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New US Legislation Allows Lawsuits Against States Allegedly Involved in Terrorism: Implications for the International Law on State Immunity

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Fokus

A new US legislation further restricts the immunity of foreign states in cases of alleged links to terrorism. The law contradicts the traditional perception of customary international law, but could ultimately become the starting point for a new legal development.

Sources:

Steinhauer / Mazzetti / Hirschfeld Davis, *Congress Votes to Override Obama Veto on 9/11 Victims Bill*, New York Times (Sept. 28, 2016), <http://nyti.ms/2cVX6aT>.

Justice Against Sponsors of Terrorism Act, S. 2040.

US Foreign Sovereign Immunity Act, 80 Stat. 2891, § 1605(a)(5).

On September 29, US Congress rejected President Obama's veto of the "Justice Against Sponsors of Terrorism Act" (JASTA), which now has entered into force. The new legislation allows US nationals, who have become victims of terrorist attacks or tortious acts, to file civil lawsuits against foreign states allegedly aiding and abetting or conspiring with the perpetrators. The 9/11 attacks serve as JASTA's initiator. 15 of 19 terrorists involved were Saudi-Arabian citizens and although the Saudi government has always firmly denied any involvement in the attacks, it will certainly become the prime target of future JASTA-based lawsuits. Notably, the previously existing regime has already allowed such suits in principle, but required an official designation by the US State Department that the state in question was a sponsor of terrorism – a designation lacking in the case of Saudi Arabia. JASTA is however not limited to 9/11 but would also cover post 9/11 terrorist attacks on US soil.

While there has been extensive media coverage of the domestic political implications, the international legal dimension of JASTA has so far attracted less attention. Regrettably, discussions in the highly politicized legislation process also did not touch upon this issue. Under the principle of sovereign equality, enshrined in Article 2(1) of the United Nations Charter, a state can generally not be subjected to another state's jurisdiction. This rule thus bars national courts from adjudicating or enforcing claims against a foreign state, as they would otherwise violate that state's sovereignty. Whereas an exception for commercial activities is accepted in international law, the International Court of Justice (ICJ) held in 2012 that even the most serious violations of international law did not justify an exception to sovereign immunity (see Bofax 401D). In its *Jurisdictional Immunities of the State* case, the ICJ found that Italy's courts had violated international law by denying Germany sovereign immunity for claims arising out of war crimes committed during World War II (ICJ Rep. 2012, 99). Although criticised in light of the grave human rights and humanitarian law violations, the judgment has been widely perceived as reflecting contemporary customary law.

JASTA could now bring a new impetus in this debate and potentially change the trajectory of the law on state immunity. Customary international law is based on the practice of states and their sense of being legally bound. A new rule of custom often develops through the successive departure from an established norm. The new US legislation – hardly in conformity with the ICJ's verdict – could be seen as such a starting point. Its impact will depend on the reaction of other states and whether they perceive JASTA as a violation of international law or a precedent indicating a new legal development. Indeed, the US administration has called JASTA "dangerous" and "a mistake", fearing lawsuits against US military or intelligence activities in foreign courts. It is thus not unlikely that other states will follow the US example – whether as retaliation for proceedings in the US or for other reasons. Meanwhile, however, JASTA must be seen as contradicting the traditional conception of absolute state immunity. The US position remains unique in international law and many fear that a new immunity exception could lead to abuse and political drawbacks. It could, on the other hand, also be conceived as triggering the emergence of a practice that promises justice for victims of international terrorism and human rights violations.

Verantwortung

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