

Immunity from Jurisdiction with Special View to Kuala Lumpur War Crime Tribunal

Dr. Abbas Hardani

Abstract—The definition of jurisdiction revolves around the principles of state sovereignty, equality and non-interference but most of the grounds for jurisdiction are related to the requirement under international law to respect the territorial integrity and political independence of other states. Article 5 of International Law Commission in 1991 state “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 articles.” Based on above facts, the paper infers on immunity of states from jurisdiction with discuss more about sovereign immunity. Also, this paper discuss about view of Kuala Lumpur War Crime Tribunal, 2013 to waiver of immunity of Israel state. The methodological approach involves an in-depth study of current practices in selected regions and selected issues and examining literature of previous finding in arriving at a logical assumption. The findings are intended to demonstrate a coherent argument and appropriate responses to conflicting points of views.

Keywords— Immunity, KLUWCT, Jurisdiction.

I. INTRODUCTION

THE concept of jurisdiction revolves around the principles of State Sovereignty, equality and non-interference. Most of the grounds for jurisdiction are related to the requirement of international law to respect the political independence of other states. International law excludes types of persons and entities from jurisdiction of domestic courts. This category includes State Immunity, Diplomatic Immunity and Immunity of International Organization.

This paper will discuss about State immunity from jurisdiction of domestic courts. The most important reason why international law gives State immunity from jurisdiction of another State is a State, regardless of their powerful or powerless, rich or poor are equal and sovereign and because they are equal, one State cannot use power to exercise their jurisdiction over another State. An equal has no power over an equal. When we say “State” in 21st century, means State with many activities from transaction with other States, employ citizen from other States in their embassies and much more activities.

Rules of State immunity taken from customary international law. These rules explain that States should protect from being sued in the judicial system of other States. Immunity will cover to legal proceeding against the State, heads of government and State cabinet ministers.

Historically, head of State can enjoy some immunity that State enjoys. A serving head of State cannot be detained or arrested in another state territory. By the way, a head of State cannot invoke his official positions as a defense for crimes such as war crimes, genocide and crimes against humanity).

II. THEORIES OF STATE IMMUNITY

Under international law, there are two types of immunity, known as absolute immunity and restrictive immunity. The doctrine of absolute immunity came from 19th century and base on this theory, court gives a State or representative of State absolute immunity from jurisdiction of another State in all circumstances in case of *Government v. Lambege et pujol* French mentioned : The reciprocal independence of State is one the most universally respected principles of international law, and it follows as a result that a government cannot be subjected to the jurisdiction of another against its will...¹. But the problems appeared 20th century when States became bigger and bigger with so many activities like political, commercial, etc, so it became necessary to create new theory to replace absolute immunity.

Base on restrictive theory, court will make difference between acts of States in exercise of their sovereign authority and deny it for act of commercial and private purpose. Clearly, States only has granted immunity for governmental act² but not for normal commercial that not include in sovereign activities³. May be its easy to make differences between sovereign and commercial acts but sometimes it's difficult for court. The court consider nature of act to find its commercial or governmental in nature, for example, purchase of military uniforms would be commercial act and exclude for immunity of jurisdiction.

The majority of States have accepted the restricted immunity doctrine and this has been reflected in domestic legislation. The important point in immunity is immunity of State due to their governmental act is not absolute, if the government act violates a peremptory norm of international law like *jus cogens* include torture, war crime, etc. the

¹ - *par in parem non habet imperium*

² - M.Sweeney, Joseph, “ The International Law of Sovereign Immunity Policy Research Study”, U.S Dept of State, 1963, pp 20-21

immunity from criminal jurisdiction of head of State or foreign minister who committed international crime has been an issue before ICJ4. We can find examples in case of *Prinz v. Federal Republic of Germany*, U.S court of Appeal and *Al-Asdani v. U.K5* and case concerning certain criminal proceeding in *France –Congo v. France-*.

III. THE CONVENTION ON THE JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, 2004

The rules of State immunity are rules of customary international law, and they originated in the practice and custom of States. The first multilateral treaty was the European Convention on State Immunity was adopted in 1972 and came into force in 1976. Around the world there was differences in practice of State and uncertainty in the law that prompted the decision of the United Nations General Assembly in 1977 to include the topic of State immunity in the program of the International Law Commission. In 2003, under General Assembly resolution 58/74 completed finalized the convention (version of 1991 Draft).

The UN Convention related to State immunity from jurisdiction discuss about restrictive theory of State immunity trying make different categories between time that State request immunity and when a State has immunity. Definition of State in conference is wide, not only State itself and State's organ but all divisions and subsidiary divisions, agencies and other entities that are performs act in the exercise of sovereign authority.

The convention already mentioned a State has immunity from jurisdiction, for State itself and its property with exceptions coming in articles seven to eighteen of the convention. The exception discussed in commercial transaction, participation in companies, operation of State owned commercial ship, Arbitration agreements. If any of above exceptions apply in a case, a State will not be able to claim immunity in a foreign court.

IV. KUALA LUMPUR WAR CRIME TRIBUNAL, 2013

The Kuala Lumpur War Crime Tribunal reconvened on 20th of November 2013 to hear two charges against Amos Yaron and the State of Israel. The State of Israel charged with the crime of genocide and war crime.

The charge was followed "from 1948 and continuing to date the State of Israel carried out against the Palestinian a

³ - *acts jure imperii*

⁴ - *acta jure gestionis*

⁵ - International Court of Justice

⁶ - Mr.Al-Adsani made a claim in the UK courts against the government of Kuwait on the ground that he had been detained and tortured by Kuwaiti government officials in Kuwait. The State Immunity Act 1978 provides that a State retains immunity unless the injuries were inflicted in that country. The victim had said that the psychological injuries he had received under torture had been exacerbated by threats he had received over the telephone while in London from the Kuwaiti ambassador anonymously, but he was unable to prove that the threats had been made by the ambassador. The Court of Appeal therefore held that the State of Kuwait was entitled to immunity and the case could not proceed.

series of acts namely killing... such conduct constitutes the crime of genocide under international law...such conduct also constitutes war crimes and crimes against humanity under international law".

Defense counsel submitted that international law does not allow the State of Israel to be imp- leaded as an accused. It was submitted that no matter what the fact may be and how serious all alleged crime may be, the State of Israel enjoys absolute immunity in international law from being impleaded in a domestic court or tribunal unless it voluntary subjects itself to such jurisdiction.

Tribunal stated that on the other hand, we have doctrine of *jus cogens* refers to that body of peremptory principles of norms recognized by international community as being fundamental to maintenance of an international legal order. In the view of tribunal the international law doctrine of State immunity found lower in importance that *jus cogens* like prohibition of genocide or war crime. By the so-called "Tate Letter", the United States mentioned immunity on foreign States only for their governmental act not for commercial activities. It is obvious that commission of war crime or genocide can never be a sovereign or governmental act. This perform for restrictive State immunity that applied by Kuala Lumpur War Crime Tribunal was given powerfull States as well like U.S in foreign Sovereignty Immunities Act 1976 and in U.K by the State Immunity Act 1978.

The Kuala Lumpur War Crime Tribunal in page 28 of judgment stated as well that another reason why the tribunal wishes to reject the doctrine of absolute State immunity from prosecution in matter of genocide, war crime and crimes against humanity is that the existing international law on war and peace and humanitarian is being enforced in a grossly inequitable manner, that powerful States misusing their power and remain unpunished."

V.CONCLUSION

The rules of State immunity concern the protection which a state is given from being sued in the courts of other states, the rules related to legal proceedings in the courts of another state, not in a state's own courts. The rules developed at a time when it was thought to be an infringement of a state's sovereignty to bring proceedings against it or its officials in a foreign country. But there are now substantial exceptions to the rule of immunity; in particular, a state can be sued when the dispute arises from a commercial transaction entered into by a state or some other non-sovereign activity of a state. The UN Convention in 2004 formulates the rule and exception to them.

7 - Article 10

8- Article 15

9 - Article 16 (2)

10 - Article 17

¹¹<http://criminalisewar.org/files/Judgement%20on%20Genocide.pdf>

¹²<http://criminalisewar.org/files/Judgement%20on%20Genocide.pdf>

It does not cover criminal proceedings and it does not allow civil actions for human rights abuses against state agents where the abuse has occurred in another country.

The Kuala Lumpur War Crime Tribunal that held in November 2013 to hear charge against Israel State tried to deny immunity of Israel State due to conflict of Immunity of State with violating peremptory norm of International law like war crime and genocide. The tribunal mentioned in judgment “ After considering the evidence adduced by the Prosecution and submissions by both the Prosecution and the Amicus Curiae-Defence Team on behalf of the two Defendants, the Tribunal is satisfied, beyond reasonable doubt, that the Second Defendant, the State of Israel is guilty of Genocide ”.

REFERENCES

- [1] Akand, Dapo & Shah, Sageeta, “ Immunities of States Officials, International Crime and Domestic Courts”, *The European Journal of International Law*, Vol 21, No 4, 2011
<http://dx.doi.org/10.1093/ejil/chq080>
- [2] Foales, Joanne, “ Immunity for International Crimes? Development in the Law on Prosecuting Heads of State in Foreign Court”, Chatham House Publication, 2011
- [3] H, Fox, “The of State Immunity”, Oxford University Press, 2002
- [4] Ishan Jan, Mohammed Naqib, “Principles of Public International Law, A Modern Approach”, IIUM press, 2009
- [5] Judgment of Kuala Lumpur War Crime Tribunal, www.criminalisewar.org, 2013
- [6] Kunchel, Sevrine, “ State Immunity and the Promise of Jus Cogens”, *Northwestern Journal of International Human Rights*, Vol 9, Issue 2, 2011
- [7] M.Sweeney, Joseph, “ The International Law of Sovereign Immunity Policy Research Study”, U.S Dept of State, 1963
- [8] R.Siegel, Jonathan, “ Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment”, *Duke Law Journal*, Vol 52, 2003
- [9] Shaw, Malcolm, “International Law”, 6th Edition, Cambridge University Press, 2008
<http://dx.doi.org/10.1017/CBO9780511841637>
- [10] Tomuschat, Christian, “The International Law of State Immunity and Its Development by National Institution”, *Vaderbilt Journal of Transnational Law*, Vol 44, 2011
- [11] United Nations Convention on Jurisdictional Immunities of States and Their Property, 2004