death or physical or psychological harm or financial loss.

It seems that recognizing this type of lawsuits by Iranian law is to deal with the Anti-Terrorism and Effective Death Penalty Act of 1996, which amended the FSIA to allow individuals to sue state “sponsors” of terrorism in US courts. The acts cover include “torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources is [used] by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency. However, the jurisdiction will be subject to the countries that are announced by the State Department of the United States as the sponsor of terrorism. In this regard, Cuba, North Korea, Sudan, Libya, Iraq, Syria, and Iran have been designated by the State Department of the United States as the sponsors of terrorism.

For the legitimacy of the United States Anti-Terrorism Act, the rules of the international law on state immunity, especially regulations relating to tort of foreign government can be cited. United Nations Convention on Jurisdictional Immunities of States and their Property and also the customary rule allow the exercise of jurisdiction in territorial tort. None of the domestic law of the states enacted on jurisdictional immunity of foreign states have not applied jurisdiction of the courts to extra-territorial tort (Abdollahi and shafei). From the perspective of some, however international human rights and development of the human rights discourse, in the form of tort exception, have destroyed the state immunity for violations of human rights legislation. But as the International Court of Justice states, due to the substantive characteristics of the peremptory norms (*jus cogens*), no theoretical conflict is conceivable with procedural rule of state immunity. No positive approach is available to discard immunity in case of extra-territorial violations of peremptory norms of human rights (ICJ Reports, 2012).

Iranian law is different from the Anti-Terrorism Act of the United States from two perspectives. Iranian law only speaks about encouragement, support and the allowing of terrorist individuals or groups residing or traveling in the realm of governance and does not speak about the direct involvement of employees, agents or representatives of foreign governments in terrorist act. While both case is mentioned in United States Act. In fact, from the perspective of the Iranian law, the criterion for the attributing of the act of these people to the state is general control criterion. In Article 8 of the Draft of International Responsibility of the States for Internationally Wrongful Acts cases in which the act of the individuals or groups is attributable to the state include government control over the action of the individuals. International Law Commission in its interpretation according to the jurisprudence

of the International Court of Justice speaks of effective control rather than general control (YILC, 2001).

Terrorist acts are specified in the United States Act, but the Iranian law speaks of the terrorist individuals or groups rather than terrorist acts which might occur in the form of terrorist groups or non-terrorist groups. In these cases, the most important issue is determining whether the group is a terrorist or not. And the list of terrorist individuals or groups will be provided by the Ministry of Intelligence and announced to the judiciary.

3.2. Lawsuits against representatives or high-ranking officials

In addition to the possibility of a lawsuit against a foreign state, the Iranian law in Article 7 also addresses lawsuit against representatives or officials.

Article 7: lawsuits against representatives or officials or institutions associated to or controlled by a foreign government, with respecting the principle of countermeasure, can be handled if the damage caused by the actions is the subject of this law.

First, there must be a distinction between immunity of foreign states and immunity of heads of government on one hand, and the immunity of state officials and representatives. International Court of Justice in the case of Congo against Belgium stresses on this general principle that the high ranking government officials, including the president, the prime minister, or the foreign ministers as diplomatic and consular officers in other countries enjoy criminal and civil immunity (ICJ Reports, 2002).

Immunity of high ranking officials of the states has two different dimensions. First, they are immune due to their official duties, that such immunity is often associated with jurisdictional immunity of the state. In the interpretations of the International Law Commission it is referred to as the immunity due to the performance of official duties. (YILC, 1991)

Second, they are immune due to their individuality and their personal activities, namely because of the special place that they possess in the international relations. This immunity applies to all personal and official acts performed by a government official, whether before or during the tenure of the office (Wirth, 2002).

The important note is that immunity resulting from performing official duties continues after the closure or termination of the individual's work, but the immunity by their individuality ends after the end of official duties. (YILC, 1991)

Jurisdictional immunity of the state is bound to *acta jure imperii*, however, the heads of the states and governments and foreign ministers serving have absolute immunity in foreign national courts (Khalf Rezai and Abdollahy).

From the perspective of the United Nations Convention on Jurisdictional Immunities of States and their Property, definition of the state includes representatives of the State acting in that capacity that naturally, high-ranking officials are also in this category. However, the immunity of high-ranking officials due to their individuality is prescribed in the rules of customary international law.

In Article 7, Iranian legislator has not paid attention to this separation. If the lawsuit is filed against high ranking officials or representatives of the government to carry out their official duties, the lawsuit is necessarily deemed against the related government (YILC, 1991). But the lawsuits against high-ranking officials, is independent of the lawsuits against the government and thus in the framework of countermeasure the Iranian courts are competent to deal with the lawsuits.

It is not clear why the lawsuits against entities related to or controlled by foreign governments have been stated in the article. In the United Nations Convention on Jurisdictional Immunities of States and their Property, 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 are in the framework of state definition. Also, according to Article 5 of Draft of State Responsibility, the actions of persons or entities that exercising elements of the governmental authority is attributable to the State. Thus lawsuit against their actions is in the framework of the lawsuit against the state.

However, according to Article 7, all lawsuits mentioned in this article can be addressed if their subject is the damage caused by acts contrary to international law or by the actions of terrorist individuals or groups, like lawsuits against the state.

4. THE CONDITIONS OF LAWSUIT COMPLAINANTS

People who are competent to lawsuit against a foreign state have been specified in the Article 6:

1. The injured party or his or her descendants who were Iranian nationals at the time of the accident or the lawsuit
2. The injured party who was in the employment of the Government of the Islamic Republic of Iran when the damage occurred.

5. LAWSUITS AGAINST AN ASSISTING FOREIGN STATE

If other states assist and cooperate for the enforcement of the judgments violating the immunity of the Islamic Republic of Iran or its officials, they are also subject to the provisions of this Law (Article 3). The issue of aid or assisting in the commission of a wrongful act is addressed in the Article 16 of the Draft of International responsibility of States in 2001. Such a situation occurs when a state voluntarily assists another state in violates the international obligations by the latter. In such a case, the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. (YILC, 2001).

6. THE ISSUE OF IMMUNITY OF ENFORCEMENT ACTIONS

According to Article 8 of the Iranian law, *“the property belonging to government or its officials or agents or institutions related to or controlled by a foreign government included in this law, with respect to the principle of countermeasure, is not immune from the enforcement actions”*. It should be noted that immunity from enforcement actions are generally distinct from judicial immunity. State practice is various regarding the immunity of enforcement actions. Some states on this type of immunity have accepted absolute immunity and only the exception of the wavering of immunity. Some states, led by the United States such as the UK, Australia, Canada and France have accepted the theory of limited immunity in immunity from enforcement actions, and thus the execution of the regulations resulting from the exception of commercial activities and tort of foreign governments are generally allowed (Abdullahi and

Shafi'i). In Article 8 of the Iranian law, granting this type of immunity is provided by countermeasure.

7. CONCLUSION

Regardless of the many conceptual objections on this law, the act is in place to respond to a political rival with strong political incentives and without approaching to the basis and the concepts of immunity of state and adopting a clear stance toward it. According to historical experience, it seems that such laws are abolished by the same intensity and speed as they are enacted, and are rarely able to bring the basis of a legal order. But in contrast, laws enacted carefully and in which foundations of the rule and the needs to solve the problem are considered, can be more trusted as a basis to establish an order.

Undoubtedly, none of the international legal issues can be separated from the political background or connections in all aspects and be viewed from a pure legal perspective, because there is a manifestation of the state, its wishes and desires in all international relations. However, the viability and the reliability of the legal rule will further, whatever it is separated from the effects of political relationship and its structure is based on the legal logic (against political logic, the logic of the best interest and the benefit).

Domestic laws of immunity of other states is actually the area of conflict between these two logics and the logics are well dueling in the legal architecture of these laws. Unfortunately, in *The law of Jurisdiction of the Justice of the Islamic Republic of Iran to Deal with Civil Lawsuits against Foreign States*, it is clearly apparent that in the contrast between these two logics, the legal logic has been on the sidelines. Finally, it can be summed up in one sentence that if the law wants to bring the basis of the legal order of immunity of foreign states in the Iranian legal system, it is obliged to get closer to the basis of the concept and reduce its dogma and political burden and be adorned with legal logic.

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