

Justice against sponsors of terrorism JASTA and its international impact

SUMMARY

On 27 September 2016, the United States Congress overrode the presidential veto to pass the Justice Against Sponsors of Terrorism Act (JASTA), the culmination of lengthy efforts to facilitate lawsuits by victims of terrorism against foreign states and officials supporting terrorism. Until JASTA, under the 'terrorism exception' in the US Foreign Sovereign Immunities Act, sovereign immunity could only be denied to foreign states officially designated by the USA as sponsors of terrorism at the time or as a result of the terrorist act. JASTA extends the scope of the terrorism exception to the jurisdictional immunity of foreign states so as to allow US courts to exercise jurisdiction over civil claims regarding injuries, death or damages that occur inside the USA as result of a tort, including an act of terrorism committed anywhere by a foreign state or official.

The bill has generated significant debate within and outside the USA. State or sovereign immunity is a recognised principle of customary international law and, for that reason, JASTA has been denounced as potentially violating international law and foreign states' sovereignty; some countries have already announced reciprocal measures against the USA. The terrorism exception to state immunity was already a controversial concept, with only the USA and Canada having introduced legislation on the matter.



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What is JASTA?

The Justice Against Sponsors of Terrorism Act (JASTA) represents an attempt by the US Congress to reduce the number of [obstacles](#) faced by victims of terrorism when bringing lawsuits in the USA against foreign states and officials supporting terrorism. The bill amends the federal judicial code (USC) to expand the scope of the terrorism exception ([Title 28 USC, section 1605A](#)) to the jurisdictional immunity of a foreign state. It will give US courts jurisdiction over civil claims regarding injuries, death, or damages that occur inside the United States as a result of a tort, including an act of terrorism, committed anywhere by a foreign state or official. It also amends the federal criminal code to permit civil claims ([Title 18 USC, section 2333](#)) sought by individuals against a foreign state or official for injuries, death or damages from an act of international terrorism (unless the foreign state is immune under the Foreign Sovereign Immunities Act, as amended by JASTA). Additionally, the bill authorises federal courts to exercise personal jurisdiction over, and impose liability on, a person who commits, or aids, abets, or conspires to commit, an act of international terrorism against a US national (thus expanding the liability of foreign government officials in civil actions for terrorist acts). However, the foreign state will not be subject to the jurisdiction of US courts if the tortious act in question constitutes 'mere negligence'. JASTA contains a stay of actions clause that can apply if the USA is engaged in good faith discussions with the foreign state or any parties as to the resolution of the claims. A stay can be granted for 180 days, and is renewable. JASTA will apply to any civil action 'arising out of an injury to a person, property, or business, on or after September 11, 2001'.

The JASTA bill was approved by the US Senate in May 2016 ([S. 2040](#)) and by the House of Representatives in September 2016, but was [vetoed](#) by President Obama. The bill passed after Congress overrode the presidential veto on 27 September 2016. There are however [indications](#) that some changes to the law are already being considered by lawmakers. Several countries, including some EU Member States have expressed concern about the bill. The existing US terrorism exception to state immunity is already considered to be [contrary](#) to customary international law and is an isolated practice among other states.

The law on state immunity and the terrorism exception

State immunity and international law

[State or sovereign immunity](#) is a well-recognised principle of customary international law based on the sovereign equality of states in the international legal order (*par in parem non habet imperium*): no state can be subject to the jurisdiction of another state. The plea of state immunity prevents a national court from exercising its adjudicative and enforcement jurisdiction in a dispute where the defendant is a foreign state (or its agents). However, while international law governs the requirements of state immunity, it is the national law of the state ([forum state](#)) before whose courts a claim against another state is brought that determines the precise manner of application.¹

Doctrine and practice have evolved from absolute immunity (i.e. a total bar against adjudicating and enforcing a claim in the local courts of a state against a foreign state, except when the latter consents to the proceedings)² into restrictive immunity. The majority of states now apply a restrictive immunity doctrine, according to which the local courts of a state may have jurisdiction in proceedings against a foreign state with respect to acts of a private or commercial nature but not to public acts in the exercise of sovereign authority, which remain immune. However, courts still vary in their interpretation of sovereign acts (*acta de jure imperii*) and private acts (*acta de jure gestionis*), as definitions

have not yet been agreed. Moreover, if the restrictive approach allows for exceptions to immunity from adjudication and delivery of judgments against a foreign state, a foreign state's immunity from enforcement or execution of coercive measures against it or its property normally remains absolute;³ the two sets of immunity are therefore governed by different rules.

Attempts at codification

The [European Convention on State Immunity](#) (ECSI, 1972) is the only international agreement in force; and it has been ratified by just eight states. The [United Nations Convention on the Jurisdictional Immunities of States and their Property](#) (UNCSI, 2004), the first global codification of the international law related to state immunity, is not yet in force.⁴ In parallel, some states have enacted national legislation on sovereign immunity; these include the UK (in order to ratify the ECSI), Australia, Canada, South Africa and the USA. Other states rely on international custom to determine the scope of immunity of foreign states. In doing so, most domestic courts assume that state immunity is the basic rule until the existence of an exception has been proven.

Under these circumstances, state immunity is still a matter for debate: it is widely supported by states as a principle, but application in national courts can differ substantially. The difficulty of distinguishing clearly between the public and private acts of a state has already been mentioned. Moreover, the development of the 'tort exception' to immunity has not been accepted by all states. Although the UNCSI and the ECSI provide for an obligation to deny sovereign immunity for tortious acts committed by another country in the forum state, such a rule of customary international law does not seem yet to be supported by state practice, as many states do not apply this exception.⁵

Reciprocal recognition of judgments

The recognition of a foreign judgment by a state is a matter either for domestic law or for agreement between states. The eight ratifying states of the ECSI [recognise the judgments](#) taken in their domestic courts, although immunity from enforcement remains absolute. Regulation (EU) [No 1215/2012](#) provides for automatic recognition and enforcement of judgments in civil and commercial matters in the EU, except in Denmark; however, it does not apply to 'acts and omissions in the exercise of State authority (*acta iure imperii*)' and provides several grounds for refusing to enforce a judgment. The USA has no bilateral or multilateral treaty in force on the reciprocal [recognition](#) and enforcement of judgments.

Jus cogens violations as a challenge to sovereign immunity

More recently, a challenge to sovereign immunity has developed on the basis of [jus cogens](#) or the [peremptory norms](#) of international law. Some domestic courts, more sensitive to the rights of the individual, have been increasingly willing to deny foreign states immunity for situations of *jus cogens* violations such as massive human rights abuses, international crimes, etc. However, other domestic courts have upheld state immunity as a requirement of customary international law even in cases alleging massive human rights violations. Both the European Court of Human Rights (ECtHR) and the International Court of Justice (ICJ) have supported [state immunity](#) over individual rights of access to court and to a remedy. The ECtHR considers state immunity a legitimate limit to the individual's right of access to court. In [Kalogeropoulou and others v. Greece and Germany](#), the unsuccessful plaintiffs (victims and relatives of victims of Nazi war crimes committed in Greece) argued before the ECtHR that their right to the execution of a final judgment – Article 6(1) of the European Convention on Human Rights – had been infringed by the refusal to take execution measures. The ECtHR rejected the application

relying on its three earlier judgments (*Al-Adsani v. UK*, *Fogarty v. UK*, and *McElhinney v. Ireland and UK*) considering that 'the grant of immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty'.

Importantly, the International Court of Justice (ICJ) sees immunity as a procedural plea – irrespective of the substance of the case or the gravity of the alleged wrongful act (e.g. *jus cogens* violations). In the [Case Concerning Jurisdictional Immunities of the State](#) (*Germany v. Italy*, 2012) and in the [Arrest Warrant Case](#) (*Democratic Republic of the Congo v. Belgium*), the ICJ has stated that the law of immunity is essentially procedural in nature: 'It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which determines whether that conduct is lawful or unlawful.' Also, in the Jurisdictional Immunities case, the Court stated that: 'whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make a reparation.' Moreover, the Court found 'no basis in State practice from which customary international law makes the entitlement of a State immunity dependent upon the existence of effective alternative means of securing redress', nor do such conditions exist in national legislation, jurisprudence or the two conventions – ECSI and UNCSI. In fact, the ICJ points to alternative ways to secure redress for the individual, such as inter-state settlement of claims.

As regards immunity from enforcement, the ICJ observed that 'the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question'. Finally, violation of a state's immunity [engages](#) the forum state's international responsibility for violation of certain legal obligations, even if the violation stems from decisions of that state's judicial organs. The ICJ also affirms that a state responsible for an international wrongful act was under an obligation to cease it; and to re-establish, by way of reparation, the situation that existed before the wrongful act was committed.⁶

Sovereign immunity and the terrorism exception

Among states with legislation on state immunity, only the USA and [Canada](#) have enacted [exceptions](#) to jurisdictional immunity regarding terrorism. In October 2015, by way of an [exequatur](#) procedure, the Italian Court of Cassation in *Flatow v. Iran* [accepted](#) the legality of this exception, provided the act of terrorism constitutes a crime against humanity (and thus a [breach of jus cogens](#)).⁷ However, the lack of international agreement as to whether terrorism should be considered a violation of *jus cogens*, and as to definitions of both *jus cogens* and terrorism, undermines the [argument](#) in favour of an exception to state immunity on the basis of terrorism as a *jus cogens* violation. Moreover, some experts [believe](#) that the terrorism exception does not comply with customary international law, as it breaches both immunity from adjudication and immunity from execution.

The terrorism exception under the US Foreign Sovereign Immunities Act

The US Foreign Sovereign Immunities Act (FSIA), adopted in 1976, established an exclusive statutory framework providing a basis for subject matter and personal

jurisdiction in lawsuits against foreign states. Under the FSIA, US courts have jurisdiction only if one of the exceptions to immunity applies. Thus, as a general rule, a foreign state is entitled to immunity from adjudication and to immunity from [attachment](#) and execution of its property (immunity from enforcement), subject, however, to expressly defined exceptions in the act. These exceptions to immunity from adjudication apply if the foreign state waives immunity, or if the claim relates to commercial activity of the foreign state in the USA or to property taken in violation of international law and the property is present in the US; they also cover most non-commercial torts occurring in the USA and arbitration, etc. In 1996, Congress amended the FSIA to create a new exception to sovereign immunity to allow lawsuits by victims of terrorism against foreign states designated as [state sponsors of terrorism](#) by the US State Department.⁸ It was [amended](#) several times by Congress.⁹ Consequently, a designated state sponsor of terrorism had no immunity in a case in which monetary damages were sought for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act, if such act or provision of material support or resources was engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

Before JASTA, this exception applied only if:

- the foreign state had been formally designated as a state sponsor of terrorism at the time of (or as a result of) the act in question; and
- the claimant or victim was a US national, a member of the armed forces, or an employee or contractor of the US government acting within the scope of employment;
- and for acts occurring in the foreign state concerned, the state was given a 'reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration'.

A 2008 amendment established a private right of action against both a foreign state sponsor of terrorism and individual officials, employees and agents of the foreign state, recodified the provisions for the award of punitive damages,¹⁰ and incorporated new mechanisms for the enforcement of judgments. In 2010, in *Samantar v. Yusuf*, the Supreme Court decided that the FSIA did not apply to individual foreign officials, whose immunity is governed by common law.¹¹

Immunity from enforcement under the FSIA

Immunity from enforcement is wider than immunity from lawsuit under the FSIA. The general rule under Title 28 USC, section 1609 is that the property in the USA of a foreign state or its agencies and [instrumentalities](#) is 'immune from attachment, arrest and execution' with some exceptions and subject to existing international agreements to which the USA was a party at the time the FSIA was enacted. More specifically, absolute immunity under the FSIA applies to: the property of a foreign central bank held for its own account (and funds held in the name of a central bank), property of a military character or used for a military activity, etc. Under the [Vienna Conventions on Diplomatic and Consular Relations](#), foreign embassies, consulates and other missions, with their bank accounts, are also immune and inviolable.

When the FSIA terrorism exception was enacted in 1996, it permitted execution of judgments related to claims for which foreign states were no longer immune under the new provision, and allowed execution against property of that state used for commercial purposes in the United States 'regardless of whether the property in question was

involved with the act on which the claim was based'. Another provision allowed execution against frozen or diplomatic assets of state sponsors of terrorism. In 2008, Congress introduced [changes](#) (Title 28 USC, section 1610(g)) in another attempt to make it easier for plaintiffs to collect the damages awarded following court judgments,¹² thus expanding the asset categories susceptible to attachment and execution to the maximum extent. For example, as with that foreign state's property, property in the USA of a foreign state agency or instrumentality engaged in commercial activity in the USA was no longer entitled to immunity from execution or attachment.

Recovery of damages from judgments against state sponsors of terrorism

The enactment of the terrorism exception to state immunity under the FSIA has generated numerous lawsuits against designated states: Cuba, Iran, Iraq, Libya, etc. However, US courts have mostly rendered default judgments, as the foreign states did not appear in court. Moreover, in those cases where immunity was raised and damages were awarded to the plaintiffs (compensatory and/or punitive), it has been difficult to enforce and execute those judgments, either because those foreign states do not recognise damages judgments given by US courts, or on account of those states having insufficient assets in the USA.

The recovery of damages, punitive damages in particular, has therefore met with enormous challenges. The legislation that enabled lawsuits against foreign states designated by the USA as sponsors of terrorism has even been criticised as offering 'hollow-rights' and false hope to the plaintiffs. Foreign states may simply remove their assets from the USA to avoid judgment enforcement, while provisional attachment or freezing of the assets raises important due process issues, especially if the foreign state is not heard in court. The US government even paid damages out of US Treasury funds to holders of judgments against Iran. For example, whilst Iranian assets in the USA amounted in 2009 to only US\$45 million, awards of more than US\$10 billion had been granted by US courts against that state by 2009 (in lawsuits linked to the [Iran hostage crisis](#), support for Hezbollah and the 9/11 attacks, among others). By 2016, the awards [granted](#) by US courts against Iran in terrorism-related cases amounted to more than US\$56 billion. In a very recent judgment in [Bank Markazi v. Peterson](#), the US Supreme Court ruled that a 2012 bill, which allowed 1 000 families access to Iranian funds in US banks after they had won a 2007 lawsuit against Iran in a US court, superseded provisions on the immunity from execution of central banks (Bank Markazi is the Central Bank of Iran). Some experts considered the ruling an [infringement](#) of international law, unless the USA resorted in this way to a countermeasure for an internationally wrongful act by Iran. Iran has protested against the confiscation of its assets and introduced a [complaint](#) against the USA before the ICJ.¹³ Iran has meanwhile passed [legislation](#) allowing for Iranian civil suits against the USA and for countermeasures against US assets in third countries. Moreover, since Canada has adopted a similar act for victims of terrorism, many cases have been filed before Canadian courts for [execution](#) of US judgments delivered against state sponsors of terrorism.

Moreover, the damages awarded by US courts are considered an important obstacle to the US conduct of foreign relations, should the USA wish to normalise relations with these states. Congress has generally insisted that punitive damages judgments must be paid or settled before normalising relations. But paying billions of dollars in damages is regarded as unrealistic. For example, the outstanding, massive [claims against Cuba](#) under the FSIA's terrorism exception are seen as an important obstacle to the full restoration of bilateral relations. Cuba was removed from the State Department's sponsors of terrorism list in

2015. While US\$185 million in Cuban assets have been paid to claimants in only three cases, almost US\$4 billion in claims are still [outstanding](#) and are a challenge to restoring economic relations, because any assets that Cuba, its agencies and instrumentalities bring into the USA will be liable to attachment by any judicial forum that might wish to execute the previous judgments. Many insist that in the case of Cuba, normalisation should pass through executive agreements settling the claims, following the examples of Libya and Iraq.¹⁴

Finally, some consider that there is little that civil litigation can do to deter terrorism, pointing to the futility of punitive damages in this area, although some compensation has been obtained by plaintiffs. As multiple courts have delivered judgments against the same defendants and often arising from the same terrorist action, the awards granted are now considered excessive and unable to deter terrorism and the sponsoring of terrorism. In the case of Iran, the chief judge of the District of Columbia District Court concluded in 2009 that 'civil litigation against Iran under the FSIA state sponsor of terrorism exception represents a failed policy' because these cases 'do not achieve justice for victims, are not sustainable and threaten to undermine the president's foreign policy initiatives'.

Debate in the United States

In light of the potential changes that the JASTA bill would bring for the well-established legal doctrine, the domestic and international implications of the bill were discussed extensively in the House of Representatives Foreign Affairs Committee hearing on [The US – Saudi Arabia Counterterrorism Relationship](#) and the Judiciary Committee hearing on [The Justice Against Sponsors of Terrorism Act before the bill was eventually adopted](#). Although it was initially debated in relation to Saudi Arabia's [potential involvement](#) in the 9/11 attacks, the Act has attracted significant attention on account of its potential impact on relations with other countries.

The opponents of JASTA focused on three main arguments. Firstly, they argue that the Act, in its current form, undermines the importance of the concept of [sovereign immunity](#), which restricts lawsuits against foreign governments. The ability to sue foreign governments in the USA is limited only to acts undertaken abroad by states that have been [designated](#) by the Department of State as state sponsors of terrorism. At the moment, only three countries – Iran, Syria, and Sudan – are [designated](#) by the US Department of State as state sponsors of terrorism but there is a risk that once enacted, JASTA will give private litigants the power to pursue legal actions against any other state. Secondly, opponents stress the possibility of other countries introducing [reciprocal measures](#) that could affect US interests and assets by increasing US exposure to lawsuits overseas, not least given the support provided by the US government to various groups as part of US counter-terrorism efforts. The US funds, trains, or equips numerous counterterrorism, military, intelligence and law enforcement groups around the world. The Act could, for instance, invite [retaliation](#) from Turkey for US support to the Kurds or Afghanistan because of death, injury or damage to property caused by drone strikes. The argument is also made that putting the USA and partner countries' national security practices under the scrutiny of courts would present a significant risk to their respective interests and could stifle cooperation. Finally, there are also potential economic costs linked to the fact that foreign companies might be unwilling to invest in the United States out of fear of potential terrorism-related lawsuits.

The [supporters](#) of JASTA rebuff most of these concerns. Firstly, they argue that the risk of lawsuits can act as a deterrent to donors, corrupt charities, financial institutions and

foreign governments that provide funding and logistical support for terrorist organisations. They also claim that civil actions targeting the assets of foreign states that support terrorism can ultimately reduce the ability of international terrorist groups to carry out attacks. Secondly, to address diplomatic concerns, JASTA gives the secretary of state the power to intervene in any civil litigation against a foreign state alleging support to international terrorism, and obtain a stay in the proceedings while government-to-government discussions proceed between the USA and a foreign government. The supporters of the bill also underline that it is narrowly tailored so as to limit the group of countries potentially affected. It imposes a geographical limitation to injury or death caused by an act of international terrorism occurring in the United States and does not confer jurisdiction on US courts in cases of attacks abroad. The definition of 'international terrorism' in US law imposes additional limitations. On the other hand, a mere omission or a tortious act or acts that constitute mere negligence do not constitute grounds for waiving the sovereign immunity of a foreign state. Proof of 'substantial assistance' requires, at the minimum, 'knowledge of illegal activity that is being aided and abetted, a desire to help that activity succeed, and some act to further such activity to make it succeed'. Debunking the reciprocity argument, the supporters of the bill argue that the already existing US law subjects foreign states to suits in the US courts when they cause injury domestically but has not triggered retaliatory lawsuits.

Consistent with his initial comments on the JASTA proposal, President Obama vetoed the bill, arguing that enacting it into law would neither protect Americans from terrorist attacks nor improve the effectiveness of the US response to such attacks. In the [veto message](#) to Congress, President Obama provided additional rationale for his decision:

- Designations of state sponsors of terrorism are made following a careful review of all available information by national security, foreign policy, and intelligence professionals. By taking such matters out of the hands of national security and foreign policy professionals and placing them in the hands of private litigants and courts, JASTA threatens to reduce the effectiveness of the US response to support for terrorism provided by third countries.
- Given that the United States has an extensive international presence and its staff enjoys protection from foreign court proceedings under the sovereign immunity principles the rules proposed in JASTA, if applied globally, could result in the introduction of reciprocity by other countries, which could have serious implications for US national interests.
- Even minimal allegations accusing US partners of complicity in a particular terrorist attack in the United States could be sufficient to open cases against them in US courts. Such decisions could cause a serious damage to US relations with its allies and partners.

Reactions in third countries

Although the discussion about the international implications of JASTA has focused primarily on Saudi Arabia due to the Kingdom's alleged involvement in the 9/11 terrorist attacks (15 out of 19 hijackers were Saudi citizens), the proposal has attracted attention in several European capitals even though official reactions to the Act are rare.

- Saudi Arabia: On numerous occasions, the Saudi government has warned of the possibility that the Kingdom would sell off US\$750 billion in American assets, if the bill was passed. In a statement issued following the adoption of the Act, the Saudi Embassy in Washington [expressed](#) hope that 'wisdom will prevail and that Congress will take

the necessary steps to correct this legislation in order to avoid the serious unintended consequences that may ensue'. Even though cooperation between the United States and Saudi Arabia against terrorism is extensive, the Saudis still spend billions on promotion of the Wahhabi interpretation of Islam which is often compared to the vision of Islam promoted by the jihadi groups like Al-Qaeda or ISIL/Da'esh on account of its radical approach.

- Gulf Cooperation Council: The Secretary General of the GCC, Abdellatif Zayani, [expressed](#) GCC members' concern with regard to JASTA, which in their view contradicts the foundations and principles of relations between states, notably the sovereign immunity principle'. The government of [Morocco](#) has also expressed support for this position.
- Russia: The Foreign Ministry has severely [criticised](#) the new law and the United States for demonstrating 'total disregard for international law'. A statement issued by the Foreign Ministry's Information and Press Department, as cited by RIA Novosti, said that 'The United States, where many politicians have come to believe in their own "uniqueness", insistently continues along the line of extending its jurisdiction to the entire world, disregarding the notions of state sovereignty and common sense'.
- France: Cited a the [New York Times](#) article, Pierre Lellouche, a Member of the Foreign Affairs Committee in the National Assembly stated that JASTA would cause a 'legal revolution in international law with major political consequences' and declared that he would pursue legislation that would permit French citizens to sue the United States with cause should the bill enter in force.
- The Netherlands: In July 2016, the Dutch Parliament submitted a formal letter in advance to the Judiciary Committee hearing on the JASTA proposal. In a binding motion on the JASTA bill, members of the Parliament considered JASTA to be 'a gross and unwanted breach of Dutch sovereignty' and declared that 'the entry into force of JASTA in its current form' was 'unacceptable for the Netherlands'. At the same time, the letter expressed support for the concerns expressed by the US Department of State.
- United Kingdom: The risk of legal suits against the government has also been raised by British politicians. In an op-ed for [The Telegraph](#), British MP, Tom Tugendhat, signalled that, under JASTA, US citizens might sue the British government claiming a negligent lack of efforts to tackle Islamic radicalism in earlier decades.

Considerations for the European Union

The cross-border nature of terrorism makes it probable that future attacks will have more or less formal links to EU Member States. In the case of the 9/11 attacks, for instance, the intelligence agencies have established a clear link between the perpetrators and Germany where they had established a 'Hamburg cell'. The threshold for the exemption from the principle of state immunity established in the JASTA bill is relatively high, which reduces the probability that the bill will be used to challenge an EU Member State in the US courts. Nonetheless, the bill's rather broad provisions leave room for broad interpretation and represent a number of legal and operational challenges for the EU and its Member States.

At EU level, the Transatlantic Relations Working Party (COTRA) in the Council has agreed on the EU *démarche* to the US Department of State that signalled the conflict of the proposed legislation with the fundamental rights of international law and in particular the principle of state immunity. The European Union considers that the adoption of the

bill and its subsequent implementation might also cause repercussions for other states that may seek to adopt similar legislation, which then could lead to a further weakening of the principles of state sovereignty and immunity. The EU also expressed the intention to seek assurance and clarification from the United States concerning the bill's implementation, in particular reassurance that the US administration would seek to request a stay of proceedings as required in order to mitigate possible breaches of the principle of state immunity.

Threshold for the exemption

A certain level of uncertainty regarding the interpretation of the provisions of JASTA in the future stems from the fact that the international framework and security environment are in constant flux. That means that certain types of action that might nowadays be considered 'mere negligence' could in theory be interpreted as grave negligence in the future and expose Member States to legal suits in the United States. This could, for instance, apply to foreign terrorist fighters (FTFs). Although the EU and Member States have taken [steps](#) to address the risks linked to FTFs, the possibility that an attack committed by a national of an EU country in the United States will be used as grounds to seek compensation from that country cannot be ruled out. Similarly, the rapidly evolving structure for funding international terrorism may in future be used to challenge European banks or companies in the US courts. This is particularly problematic given that JASTA adopts an exclusively USA-centric [definition of terrorism](#) and of a terrorist organisation. This implies that if a specific group is not on the EU list of terrorist groups, which would imply that individual Member States can interact with that group, the fact that it is on the US list of terrorist organisations would be grounds for legal proceedings in the US courts.

Procedural challenges and reciprocity

Additional complications arise from the fact that even if a specific case fell beyond the scope of JASTA and hence state immunity was to be maintained, a decision to that effect would need to be taken during the court's proceedings. This implies that in order to establish non-involvement or 'mere negligence' of a specific state that state would need to present evidence in its defence in the courtroom. Such evidence is very likely to be of a sensitive nature, which could consequently harm the interests of that country. Given current international practice, it is very unlikely that any government would engage in such proceedings. At the same time, the adoption of JASTA will require the EU Member States to consider whether to introduce similar rules with regard to the United States.

Application of the principle of state immunity

In addition, even though JASTA's provisions and the current debate surrounding them do not suggest the authors' intention to target European countries, the EU will need to react to the limitation on the principle of state immunity proposed in JASTA. As mentioned earlier, state immunity is a well-recognised principle of customary international law based on the sovereign equality of states in the international legal order. Subjecting the EU Member States to civil law suits in the US courts would therefore represent a significant violation of their sovereignty.

The European Union's approach to victims' rights

Despite the increase in number of terrorist attacks and victims of terrorism in the European Union, no proposals similar to JASTA have been made. Nonetheless, the question of [victims' rights](#) – in cases both of terrorist attacks and of cross-border crime

more broadly – has been addressed, not least in the [Victims' Rights Directive](#) of 2015. The European Commission's priorities in this policy area are the following:

- **Implementation of the Victims' Rights Directive:** The Member States were required to transpose the Victims' Rights Directive by 16 November 2015. As of September 2016, 11 Member States have still not informed the Commission of their national measures transposing the Victims' Rights Directive. Most of these countries have nonetheless notified at least a partial transposition (but Greece and Luxembourg have yet to transpose any measures) and the Commission is aware that many Member States are currently working on completing the transposition. In January this year, the Commission opened infringement procedures against those Member States that had not notified their national measures transposing the Victims' Rights Directive.
- **Adoption of related provisions under the proposed directive on combatting terrorism:** The European Parliament has [proposed](#) several far-reaching amendments strengthening the rights of victims of terrorism (including access to unconditional legal aid, access to medical treatment and creation of a common coordination centre).
- **Improving victims' access to compensation in cross-border cases:** The matter of compensation for victims of crime was discussed recently in Council. The Member States are not eager to amend the current rules but would prefer to focus on improving their cross border application through better cooperation and the exchange of best practice. In that regard, the Commission is working on fostering cooperation among the national authorities responsible for administration of compensation and on improving access to information in cross border cases. The Commission has hosted a meeting for the national contact points responsible with a view to exchanging best practice and improving methods of cooperation and channels of communication (for instance exploring the new possibilities available under the e-justice portal) resulting from application of the 2004 Compensation Directive.
- **Consolidating cooperation within the European Network on Victims' Rights:** The Commission funds and cooperates with the network, which was [launched](#) during the Dutch Presidency. The network is a platform of national experts working at the ministries and dealing with victims' rights. The main objective of the network is to exchange best practice on implementation of Victims' Rights legislation. The first two years of the network's operation (until mid-2017) are covered by a Commission grant under the [Justice Programme](#).
- **Promoting the victims' rights policy and mainstreaming it into related criminal law policies:** The Commission is actively ensuring that the victims' rights aspects are present and well-defended in other policies. This is particularly important in the context of the on-going work on the [Istanbul Convention](#), fighting hate crime, protecting the rights of children in migration, developing new policies with victim-related aspects, such as fighting non-cash payment fraud.

Main references

Fox, Hazel and Webb, Philippa, [The law of state immunity](#), Oxford University Press, 2013, p. 645.

Kim, Jeewon 'Making State Sponsors of Terrorism Pay: A Separation of Powers Discourse under the Foreign Sovereign Immunities Act', *Berkley Journal of International Law*, Vol. 22, No 3, 2004.

Endnotes

- ¹ This briefing focuses on civil as opposed to criminal proceedings.
- ² China still applies the absolute immunity doctrine, not recognising any exceptions based on commercial activities and conduct. There is absolute state immunity from criminal proceedings.
- ³ Immunity from adjudication means that the court is prevented from considering claims against that party and awarding a judgment. Immunity from enforcement or execution means that the court is prevented from recognising a foreign judgment against the immune party and from executing orders or injunctions against it. Enforcement of judgments against a foreign state's property is very difficult to effect, unless that state **waives** immunity or the property is used for 'non-governmental commercial purposes', etc.
- ⁴ The convention has so far been signed by 28 states and ratified by 21. It will enter into force after it has been ratified by 30 states. The US is not a signatory to the UNCSI.
- ⁵ There is a debate around what constitutes state practice regarding the law of state immunity: judgments by courts or actions/statements by the executive in international fora, particularly when assessments of the two branches differ.
- ⁶ [Case Concerning Jurisdictional Immunities of the State](#) (Germany v. Italy: Greece intervening, 2012), ICJ.
- ⁷ The Italian Court stated that 'the immunity of the foreign state is not a right but a prerogative which cannot be assured when it concerns *delicta imperii*, that is crimes perpetrated in violation of international *jus cogens norms*, as such infringing universal values that transcend the interests of the particular state communities'.
- ⁸ Currently, the State Department lists Iran, Sudan and Syria as state sponsors of terrorism. In 2015, Cuba was taken off the list. South Yemen was removed from the list in 1990, Iraq in 2004, Libya in 2006, and North Korea in 2008.
- ⁹ The US Departments of State and Justice strongly opposed the introduction of the 1996 legislation on the terrorism exception in FSIA, on the grounds that it might interfere with the executive's conduct of foreign policy.
- ¹⁰ Punitive damages may be awarded in order to 'punish and deter' a certain conduct, in addition to compensatory damages (actual damages).
- ¹¹ Contrary to the conclusions reached by courts in the UK and Australia under their respective immunity statutes (*Jones v. Saudi Arabia* and *Zhang v. Zemin*).
- ¹² Because those states either did not engage in commercial activity in the US or their assets were seized or frozen as a result of government sanctions.
- ¹³ Argentina has also introduced an [application](#) before the ICJ against the US concerning a matter of jurisdictional immunity. The US must consent to the ICJ jurisdiction for the proceedings to go ahead.
- ¹⁴ After Libya's government recognised responsibility for the Pan Am bombing in 1998, full diplomatic relations with the US were restored in May 2006. However, disagreements over the outstanding legal claims against Libya hindered true re-engagement. In October 2008, after Libya made its final payment into a settlement fund for terrorism claims, the US administration restored Libya's immunity from terrorism lawsuits and dismissed any pending cases.

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