

Research Article

RIGHT OF VICTIMS OF TERRORISM TO COMPENSATION AGAINST THE PRINCIPLE OF JURISDICTIONAL IMMUNITY OF A FOREIGN STATE

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ABSTRACT

Background: Terrorist attacks in various parts of the world have resulted in thousands of victims, injuries and property losses. It is acknowledged that several of these attacks were likely sponsored or facilitated by state actors or committed by movements supported by governments.

In light of this, it has become necessary for the international community to adopt a multilateral and comprehensive international agreement to combat terrorism and mitigate its effects—particularly following the adoption of the Pact for the Future by the United Nations General Assembly at its seventy-ninth session. Action 23 of the Pact, in Paragraph (c), calls for “revitalising efforts towards the conclusion of a comprehensive convention on international terrorism.”¹

Methods: This study employed a deductive approach by examining and analysing various domestic judgements from the United States, the UK, Germany, France, Switzerland, Austria, Canada, Italy, Ukraine, Poland, Greece, China and India, as well as scholarly commentary by authors and jurists. It also involved reviewing relevant international agreements and exploring the possibility of integrating provisions from both foreign state immunity frameworks and international judicial cooperation agreements. The aim was to address the problem of protecting states from liability for supporting terrorism while proposing an effective legal formula to enable victims of terrorism to obtain compensation. The anti-terrorism exceptions incorporated into the state immunity acts of the United States and Canada were also examined.

1 The Pact for the Future (adopted 22 September 2024 UNGA Res 79/1) para 44 <<https://docs.un.org/en/A/RES/79/1>> accessed 23 May 2025.

Results and conclusions: *The study concludes that state immunity is a well-established principle in both written and customary international law and has gained acceptance by various national judicial systems. However, both national and international jurisprudence and courts have shown hesitation to adopt an anti-terrorism exception, as such an adoption would entail a violation of the international rule of immunity and could lead to discriminatory treatment between states, despite the inherent fairness of holding terrorist-supporting states accountable.*

Therefore, this study proposes a set of legal provisions to be included in any multilateral international agreement on combating terrorism, as well as in related international agreements.

1 INTRODUCTION

In the past, states had general immunity for their kings, emperors and messengers.² The principle of *par in parem non habet imperium* originally dates back to Roman law, which formed the foundation and historical basis of the principle of state immunity.³ The rules governing this immunity began to take their form and diverge later. Lauterpacht described state immunity as:

“Like the jurisdictional immunity of a domestic state, it is against the broader principle which accepts the submission of state institutions to the normal legal practice as it is directed by the courts.”⁴

The concept of state immunity has generally evolved through the various immunities recognised with regard to ambassadors, warships and heads of state. The need to protect representatives of foreign states led to the development of diplomatic immunity.⁵ The presence of warships of states in the ports of other states in times of peace sometimes required recognition of those ships’ immunity from local jurisdiction.⁶ Similarly, visits by kings and princes required the development of rules relating to their immunity and the inviolability of their property and entourage, as well as immunity from being sued in local courts.⁷

2 Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (3rd edn, OUP 2008) 256.

3 Xiaodong Yang, *State Immunity in International Law* (Cambridge Studies in International and Comparative Law, CUP 2012) 52.

4 Hersch Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’ (1951) 28 *British Yearbook of International Law* 237.

5 Denza (n 2).

6 *Schooner Exchange v McFaddon* [1812] 11 US 116 <<https://supreme.justia.com/cases/federal/us/11/116/case.htm>> accessed 23 May 2025; ILC, ‘Draft Articles on Jurisdictional Immunities of States and their Property and commentaries thereto’ [1991] *Yearbook of the ILC* 2(2)/13, 24, art 6; 50, art 16.

7 Ian Brownlie, ‘Contemporary Problems Concerning Immunity of States: Preliminary Report’ (1987) 62(1) *Annuaire de l’Institut de Droit International* 45, 49.

Today, the principle of state immunity in the international legal order still prevents the adjudication of cases involving states as parties. Although there are various international dispute settlement bodies worldwide, including the International Court of Justice, these bodies still lack a mechanism in international law; the execution of judgments is subject to the good faith of states.⁸

Based on this principle of immunity, lawsuits against states that sponsor terrorist attacks cannot be heard by domestic courts. Nonetheless, many such lawsuits have been filed in domestic courts against foreign governments. The right of litigation in these cases is often hampered by the principle of state immunity.

This paper examines the evolution of the principle of immunity, from its original approach to its current restrictive one. It further highlights the adoption of the anti-terrorism exception by a number of states. It analyses the feasibility of establishing a legislative custom to combat state support for terrorism.

2 DEVELOPMENTS OF THE JURISDICTIONAL IMMUNITY OF STATES

The principle of state immunity has developed in two stages: the absolute immunity stage and the restricted immunity stage. The absolute doctrine grants the state—along with its institutions, agencies and properties—complete immunity from any lawsuit, seizure or confiscation. This immunity is not subject to any exception except in rare cases. The restricted doctrine is the doctrine that limits immunity from prosecution to sovereign government actions, and from execution to property owned exclusively for sovereign purposes, excluding any commercial or private activity and any property owned for commercial purposes.

The principle of jurisdictional immunities of states and their property emerged primarily at the levels of national jurisprudence and international law with the declaration by US Chief Justice John Marshall in 1812. In the case concerning *The Schooner Exchange*, a vessel belonging to the French Imperial Navy, Marshall held that the ship was immune from seizure or any other legal action due to the principles of sovereignty and the need to maintain friendly relations between nations—a rationale he explained in his ruling.⁹

In the broader context of extending the provisions of immunity to all state ships—warships and non-warships—several opinions have supported the view that ships owned, managed or operated by the government for the purpose of engaging in trade, whether to promote

8 Carter of the United Nations (1945) <<https://www.un.org/en/about-us/un-charter>> accessed 23 May 2025. Article 94, para 2 stipulates that 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.'

9 *Schooner Exchange v McFaddon* (n 6).

the commerce of its people or to secure income for the treasury, should be considered as public ships on an equal footing with warships.¹⁰

During the nineteenth century, a fluctuation occurred between the absolute and restricted doctrines of state immunity. Over time, state immunity began to retract, and increasing interest began in the issue of exceptions to immunity. The increasing activity of states in the economic field, specifically the expansion of state trade, made it necessary to exclude non-governmental actions *acta jure gestionis* from enjoying state immunity.¹¹

British courts continued to adhere to absolute immunity and did not recognise the commercial exception.¹² However, over time, British courts gradually shifted from the application of the absolute doctrine towards the restricted doctrine; they were more willing to deny immunity to independent commercial entities.¹³ This shift culminated in the enactment of the State Immunity Act in 1978, which formally adopted the restricted doctrine of immunity in the United Kingdom.¹⁴

Similarly, Germany continued to adhere to the absolute doctrine until after World War II. In 1921, its courts upheld the immunity of a merchant ship owned by the US government.¹⁵ However, German courts later moved to restrict immunity concerning cases to which a state was a party, especially after Germany ratified the Brussels Convention of 1926 on the immunity of state-owned vessels.¹⁶ German courts began to adopt a more restrictive approach by applying the restrictive doctrine, particularly involving private and maritime law activities conducted by states.¹⁷

The European Court of Human Rights has, in several cases, adopted an attitude that state immunity achieves a legitimate aim through promoting courtesy and friendly relations between states.¹⁸ Accordingly, the Court ruled that limiting an individual's right to access

10 *Berezzi Bros Co v SS Pesaro* [1926] 271 US 562, 574 <<https://supreme.justia.com/cases/federal/us/271/562>> accessed 23 May 2025.

11 Yang (n 3) 35.

12 *Mighell v Sultan of Johore* [1894] 1 QB 149. The Court of Appeal made it clear that by applying the precedent of *Parlement Belge*, the question should not arise as to whether the private or commercial nature of the state's activities deprived it of immunity. Hazel Fox, *The Law of State Immunity* (2nd edn, OUP 2008) 261.

13 *Trendtex Trading v Bank of Nigeria* [1977] 1 QB 529; ILC, Draft Articles on Jurisdictional Immunities (n 6) 25.

14 UK State Immunity Act 1978 (1978 c 33) ss 3–11 <<https://www.legislation.gov.uk/ukpga/1978/33>> accessed 23 May 2025.

15 Yang, (n 3) 17, 475.

16 International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels (signed 10 April 1926) [1937] LNTS 176/199.

17 Yang (n 3) 35, 496.

18 *Fogarty v United Kingdom* App no 37112/97 (ECtHR, 21 November 2001) para 34 <<https://hudoc.echr.coe.int/eng?i=001-59885>> accessed 23 May 2025; *McElhinney v Ireland* App no 31253/96 (ECtHR, 21 November 2001) para 37 <<https://hudoc.echr.coe.int/eng?i=001-59887>> accessed 23 May 2025.

court in consideration of the sovereignty of other states can constitute a proportionate measure.¹⁹ On the other hand, it confirmed that the court must examine the nature of the transaction in the case, and the rules of customary international law applicable to the issue of the acceptability of the case.²⁰

In the United States, the approach to state immunity was historically characterised by referral of cases to the State Department to decide on granting state immunity—thus deterring the cases from the executive power. Courts would typically adhere to the State Department's suggestions in this regard.²¹ This approach led to the issuance of the Tate Letter in 1952, which, for the first time, demonstrated the restrictive theory of foreign state immunity.²²

Following the Tate Letter, the US administration officially embraced the restrictive approach, allowing for the denial of immunity in cases involving the commercial activities of foreign governments. However, the Tate Letter was very general and failed to mention several matters. Notably, it did not address the question of immunity from enforcement, and subsequent case law suggested that courts continued to adhere to the absolute approach.²³

Due to these shortcomings, momentum grew for transferring the determination of immunity from the executive to the judiciary. This culminated in the enactment of the Foreign State Immunity Act (hereinafter referred to as the FSIA) in 1976, which adopted the restrictive doctrine.²⁴ The FSIA divided immunity into two categories: immunity from jurisdiction, covered in Sections 1604-1607, and immunity from execution, addressed in Sections 1609-1611. Section 1604 states that "a foreign state shall be immune from the jurisdiction of the courts of the United States..." while Section 1609 and the following sections indicate clearly that immunity from execution is separate from jurisdictional immunity. Therefore, a waiver of execution must be granted and cannot be inferred solely from a waiver of jurisdictional immunity.

Despite efforts to remove the executive branch from immunity determinations, the US administration continues to play an important role under the FSIA. This is due to its

19 Committee of Legal Advisers on Public International Law, *State Immunity under International Law and Current Challenges: Proceedings of the Seminar, Strasbourg, 20 September 2017* (CAHDI 2017) 20.

20 *Oleynikov v Russia* App no 36703/04 (ECtHR, 14 March 2013) paras 71, 72, 73 <<https://hudoc.echr.coe.int/eng?i=001-117124>> accessed 23 May 2025.

21 In the abovementioned *Schooner Exchange* case, the US Attorney presented a 'suggestion' of immunity to the court, and since the early nineteenth century it has been the practice of the courts to refer the matter to the US administration. See, Fox (n 12) 219.

22 US Department of State, 'Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments: letter of 19 May 1952 addressed by the Department of State's Acting Legal Adviser Jack B Tate to the Acting Attorney General Phillip B. Perlman' [1952] Department of State Bulletin 26/984 (Tate letter).

23 Fox (n 12) 220.

24 US Foreign Sovereign Immunity Act 1976 (FSIA), Public Law 94-583 (21 October 1976) <<https://www.congress.gov/bill/94th-congress/house-bill/11315/text>> accessed 23 May 2025.

continued interference in cases where a foreign state is a party, as well as the courts' continued referral to the administration in determining whether immunity should be granted.²⁵ The US administration often appears as *amicus curiae* in cases of great importance to its interests.²⁶

Globally, although the principle of state immunity has evolved—and the scope of protection afforded to states and their property has narrowed—many countries still tend to adopt broader immunity. For example, Eastern European countries have generally avoided addressing the topic within their jurisdictions.²⁷ This may be attributed to the legacy of communist era policies, which aimed to protect state property beyond their borders through the principle of reciprocity. Even following the collapse of communist regimes in Eastern Europe, the Supreme Court of Poland refused to consider the violations of *jus cogens* of international law as an exception to state immunity.²⁸

However, a notable shift has occurred in Ukraine in response to the 2022 Russian invasion. The Ukrainian judiciary, including the Supreme Court, has relied, *inter alia*, on the territorial tort principle.²⁹

Elsewhere, Indian law permits the prosecution of a foreign state in limited circumstances, provided for in Subsection 86(2) of the Civil Procedure Code.³⁰ In China, the restrictive doctrine was not adopted until recently, when the Chinese Congress enacted the Foreign State Immunity Law on 1 September 2023.³¹

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- 25 Joseph W Dellapenna, *Suing Foreign Governments and their Corporation* (2 edn, Brill Nijhoff 2003) 44, 49.
- 26 *Tel Oren v Libyan Arab Republic* [1984] 726 F 2nd 774, 233 US App DC 384 <<http://uniset.ca/other/cs4/726F2d774.html>> accessed 23 May 2025; *United States v Noriega* [1990] 746 F Supp 1506 (SD Fla) <<https://law.justia.com/cases/federal/district-courts/FSupp/746/1506/1757098/>> accessed 23 May 2025; *Lafontant v Aristide* [1994] **844 F Supp 128 (EDNY)** <<https://law.justia.com/cases/federal/district-courts/FSupp/844/128/1523518/>> accessed 23 May 2025.
- 27 Cristina Elena Popa Tache, 'State Immunity, Between Past and Future' (2023) 6(1) *Access to Justice in Eastern Europe* 98, doi:10.33327/AJEE-18-6.1-a000121.
- 28 Roman Nowosielski, 'State Immunity and the Right of Access to Court: The Natoniowski Case Before the Polish Courts' (2010) 30 *Polish Yearbook of International Law* 271-2.
- 29 Telyzaveta Badanova, 'Jurisdictional Immunities v Grave Crimes: Reflections on New Developments from Ukraine' (*EJIL:Talk!*, 28 September 2022) <<https://www.ejiltalk.org/jurisdictional-immunities-v-grave-crimes-reflections-on-new-developments-from-ukraine/>> accessed 5 June 2025; Case No 308/9708/19 (Supreme Court of Ukraine, 14 April 2022) <<https://reyestr.court.gov.ua/Review/104086064>> accessed 5 June 2025.
- 30 Sonal Sharma, 'Sovereign Immunity in India - Absolute or Qualified?' (*Kluwer Arbitration Blog*, 4 June 2014) <<https://arbitrationblog.kluwerarbitration.com/2014/06/04/sovereign-immunity-in-india-absolute-or-qualified/>> accessed 4 June 2025.
- 31 Tony Dymond and others, 'China's New Foreign State Immunity Law Targets Commercial Assets and Transactions' (*Debevoise & Plimpton*, 16 January 2024) 1-2 <<https://www.debevoise.com/insights/publications/2024/01/chinas-new-foreign-state-immunity-law-targets>> accessed 4 June 2025.

Currently, almost only Western jurisdictions have adopted the restrictive doctrine through either legislation or judicial practice. Nonetheless, jurisdictional immunity still plays a significant role in protecting states; this aspect can be observed in arbitration cases to which states are parties, where domestic courts are still not certain.³²

At the multilateral level, although not yet in force, the 2004 UN Convention on Jurisdictional Immunities of States and Their Property³³ represents a significant achievement. The European Convention, adopted in 1972, remains the only international convention currently in effect regarding state immunity.³⁴ It has had a significant impact on the development of the principle of state immunity.³⁵

Importantly, the 2004 UN Convention excludes immunity for diplomatic missions, their officials, and consular posts and their officials and "...immunities accorded under international law to heads of State *ratione personae*."³⁶

3 EXCEPTIONS TO STATE IMMUNITY IN TERRORISM CASES AT THE DOMESTIC LEVEL

Both the United States and Canada have amended their domestic foreign state immunity legislations to allow victims of terrorism to sue the governments that support terrorist acts.³⁷ While other countries considered the matter through their courts without enacting specific legislation on it.

32 Popa Tache (n 27) 99; Hannepes Taychayev and Gladwin Issac, 'Is the Last Bastion of State Immunity Under Siege?: Some Reflections on the English High Court's Decision in *General Dynamics v Libya*' (*Kluwer Arbitration Blog*, 12 September 2024) <<https://arbitrationblog.kluwerarbitration.com/2024/09/12/is-the-last-bastion-of-state-immunity-under-siege-some-reflections-on-the-english-high-courts-decision-in-general-dynamics-v-libya/>> accessed 22 May 2025.

33 United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004 UNGA Res 59/38) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en> accessed 22 May 2025.

34 *ibid*, UN treaty status.

35 European Convention on State Immunity (adopted 16 May 1972) ETS 74.

36 UN Convention on Jurisdictional Immunities (n 33) art 3, paras 1, 2.

37 US Antiterrorism and Effective Death Penalty Act 1996 (AEDPA), Public Law 104-132 (24 April 1996) <<https://www.congress.gov/bill/104th-congress/senate-bill/735/text>> accessed 26 May 2025; US Justice Against Sponsors of Terrorism Act 2016 (JASTA), Public Law 114-222 (28 September 2016) <<https://www.congress.gov/bill/114th-congress/senate-bill/2040/text>> accessed 26 May 2025; Canada Justice for Victims of Terrorism Act (JVTa) SC 2012, c 1, s 2 (13 March 2012) <<https://laws-lois.justice.gc.ca/eng/acts/J-2.5/>> accessed 26 May 2025.

3.1. US Legislative Exceptions to Sovereign Immunity in Terrorism Cases

The 1996 Antiterrorism and Effective Death Penalty Act (hereinafter AEDPA) granted jurisdiction to American courts over certain terrorist acts, even if they occurred abroad, thereby exceeding the territorial jurisdiction of the American courts contrary to the text of subparagraph (a)(5) of Section 1605 of FSIA which waives immunity from the jurisdiction only in cases:

“... in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property—occurring in the United States—and caused by the tortious act or omission of that foreign state...”³⁸

Through this amendment, subparagraph (a)(7) was added to Section 1605, depriving a foreign state engaged in supporting terrorist acts of immunity.³⁹ This amendment has been applied in most cases before the United States courts to Iran.⁴⁰ A corresponding amendment was made to Section 1610, allowing the attachment of the foreign state's property to enforce a judgment, provided the state's immunity has been waived in accordance with the provisions of the Section above.⁴¹

Notably, this exception applies exclusively to lawsuits filed by American citizens. Based on this amendment, lawsuits have been initiated against Syria, Iraq, Sudan, Cuba and Iran.⁴²

38 FSIA (n 24) art 1605, spara (a)(5).

39 ibid, art 1605, spara (a)(7).

40 *Oveissi v Islamic Republic of Iran* [2009] 573 F 3rd 835 (DC Cir) <<https://callidusai.com/wp/ai/cases/187411/oveissi-v-islamic-republic-of-iran>> accessed 23 May 2025; *Brewer et al v Islamic Republic of Iran et al* [2009] 664 F Supp 2nd 43 (DDC) <<https://www.casemine.com/judgement/us/591465edadd7b04934295756>> accessed 23 May 2025; *Wachsmann v Islamic Republic of Iran* [2009] 603 F Supp 2nd 148 (DDC) <<https://www.casemine.com/judgement/us/591467c4add7b049342b8804>> accessed 23 May 2025; *Wanger v Islamic Republic of Iran* [2001] 172 F Supp 128 (DDC), 134, n 7 <<https://case-law.vlex.com/vid/wagner-v-islamic-republic-886226605>> accessed 23 May 2025; *Nikpin v Islamic Republic of Iran* [2007] 471 F Supp 2nd 53 (DDC) <<https://case-law.vlex.com/vid/nikbin-v-islamic-republic-893701066>> accessed 23 May 2025.

41 AEDPA (n 37) s 221, para (b) (1) (B).

42 *Baumel v Syrian Arab Republic* 1:06-cv-00682 [2009] DDC <<https://www.courtlistener.com/docket/4204562/idb/baumel-v-syrian-arab-republic/>> accessed 25 May 2025; *Gates, et al v Syrian Arab Republic, et al* No 08-7118 [2011] 646 F 3d 1 (DDC) <<https://law.justia.com/cases/federal/appellate-courts/cadc/08-7118/08-7118-1308962-2011-05-20.html>> accessed 25 May 2025; *Simon v Republic of Iraq* [2008] 529 F 3rd 1187 (DC Cir) <<https://callidusai.com/wp/ai/cases/187177/simon-v-republic-of-iraq>> accessed 25 May 2025; *Rux v Republic of Sudan* [2009] 672 F Supp 2nd 726 (ED Va) <<https://www.casemine.com/judgement/us/59146582add7b0493428d6af>> accessed 25 May 2025; *Saludes v Republica de Cuba* [2009] 655 F Supp 2nd 1290 (SD Fla) <<https://www.casemine.com/judgement/us/5914b155add7b04934758a84>> accessed 25 May 2025; *Kirschenbaum v 650 Fifth Ave & Related Props* [2017] 257 F 3rd 463 (SDNY) <<https://case-law.vlex.com/vid/kirschenbaum-v-650-fifth-889036149>> accessed 25 May 2025.

What distinguishes this amendment is the lack of any requirement for territorial connection to the territory to the United States. This may reflect the passive personality principle in American law, which allows US jurisdiction over any crime committed against an American national abroad. Under this principle, American courts may judge any negligent act issued by a foreign country that causes harm to an American national anywhere in the world.⁴³ This approach can be aligned with the universal jurisdiction of national courts related to serious international crimes—such as war crimes, crimes against humanity, and genocide—when no traditional criterion for exercising ordinary criminal jurisdiction, such as the place where the crime occurred or one of the acts that constitute it, or the nationality of the perpetrator exists.⁴⁴

The most prominent aspect of ignoring the territorial provision is the absence of any requirement for territorial connection in enforcement, not even a link between the funds and the activity underlying the lawsuit, nor a requirement that the assets be owned by the institution or government agency against which the lawsuit was filed. This marks a complete departure from the traditional American approach to execution against foreign state property, which is among the strictest globally in requiring a territorial connection.⁴⁵ This provision is derived from the explicit text of Section 1610(a), which states the following:

“The property in the United States of a foreign state, ... used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a state after the effective date of this Act, if

(2) the property is or was used for the commercial activity upon which the claim is based...”

Trooboff has pointed out that the provision of connection is necessary to prevent an influx of lawsuits against foreign states in the United States which—in his opinion—could lead to undermining diplomatic relations.⁴⁶

It must be emphasised that the US State Department must have designated the foreign state targeted by the amendment as a State Sponsor of Terrorism at the time of the act—or as a

43 Curtis A Bradley, 'Universal Jurisdiction and US Law' (2001) 2000 University of Chicago Legal Forum 323.

44 Most countries adopt the universal jurisdiction provision, including: Bosnia and Herzegovina, South Korea, the Russian Federation, Sudan, Ukraine, the United Kingdom, and the United States of America, see the list of countries according to their adoption of universal jurisdiction, and the crimes they cover. 'Universal Jurisdiction: A Preliminary Survey of Legislation Around the World - 2012 Update' (*Amnesty International*, 9 October 2012) IOR 53/019/2012 <<https://www.amnesty.org/en/documents/ior53/019/2012/en/>> accessed 25 May 2025.

45 FSIA (n 24) s 1605, para (a)(7), s 1610, paras (a)(7), (b)(2), (g)(1).

46 Peter D Trooboff, *Foreign State Immunity: Emerging Consensus on Principles* (Recueil des Cours de l'Académie de droit international de La Haye (R de C) 200, Brill Nijhoff 1986) doi:10.1163/1875-8096_pp1rdc_A9789024736447_03; Fox (n 12) 83.

consequence of the act—in accordance with the provisions of Sections 1605(a)(7)(A) and 1605A(a)(2)(A)(i)(I) of FSIA.⁴⁷

This exception has been criticised by many researchers.⁴⁸ In particular, the discretion given to the executive—i.e. the US administration—to consider states as supporters of terrorism, thereby determining the application of the immunity exception, effectively revives the very problem the FSIA of 1976 sought to eliminate: the executive's power to control the judicial determination of state immunity. US courts themselves have expressed their concerns about the deficiencies of the AEDPA.⁴⁹

This represents the situation at both the political and legal levels in the United States. On the international level, it appears that the legal mechanism employed in the fight against terrorism must, to be effective, align with the principles of justice. It would be inconsistent with justice to authorise the executive authority of a state to issue decisions that entail legal and judicial consequences for parties to legal relations, without appropriate judicial scrutiny.

In this context, the International Court of Justice established important jurisprudence in its judgement issued on 3 February 2012, in which it held Italy responsible for violating the immunity Germany enjoys under international law.⁵⁰

The US subsequently enacted the Justice Against Sponsors of Terrorism Act (hereinafter JASTA) on 28 September 2016, legislation that sparked political and legal controversy. JASTA was enacted primarily to enable lawsuits filed by victims of the 11 September 2001 attacks and their families.⁵¹ Section 3 of JASTA added Section 1605B to the Foreign Sovereign Immunities Act (FSIA) of 1976. One of the most important features of this amendment is that it lifts the immunity of foreign states without requiring a determination by the executive branch regarding whether the state in question is considered a supporter of

47 The countries designated by the US State Department as sponsors of terrorism are: Cuba, North Korea, Iran, Iraq, Sudan, Syria, and Libya, but it later removed the names of Iraq, Libya, and North Korea from the blacklist, leaving only four countries to which this exception to judicial immunity applies. For a list of countries classified as state sponsors of terrorism by the U.S. State Department, see: Bureau of Counterterrorism, 'Terrorist Designations and State Sponsors of Terrorism' (*US State Department*, 2025) <<https://www.state.gov/terrorist-designations-and-state-sponsors-of-terrorism/>> accessed 25 May 2025.

48 Andrea Bianchi, 'Immunity Versus Human Rights: The Pinochet Case' (1999) 10(2) *European Journal of International Law* 266, doi:10.1093/ejil/10.2.237; Curtis A Bradley and Jack I Goldsmith, 'Pinochet and International Human Rights Litigation' (1999) 97(7) *Michigan Law Review* 2157.

49 *In re Islamic Republic of Iran Terrorism Litigation* [2009] 659 F Supp 2nd 31, 37, 38 <<https://case-law.vlex.com/vid/in-re-islamic-republic-893484580>> accessed 25 May 2025.

50 *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (ICJ, 3 February 2012) paras 139 (2, 3 and 4) <<https://www.icj-cij.org/case/143>> accessed 22 January 2025.

51 JASTA (n 38) s 7, para (2); US Senate, 'Justice against Sponsors of Terrorism Bill' [2016] *Congressional Record* 162(147)/S6204 <<https://www.congress.gov/congressional-record/2016/9/28/senate-section/article/s6204-1>> accessed 24 February 2025.

terrorism. As a result, any foreign state may be subject to US jurisdiction, regardless of its designation on the pre-prepared list of countries supporting terrorism.⁵²

Moreover, the amendments link both the terrorist act and its consequences to US territory,⁵³ requiring that acts and their results occur within the United States. However, the act of support by the foreign state for the terrorist activity is not required to have taken place on US territory.⁵⁴

Notably, this amendment does not establish any mechanism for investigating a foreign state's involvement in supporting terrorism prior to lifting immunity. Immunity may be revoked solely based on the filing of a lawsuit alleging that the state sponsored a terrorist act causing casualties, human or property damage, without any conclusive determination of whether the state supported such an act.⁵⁵

This issue raises complex concerns in international law, specifically in relation to the immunity of state officials from criminal proceedings. Diplomatic and consular immunities remain broadly observed to preserve friendly relations among states.⁵⁶ From another perspective, such immunities are essential for ensuring that state officials can perform their state functions.⁵⁷ Recently, the ILC of the United Nations adopted draft articles on the immunity of state officials from foreign criminal jurisdiction on first reading.⁵⁸ While draft Articles 4 and 6 provide for immunity enjoyed so far,⁵⁹ Article 7 outlines exceptions which are linked to the most dangerous international crimes, such as genocide, war, and crimes against humanity. These exceptions notably do not extend to the support of terrorism,⁶⁰ given that terrorism has not yet been characterised as an international crime, though it is widely characterised as "a matter of grave concern to the international community".⁶¹

52 FSIA (n 24) s 1605B, subs (b).

53 *ibid*, subs (b) stipulates that '... 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 ...'

54 *ibid*, subs (b), paras (1) and (2) stipulate:

...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 State while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign State occurred.

55 *ibid*, according to subs (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...'

56 ILC, 'Immunity of State officials from foreign criminal jurisdiction' [2022] Report of the ILC (A/77/10), ch 6/188, 197, gen comment para (9).

57 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (ICJ, 14 February 2012) para 53 <<https://www.icj-cij.org/case/121>> accessed 22 January 2025.

58 ILC, Immunity of State officials from foreign criminal jurisdiction (n 56) 188, para 66.

59 *ibid* 189.

60 *ibid* 190.

61 Kimberley N Trapp, 'Holding States Responsible for Terrorism before the International Court of Justice' (2012) 3 (2) *Journal of International Dispute Settlement* 289, doi:10.1093/jnlids/ids006.

JASTA also restricts the revocation of immunity to acts, explicitly excluding omissions and acts of negligence.⁶² It further excludes acts of war from the scope of its application.⁶³ This is in harmony with the general trend in the US FSIA, and before it, the judgments of American courts, including the *Schooner Exchange* judgment, which respected the sovereign functions of foreign states and their property.

As with the 1996 AEDPA, JASTA has faced extensive criticism. Former US President Barack Obama, in his veto message to Congress, highlighted concerns. He warned that JASTA places the authority to search and investigate any foreign country's involvement in providing support for terrorism in the hands of private litigants and courts rather than in the hands of intelligence and national security experts. He referred to the potential risks posed by reciprocity, suggesting that American civil and military employees deployed abroad could be exposed to litigation and legal accountability in foreign courts. He expressed concerns about the possibility of exposing American government property located outside the borders of the United States to coercive measures such as seizure, execution, and more. Obama also noted the serious political implications of allowing any country allied with the United States to be subject to the jurisdiction of the US courts, which could jeopardise the United States' relations with its allies at a time when it is most in need of building coalitions.⁶⁴

Nonetheless, one notable aspect of JASTA is that it adheres to the principle of sovereign equality by subjecting all foreign states equally to US jurisdiction, without deferring to the opinion of the US administration—whose stance involves mixing politics and justice. However, like its predecessors, this law violates the principle of state immunity under international law and contravenes the principle approved by the US legislator when it enacted the FSIA in 1976.

Several lawsuits have been filed before the US courts under the JASTA amendment, including lawsuits filed against Sudan⁶⁵ and Saudi Arabia⁶⁶ in relation to the September 11 attacks. Regarding Sudan, after the fall of former President Omar al-Bashir in 2019, the US Congress passed the Consolidated Appropriations Act, which resolved many of the claims against Sudan and reinstated its sovereign immunity under Section 1605A and related

62 FSIA (n 24) s 1605B, subs (d).

63 *ibid*, s 1605B, subs (a), para (2).

64 US Senate, 'Justice against Sponsors of Terrorism Bill-Veto' [2016] Congressional Record 162(145)/s6072 <<https://www.congress.gov/congressional-record/2016/9/26/senate-section/article/s6071-6>> accessed 24 February 2025.

65 *Chava Mark v Republic of the Sudan* No 21-5250 [2023] DC Cir <<https://law.justia.com/cases/federal/appellate-courts/cadc/21-5250/21-5250-2023-07-21.html>> accessed 25 May 2025.

66 *Ashton et al v Kingdom of Saudi Arabia* No 1:2017cv02003 [2023] SDNY <<https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2017cv02003/471132/290/>> accessed 25 May 2025.

provisions.⁶⁷ However, the Act explicitly excluded lawsuits filed by victims of the September 11 attacks and their families, which remain ongoing under JASTA.⁶⁸ This partial restoration of Sudan sovereign immunity confirmed the impact of political considerations on justice mechanisms and their reflection on the US judicial system.⁶⁹

3.2. Canadian Legislative Exceptions to Sovereign Immunity in Terrorism Cases

Canada has also amended its State Immunity Act (hereinafter SIA)⁷⁰ through the enactment of the Safe Streets and Communities Act.⁷¹ This legislative amendment introduced sections 2.1, 6.1 and 12.1 into the SIA,⁷² along with some amendments in the structure of the Act.⁷³ Under the Canadian (JVTA), a foreign state must be included on a list established by the Governor in Council to remove its immunity lifted in any action brought against it before Canadian courts for allegedly supporting terrorism or terrorist activities.⁷⁴

This listing requirement has been criticised for its restrictive approach. Specifically, the JVTA limits the characterisation of support for terrorism to specific countries provided for in subsection 6.1(2),⁷⁵ thereby narrowing the scope of potential legal relief available to victims. This mechanism raises similar concerns to those seen in the US under the AEDPA, where the executive's role in determining the applicability of immunity risks politicising judicial decisions and undermining the separation between political discretion and legal adjudication.

To date, only two states have been designated on Canada's list of foreign states supporting terrorism: Iran and Syria.⁷⁶ In response, Iran has instituted proceedings against Canada

67 US Consolidated Appropriations Act 2021, Public Law 116–260 (27 December 2020) division FF, title XVII Sudan Claims Resolution <<https://www.congress.gov/bill/116th-congress/house-bill/133/text>> accessed 20 March 2025.

68 *ibid*, subss 1706(a)(2)(A) and (B).

69 US Senate, A BILL 'To Resolve Certain Pending Claims against Sudan by United States Citizens, and for other Purposes' (ROS20B43 9SR, 18 May 2025) s 2, para (3) <<https://www.foreign.senate.gov/download/ros20b43>> accessed 25 May 2025.

70 JVTA (n 37).

71 Canada Safe Streets and Communities Act (SC 2012, c 1) pt 1 <https://laws-lois.justice.gc.ca/eng/annualstatutes/2012_1/page-1.html> accessed 26 May 2025.

72 JVTA (n 37) ss 4, 5 and 8.

73 *ibid*, ss 3.1, 6, 7, 8 and 9.

74 Canada State Immunity Act (RSC, 1985, c S-18) subss 6.1 (1) and (2) <<https://laws-lois.justice.gc.ca/eng/acts/s-18/page-1.html>> accessed 26 May 2025.

75 Reem Zaia and Darren Johnston, 'Canada's Justice for Victims of Terrorism Act Needs a Rewrite' (*Policy*, 18 July 2024) <<https://www.policymagazine.ca/canadas-justice-for-victims-of-terrorism-act-needs-a-rewrite/>> accessed 28 May 2025.

76 Order Establishing a List of Foreign State Supporters of Terrorism PC 2012-1067 (7 September 2012) [2012] Canada Gazette II 146(20) <<https://gazette.gc.ca/rp-pr/p2/2012/2012-09-26/html/sor-dors170-eng.html>> accessed 28 May 2025.

before the International Court of Justice, claiming that Canada has violated its obligations under customary international law by failing to respect the immunities of Iran and its property.⁷⁷ While these proceedings were initiated against Canada, a favourable judgement for Iran may have broader implications, particularly for the United States. An ICJ Judgment⁷⁸ characterising the terrorism-support exception to state immunity as a breach of international law would pose a direct challenge to the legal basis of various U.S. measures taken against Iran.

In most cases involving the recognition and enforcement of US court judgments, Canadian courts have not fully considered Iran's jurisdictional immunity. However, full proceedings on this issue have taken place in relation to claims arising from the tragic incident of Ukraine International Airlines Flight PS 752.⁷⁹

3.3. Exceptions to State Immunity in Terrorism Cases in Other Jurisdictions

By contrast, no similar texts can be found in the state immunity laws of European jurisdictions. At the judicial level, the French Court of Cassation upheld immunity in such a case, ruling that a state's support for a terrorist group does not, in itself, justify the revocation of immunity in compensation cases brought by victims of that group's activities and their families.⁸⁰ Similarly, a UK court considered that: "The act of state-sponsored terrorism is of its own character a governmental act as opposed to an act which any private citizen can perform."⁸¹

However, the Italian Court of Cassation took a different approach, recognising a US judgment against Iran concerning the September 11 attacks.⁸² Meanwhile, the Ukraine

77 *Alleged Violations of State Immunities (Islamic Republic of Iran v Canada)* Press Release No 2023/34 (ICJ, 28 June 2023) <<https://www.icj-cij.org/case/189>> accessed 22 May 2025.

78 Maryam Jamshidi, 'Iran's ICJ Case against Canada Tests the Terrorism Exception to Sovereign Immunity' (*Just Security*, 24 July 2023) <<https://www.justsecurity.org/87357/irans-icj-case-against-canada-tests-the-terrorism-exception-to-sovereign-immunity/>> accessed 22 May 2025.

79 *Alleged Violations of State Immunities (Islamic Republic of Iran v Canada)* Application instituting proceedings (ICJ, 27 June 2023) 10, para 18 <<https://www.icj-cij.org/case/189>> accessed 29 May 2025; *Zarei v Iran* CV-20-635078 [2021] ONSC 3377 (CanLII) <<https://canlii.ca/t/jg0tx>> accessed 29 May 2025.

80 Gilles Cuniberti, 'Flatow v Iran – French Supreme Court Rules on Sovereign Immunity in Exequatur Proceedings' (*EPIL European Association of Private International Law*, 21 September 2023) <<https://epil.org/2023/09/21/flatow-v-iran-french-supreme-court-rules-on-sovereign-immunity-in-exequatur-proceedings/>> accessed 3 June 2025.

81 *Heiser v Islamic Rep of Iran & MOIS* No HQ12X03803 [2019] EWHC 2074 (QB), 190 ILR 586, para 184 <https://www.quadrantchambers.com/sites/default/files/media/document/neutral_citation_number_2019_ewhc_2074.pdf> accessed 30 May 2025.

82 *Estate/Trust Case* 39391 (Corte Suprema di Cassazione, 10 December 2021) paras 8, 11 <<https://all-in-lavoro.seac.it/document/2/4743838/0?link=true>> accessed 29 May 2025.

Supreme Court held that the grant of sovereign immunity to Russia in cases of compensations to Ukrainian nationals would violate the Council of Europe Convention on the Prevention of Terrorism and the International Convention for the Suppression of the Financing of Terrorism, in particular its Article 8.⁸³ Although this judgment links the lifting of immunity to international counter-terrorism instruments, the conventions cited do not explicitly provide for the lifting of state immunity in cases involving support for or commission of terrorist acts.⁸⁴

4 THE FEASIBILITY OF FORMULATING AN EXCEPTION TO THE PRINCIPLE OF STATE IMMUNITY FOR THE BENEFIT OF VICTIMS OF TERRORISM IN DOMESTIC LAWS

As seen in recent lawsuits, plaintiffs have brought claims against states accused of financing or sponsoring terrorist acts that caused profound personal and material harm—whether through the loss of their loved ones, permanent injuries and disabilities that changed their lives forever, or severe losses to their property and interests. These claims often faced the barrier of state immunity. Even if this hurdle were overcome, they faced another barrier: the immunity of states' property within the territories of other states. This second layer of immunity is even stronger—it strips any given judgment of its practical value.

In recognition of this injustice, legislators in the USA and Canada amended their state immunity acts. While these amendments offer victims a solution to the problem of state immunity preventing individuals from their right to a fair trial and the execution of the resulting rulings, they also introduce difficult questions. Among them is the issue of how states that support terrorism are identified, and whether the resulting compensation—potentially significant—should be borne by the millions of citizens of those states.

The approach adopted by the US and Canada could serve as a model. By enacting similar legislation, other countries could put pressure on the governments of countries involved in supporting and financing terrorist operations in other countries. However, such a solution faces two major challenges.

83 Badanova (n 29).

84 International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999 UNGA Res 54/109) [1999] UNTS 2178/197; Council of Europe Convention on the Prevention of Terrorism (16 May 2005) [2018] OJ L 159/3.

4.1. Adopting a Legislative Anti-Terrorism Approach That Amends International Custom Related to The State Immunity

States and property immunity remain cornerstones of international law, protected by two international legal documents, the United Nations Convention on Jurisdictional Immunities of States and Their Property adopted in 2004,⁸⁵ and the ICJ Judgement on 3 February 2012 in *the Jurisdictional Immunities of the State case* between Germany, Italy and Greece.⁸⁶

Article 5 of the 2004 Convention states:

“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.”

This article imposes an obligation on the courts of all states parties to the convention to respect such immunity. Article 6 elaborates further under the title “Modalities for giving effect to state immunity,” outlining how this obligation must be upheld:

“1. 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.

2. A proceeding before a court of a state shall be considered to have been instituted against another state if that other state:

(a) is named as a party to that proceeding; or

(b) is not named as a party to the proceeding, but the proceeding in effect seeks to affect the property, rights, interests or activities of that other state.”

The obligation is clear: states should refrain from exercising jurisdiction over another state in accordance with the provisions of Article 5. This duty is derived from the combined effect of Articles 5 and 6.⁸⁷ The text referenced above in paragraphs (1) and (2) of Article 6 reinforces this interpretation.⁸⁸

However, a reading of Articles 5 and 6 of the United Nations Convention reveals that they do not explicitly establish international responsibility for breaching the immunity of states and their property. Nor does the Convention contain any provision outlining the consequences of such a breach. In such cases, responsibility is determined by the general principles and established rules of customary international law.

This conclusion is by the Draft Articles on The Responsibility of States For Internationally Wrongful Acts, adopted by the International Law Commission (ILC) at the fifty-third

85 UN Convention on Jurisdictional Immunities (n 33).

86 *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 50).

87 UN Convention on Jurisdictional Immunities (n 33) art 5.

88 *ibid*, art 6, paras 1, 2.

session in 2001. Draft Article 12 states: “There is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation, regardless of its origin or character.”⁸⁹

According to paragraph (1) of the General Commentary to the draft articles, the ILC aimed to codify “the basic rules of international law concerning the responsibility of states for their internationally wrongful acts.” The focus was on “the secondary rules of state responsibility”—rules that specify the mechanism and method of establishing responsibility for a certain act on a state.⁹⁰

Paragraph (1) of the commentary also clarifies that “the articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility.” That task falls to the “primary rules” of international law—whether customary or written—that define the specific obligation in question. In the context of state immunity, these primary rules are represented by Articles 5 and 6 of the 2004 United Nations Convention, as well as by longstanding customary practices, including judgments of national courts in various states.

In its arguments before the ICJ, specifically in its last request before the judgment, Germany invoked the rules on state responsibility for internationally wrongful acts as set out in the 2001 draft articles.⁹¹ In its fourth submission, Germany asked the court to rule on the international responsibility of Italy.⁹²

Although the final judgement refrained from explicitly mentioning the international responsibility of Italy, it did affirm that Italy had breached its obligations and requested Italy to take measures to suspend the legal effects of its rulings that violated Germany’s jurisdictional immunity. This requirement aligns with key provisions of the 2001 draft articles, particularly Article 34, which stipulates:

“Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.”

Article 35 also stipulates:

“A state responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed ...”

89 International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ [2001] Yearbook of the ILC 2(2)/26, 54, gen comment art 12.

90 *ibid* 54.

91 *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 50) 49, [137].

92 *ibid*, 11, [17] (4).

Despite the enormity of the crimes committed by the forces of the Third Reich during World War II—crimes that were the subject of the Distomo case—the International Court of Justice held that Italy was internationally responsible for violating Germany's immunity. Italy had imposed enforcement measures on *Villa Vigoni*, a property owned by the German government and located in northern Italy.⁹³

4.2. Creating Mechanisms to Enforce the Judgements Issued in Accordance with The Anti-Terrorism Exception in The Judicial Systems of Various Countries

If a judgment is issued by the US or Canadian courts in accordance with their anti-terrorism exceptions, no issue arises if the property of the state against which the judgment is rendered is found within the territory of the trial jurisdiction. However, difficulties emerge but when the enforcement is sought outside such a territory—particularly regarding whether current bilateral or multilateral judicial agreements are sufficient to oblige states to enforce judgments that violate the principle of state immunity.

In the US, there is no bilateral or multilateral agreement in force for the mutual recognition and enforcement of judgments with any country in the world. As a result, it is difficult to enforce judgments issued by US courts based on the Justice Against Sponsors of Terrorism Act (JASTA)—outside the United States. This lack of cooperation stems from other countries' concerns over the excessive compensation awarded by American courts, which are viewed as disproportionate.⁹⁴

Although the United States have instituted a Crime Victims Fund,⁹⁵ this fund is financed exclusively through fines and criminal forfeits collected by US competent authorities; compensation from foreign states is not deposited into it.⁹⁶

93 *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 50) 51.

94 'Enforcement of Judgments' (US Department of State - Bureau of Consular Affairs, 2025) <<https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-assist/Enforcement-of-Judgements.html>> accessed 1 March 2025.

95 US Code, 42 USC The Public Health and Welfare, ch 112, § 10601(c) <<https://tile.loc.gov/storage-services/service/l1/uscode/uscode1982-03004/uscode1982-030042112/uscode1982-030042112.pdf>> accessed 5 June 2025.

96 *ibid*, § 10601(b). Institution of victims fund is used as a means of insuring that victims receive the compensation awarded to them, there has been many examples of such funds like national foundations in Austria and Germany and the victims trust fund mentioned in Art. 79 of the Statute of the ICC. Stefan Kadelbach, 'State Immunity, Individual Compensation for Victims of Human Rights Crimes, and Future Prospects' in Valentina Volpe, Anne Peters and Stefano Battini (eds), *Remedies against Immunity?: Reconciling International and Domestic Law after the Italian Constitutional Court's Sentenza 238/2014* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 297, Springer 2021) 143, doi:10.1007/978-3-662-62304-6_7.

In contrast, many other countries have entered into bilateral and multilateral agreements on judicial cooperation and mutual recognition and enforcement of judgments. For example, Article 25(b) of the Riyadh Arab Convention for Judicial Cooperation 1983 obliges each contracting party to recognise and enforce judgments issued by the courts of any other contracting party.⁹⁷ However, Article 25(c) excludes judgments issued against the government of the requested party, as well as judgments whose recognition or enforcement would be inconsistent with international treaties or agreements in force in that party.⁹⁸

Accordingly, this provision grants sovereign immunity to the property of the requested state, but does not extend immunity to third-party states whose property may be located in the territory of the enforcing state.

In Europe, Article 2(4) of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2019 stipulates that:

“A judgment is not excluded from the scope of this convention by the mere fact that a state, including a government, a governmental agency or any person acting for a state, was a party to the proceedings.”⁹⁹

However, no similar provision exists in European Parliament Regulation No. 1215/2012 adopted on 12 December 2012 on jurisdiction and recognition and enforcement of judicial decisions in civil and commercial matters. Nor does this regulation refer to the 1972 European Convention on State Immunity. Notably, Article 45(1)(a) stipulates the refusal to recognise judgments issued by the courts of a member state if they are manifestly contrary to the general policy of the member state requested to implement. This could be invoked to refuse enforcement of judgments against the government or official bodies of another member state, in addition to referring to international custom in this regard.¹⁰⁰

Enforcement against the property of a foreign state often contradicts the general policy pursued by states. For instance, in the *LIAMCO* case, the Swiss Federal Court noted the coercive measure against Libyan funds was unjustified, stating:

“Switzerland’s interests do not require such a measure; on the contrary, it may cause political and other difficulties.”¹⁰¹

97 Riyadh Arab Convention for Judicial Cooperation (6 April 1983) art 25 (b) <http://www.leagueofarabstates.net/ar/legalnetwork/Pages/agreements_details.aspx?RID=67> accessed 1 March 2025.

98 *ibid*, art 25 (c).

99 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention) [2022] OJ L 187/4, art 2, para 4.

100 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1, art 45, para 1.

101 *Libya v LIAMCO* (Switzerland, 19 June 1980) <<https://vlex.ch/vid/libya-v-liamco-swiss-868582902>> accessed 29 May 2025.

It is worth noting here that the European Union—with the exception of Denmark—¹⁰² is a party to the 2019 Hague Convention.¹⁰³ The United States' adoption of both the AEDPA of 1996 and the JASTA of 2016 does not significantly affect its relations with other countries due to its power and influence in the world. The implementation of the two acts and the judgment on compensation in favour of victims of terrorist acts against the governments of certain countries will not lead to significant harm to the United States' relations and interests, despite internal criticism—such as the objections expressed by former President Barack Obama.

However, the adoption of such laws by other countries, especially third-world countries, will result in negative political, diplomatic and economic consequences upon implementation. This highlights the importance of a unified multilateral international text, under the auspices of the United Nations, to regulate the process of compensation for victims of terrorist acts. Such a framework should obligate member states to uphold the rights of terrorism victims through a complete system that provides a compensation mechanism and prevents any retaliatory measures by the state from which such compensation is demanded.

The core principle of any such instrument should be the removal of state immunity if it is proven that a state supported or sponsored a terrorist act. However, this stripping of immunity must be confined to the context and scope of the legal claim brought by the affected individuals.

5 CONCLUSIONS

State immunity is still widely recognised in relation to states' non-commercial activities. The terrorism support exception is not recognised by most legislations and courts, and is currently only found in US and Canadian legislation. This fact can be attributed to the unwillingness of most countries to adopt such a doctrine that may put them in confrontation with other countries.

Given this context, it would be preferable for any future multilateral agreement to include a provision enabling victims and their relatives to obtain appropriate compensation from states proven to have supported the terrorist acts that caused them harm. By formulating this principle in a binding international agreement, it would become a norm of international law. This would relieve individual states from diplomatic embarrassment, establish the right to compensation as a human rights norm, and help avoid violating the principle of equality between states by treating certain countries as those that support terrorism, thereby refraining from applying sovereign jurisdictional immunity to them.

102 Council Decision (EU) 2022/1206 of 12 July 2022 Concerning the Accession of the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters [2022] OJ L 187/1, Preamble, para (13).

103 *ibid*, art 1.

Importantly, such a legal rule would bind the domestic jurisdiction of state parties to the agreement, thereby allowing victims to pursue their claims in national courts even if the defendant state is not party to the agreement. Unlike the requirements for jurisdiction of international courts—which obligate the defendant state's prior consent—national courts would acquire jurisdiction automatically through the treaty's effect on domestic legal systems once immunity is lifted. The defendant state would thus be subject to national jurisdiction without needing to explicitly accept it.

To strengthen the enforceability of this principle and encourage broader state participation, the following text could be included in a future multilateral agreement in line with Action 23(c) of the Pact for the Future:¹⁰⁴

“A state found to be sponsoring the terrorist act which causes death, injuries or property loss shall not enjoy immunity conferred upon it under international law from jurisdiction or execution.”

Additionally, execution-related provisions may include safeguards, such as:

“The court may refuse the execution if—

- The person against whom recognition or enforcement is sought did not appear in the trial, or was not properly represented therein.
- The judgment to be recognised or enforced is not a final judgment and is not enforceable in the state of origin.
- It finds that the compensation awarded is excessive.”

The third paragraph is proposed to prevent the execution of exaggerated compensations. Such a provision would promote justice, rationality, helping to balance the rights of victims in each case and encouraging states to sign and accept the proposed convention. Courts may base their determination of excess compensation on their domestic laws and the jurisprudence of the supreme courts in their countries.

It is also possible to introduce a provision revoking the immunity of government employees involved in supporting terrorism, but only at the investigation stage, while maintaining their immunity from trial and judgment, recognising that these individuals may have been acting under orders.

To further institutionalise the terrorism support exception, two key amendments can be proposed:

1. Insert a new article after Article 12 of the UN Convention on Jurisdictional Immunities of States and Their Property, providing a terrorism support exception to state immunity.¹⁰⁵

104 The Pact for the Future (n 1).

105 UN Convention on Jurisdictional Immunities (n 33) art 12. This article provides for Personal injuries and damage to property exception from immunity.

2. Add a subparagraph to Draft Article 7(1) of the Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction, listing the support of terrorism activity as one of the most dangerous international crimes.

These proposed provisions would solidify an international prohibition on supporting terrorism and thereby strengthen the position of terrorism victims before the national courts of various states in both the trial and enforcement phases.

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Domestic Laws. – 4.1. *Adopting a Legislative Anti-Terrorism Approach that Amends International Custom Related to the State Immunity.* – 4.2. *Creating Mechanisms to Enforce the Judgements Issued in Accordance with the Anti-Terrorism Exception in the Judicial Systems of Various Countries.* – 5. Conclusions.

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ПРАВО ЖЕРТВ ТЕРОРИЗМУ НА КОМПЕНСАЦІЮ ЗГІДНО З ПРИНЦИПОМ ЮРИСДИКЦІЙНОГО ІМУНІТЕТУ ІНОЗЕМНОЇ ДЕРЖАВИ

Алаа Еддін Зольфакар

АНОТАЦІЯ

Вступ. Терористичні атаки в різних частинах світу призвели до тисяч жертв, ушкоджень та втрат майна. Визнано, що деякі з цих атак, ймовірно, були здійснені за сприяння державних суб'єктів, або спонсорувалися ними, або були скоєні рухами, що підтримуються урядами.

З огляду на це, міжнародному співтовариству стало необхідним ухвалити багатосторонню та всеосяжну міжнародну угоду щодо боротьби з тероризмом та пом'якшення його наслідків, особливо після прийняття Генеральною Асамблеєю

Організації Об'єднаних Націй «Пакту заради майбутнього» на її сімдесят дев'ятій сесії. Дія 23 Пакту, у пункті (с), закликає до «активізації зусиль, спрямованих на укладення всеосяжної конвенції про міжнародний тероризм».

Методи. У цьому дослідженні було використано дедуктивний підхід, який охопив вивчення та аналіз різних національних рішень зі Сполучених Штатів, Великої Британії, Німеччини, Франції, Швейцарії, Австрії, Канади, Італії, України, Польщі, Греції, Китаю та Індії, а також наукових коментарів авторів та юристів. У статті також міститься огляд відповідних міжнародних угод та вивчення можливості інтеграції положень як із систем імунітету іноземних держав, так і з угод про міжнародне судове співробітництво. Метою роботи було вирішення проблеми захисту держав від відповідальності за підтримку тероризму, а також запропонувати ефективну правову формулу, яка б дозволила жертвам тероризму отримати компенсацію. Також були розглянуті винятки щодо боротьби з тероризмом, зазначені у законах про імунітет держав Сполучених Штатів та Канади.

Результати та висновки. У дослідженні зроблено висновок, що державний імунітет є усталеним принципом як у писаному, так і у звичаєвому міжнародному праві і отримав визнання в різних національних судових системах. Однак як національна, так і міжнародна судова практика та суди демонструють нерішучість у прийнятті винятку щодо боротьби з тероризмом, оскільки таке рішення означало б порушення міжнародного принципу імунітету та могло б призвести до дискримінації між державами, незважаючи на справедливість притягнення до відповідальності держав, що підтримують терористів.

Таким чином, у цьому дослідженні пропонується набір правових положень, які слід додати до будь-якої багатосторонньої міжнародної угоди про боротьбу з тероризмом, а також до пов'язаних міжнародних угод.

Ключові слова: державний імунітет, імунітет державних посадовців, виняток щодо боротьби з тероризмом, право на компенсацію, віктимологія, угоди про правову допомогу, розвиток міжнародного права.