

Ottawa, July 20, 2023

Mr. Stuart Delery
White House Counsel
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Subject: Freezing sovereign assets should not be considered as a step toward their confiscation

Dear Mr. Delery:

I am honored to write this letter regarding the United States District Court for the District of Columbia ruling of a default judgement that a certain amount of funds be awarded as compensatory damage to the Iranian American journalist and human rights activist, Masih Alinejad.

While grateful of all efforts by your country in defence of human rights and democratic values, I, Mahmoud Masaeli, a Canadian Iranian retired professor of Political Science and international law, and president of Alternative Perspectives and Global Concerns, would like to stress that such orders by US courts reflect a breach of international norms and consequently cannot lead to justice in favor of the oppressed people of Iran who have been suffering from the most serious injuries and damages under theocratic rules for years. Here are the arguments to support my claim:

It is quite evident that the US federal courts are acting in accordance with three pieces of legislation:

- Foreign Sovereign Immunities Act of 1976.
- Anti-Terrorism and Effective Death Penalty Act of 1996; and
- Justice Against Sponsors of Terrorism Act of 2016.

Everything looks seamlessly lawful here, and no special problems seem to arise regarding the international obligations of countries, including the US. It is also evident that the US courts have grounded their orders on a *restrictive theory* of the foreign sovereign immunities.

The *restrictive theory* suffers from *inherent* and *structural* weaknesses.

- Inherent weakness in the sense that it contradicts the rules and norms of international law, and
- Structural deficiency in the sense that it holds the US responsible for violations of international obligations.

Here are the lines of argument:

1. Draft Articles on State Responsibility for Internationally Wrongful Acts, articles 21 to 22 identify the said inherent weaknesses arising from the supposed countermeasures against the outlaw states.

Article 21 *Self-defence*: The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22 *Countermeasures in respect of an internationally wrongful act in respect of an internationally wrongful act*: The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.¹

These two articles are interdependent and indivisible. Countermeasures, as self-help measures, are the essentials of a decentralized international system of states. This nexus connotes a twofold role: On the one hand, they operate to remind responsibility for wrongful acts. On the other, they function as a pretext (a shield) to provide justification for taking measures that are illegal. This issue creates inconsistencies in the international behaviour of states. If one state favors the *restrictive theory* of immunities, as a countermeasure, others react accordingly. In this vein, national interests of state require them to favor the *absolute theory* of the foreign sovereign immunities.

In the *Jurisdictional Immunities* Case, the ICJ confirms this argument.

The Court notes that, although there has been much debate regarding the origins of State immunity and the identification of the principles underlying that immunity in the past, the International Law Commission (hereinafter the “ILC”) concluded in 1980 that the rule of State immunity had been “*adopted as a general rule of customary international law solidly rooted in the current practice of States*” (emphasis added). In the opinion of the Court, that conclusion was based upon an extensive survey of State practice and is confirmed by the record of national legislation, judicial decisions, and the comments of States on what became the United Nations Convention on the Jurisdictional Immunities of States and their Property.

It believes that practice to show that, whether in claiming immunity for themselves or according to it to others, States generally proceed on the basis that *there is a right to immunity under international law, together with a corresponding obligation on the part of other States* (emphasis added) to respect and give effect to that immunity.²

¹ Draft Articles on State Responsibility for Internationally Wrongful Acts, *International Law Commission*, 2001.

² The International Court of Justice, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening). Summary of the Judgment of 3 February 2012. 03 February 2012, p. 3.

The agreement regarding the validity and importance of State immunity has also been admitted by the U.S. Supreme Court in *Saudi Arabia v. Nelson*

Under the Act, *a foreign state is presumptively immune from the jurisdiction of United States courts*; (emphasis added) unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.³

Since the absolute theory of immunities is confirmed by customary international law, can the specific exception precede customary international law? This question brings us to another line of argument.

2. The ICJ in the *Jurisdictional Immunities Case*, states that state immunity had been “*adopted as a general rule of customary international law solidly rooted in the current practice of States*”.⁴ As customary international law, any exception must satisfy the requirements stipulated in the ICJ statute, article 38(1-b): “international custom, as evidence of a general practice accepted as law” conferring immunity on States and, if so, what is the scope and extent of that immunity”⁵. The requirement, i.e., accepted as law, which is accompanied by *opinio juris*, involves the tacit consent of states and implicit conventionality which are the sole prerequisite for a piece of law to be universally binding upon states. The second requirement makes sense when state practice reach a threshold; there must be some instances of practices by states. The two elements, characterize *generality* and *uniformity* as the specifications of customary international law. Have these requirements been satisfied by the practice of the US courts? It seems the answer cannot be in the affirmation. None of these requirements are met with the application of exceptionalism in the law of foreign immunities. There is no *generality* requirement in the practice of the US courts.

In the *North Sea Continental Shelf*, the Judge KōtarōTanaka in dissenting opinion admits this argument:

For to become binding, a rule or principle of international law need not pass the test of universal acceptance. This is reflected in several statements of the Court, e.g.: “generally . . . adopted in the practice of States” (Fisheries, Judgmerzt, I.C.J. Reports 1951, p. 128). Not all States have, as indicated earlier in a different context, an opportunity or possibility of applying a given rule. The evidence should be sought in the behaviour of a great number of States, possibly the majority of States, in any case the great majority of the interested States.⁶

³ *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), *Justicia*.

⁴ International Court of Justice, *Judicial Immunities of the State*, Judgment of February 03, 2012, p. 123.

⁵ *Ibid.*, p. 122.

⁶ International Court of Justice, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, Dissenting Opinion of Judge Tanaka, p. 179.

In the *Case Military and Paramilitary Activities in and Against Nicaragua*, the Court once again confirms the said requirements:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules. ... The Court has however to be satisfied that there exists in customary international law an *opinio juris as to the binding character of such abstention* (emphasis added). This *opinio juris* may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolution.⁷

Further, repetition of the practice as evidence of uniformity and consistency cannot be established in the behaviour of states, except the US, and sometimes Canada. In the very *North Sea Continental Shelf*, the judge Lachs in his dissenting opinion is of the firm opinion that repetition is required to establish a norm of customary international law:

To decide whether these two factors in the formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided.⁸

The ILC has also established a threshold regarding the rules of customary international law:

A general practice and acceptance of that practice as law (*opinion juris*) or the two constituent elements of customary international law: together they are the essential conditions for the existence of a rule of customary international law.⁹

If immunity of states is a rule of international law, any exception must be supported by a firm justification, as the ILC puts it: "The identification of such a rule does involve a careful examination of variable evidence to establish their presence in any given case".¹⁰ Can the practice of the US courts in applying exceptions to the general rule of customary international law provide a firm justification? In an affirmative response, only one justification is presented. What is this justification?

3. The UN Charter provides the answer to the question. Freezing sovereign assets, as an exception to the customary rule of state immunity, and consequently equality of sovereignty, is justified in situations where *the breach of the norms of international law, is a threat to*

⁷ The International Court of Justice, *Case Military and Paramilitary Activities in and Against Nicaragua*, Merits judgment of 27 June 1986 at 184.

⁸ International Court of Justice, *North Sea Continental Shelf* (Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, Dissenting Opinion of Judge Lachs, p. 229.

⁹ The ILC, Draft conclusions on identification of customary international law with commentaries, 2018.

¹⁰ *Ibid.*

international peace and security (emphasis added). Articles 39 to 42 of the Charter considers (multilateral) sanctions as means of deterring any serious threat to international security. Although in the Charter the term freezing sovereign assets is not cited directly, the implicit language in articles 39 to 42 proves certain actions as the imposition of costs for the breach of international norms. What is quite evident is that the whole of state is held responsible for the commission of wrongful acts, hence sanctions are designated to serve the *common good*; both internationally (the peace and security) and nationally (for the interest of the people of the designated country).

Security Council as the highest authority and sole source of determination of sanctions sets out the law as well as its enforcement. Imperative in this determination is conformity with certain criteria. First, sanctions must comply with the purposes of the United Nations. "In discharging these duties, the Security Council shall act in accordance with the Purposes and Principles of the United Nations".¹¹ The purposes simply summarized are presenting international peace and security, developing friendly relationship among the members in accordance with the principle of equal sovereignty, achieving international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and promoting and respecting human rights and fundamental freedoms for all without distinction of race, sex, language, or religion. These purposes facilitate the *common good* in the international scope. The only exception to the absolute view of immunity is authorized in the condition that this internationally oriented common good is respected. This is a firm legal obligation by all members of the United Nations, any derogation from it can hardly be permitted, as article 25 of the Charter puts it: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

This imperative toward preservation of the international common good has been illustrated in several objections against the exception to the absolute theory of immunities. The European Union delegation to the United States, for example, in a letter to President Obama raised its objection against JASTA: "The possible adoption and implementation of the (bill) would be in conflict with fundamental principles of international law and in particular the principle of State sovereign immunity".¹² An official at the Saudi Arabian Ministry of Foreign Affairs on Thursday said that the enactment of the JASTA law by the US Congress "is of great concern to the community of nations that object to the erosion of the principle of sovereign immunity, which has governed international relations for hundreds of years".¹³ A similar objection was raised by the Coordinating Bureau of the Non-Aligned Movement, and similarly by the Secretary General of the (Persian) Gulf Cooperation Council.

Objections to the exceptions to the customary rule of sovereign immunities, boosts one of the delicate principles of international law: *Persistent Objector Rule*. If several states consistently object to an exception in rule of customary international law in the course of its formation, such

¹¹ The UN Charter, article 24 (2).

¹² *Reuters*, World News, September 21, 2016.

¹³ *Arab News*, September 30, 2016.

exception will be caught by the rule of customary law. In the *Anglo-Norwegian Fisheries Case* 1951, the ICJ admits the persistent objector rule:

...the ten-mile rule would appear to be inapplicable as against Norway inasmuch as the country has always opposed any attempt to apply it to the Norwegian coast.¹⁴

In the same vein, in the *Asylum Case* (Colombia v. Peru), the ICJ reminds the persistent objector rule, which I consider as a serious violation of international law norms by the US courts.

But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.¹⁵

The second criterion holds that sanctions should not impinge humanitarian concerns and must align with the common good serving the benefits of the people of the designated countries. Sanctions are justified only if a country threatens the first purpose of the United Nations i.e., international peace and security. This threat is originated from the nature of the outlaw regime of the country which is not willing to respect the intrinsic rights of its people. In other words, as the advocates of *Democratic Peace Theory* argue,¹⁶ any threat to international peace and security derives from non-democratic violators of human rights regimes. Such threats must be deterred, and sanctions are the means of deterrence.¹⁷ *Here is where the internal and international imperatives of the common good coincide.*

4. The Security Council emphasizes such a thoughtful humanitarian coincidence. Sanctions are applied against individuals, groups and entities that are associated with terrorism. Although terrorism has not been defined in an agreed-base, and hence could not be listed on the roster of international crimes in the Rome Convention, terrorism is a threat to international peace and security. It is also one of the most serious reasons hampering the wellbeing of people not only in the western countries, but also, and more importantly in the life of the countries affected by terrorism such as Afghanistan. In resolution 2615 (2021) targeting Taliban, Security Council decided that the exception of the customary rule of immunities is permitted in terms of humanitarian concerns. *Stressing* the important role that the United Nations will continue to play in promoting peace and stability, Security Council

¹⁴ The International Court of Justice, *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951.

¹⁵ The International Court of Justice, *Asylum Case* (Colombia vs. Peru) 1950, Judgment of 20 November 1950.

¹⁶ The idea was first time theorized by Immanuel Kant, then followed by the contemporary liberal thinkers of international law and relations. See: Kant, I. (1795/2003). *Perpetual Peace: A Philosophical Sketch*. Hackett Publishing Company, Inc.

¹⁷ An elegant expression of this dictum is presented by John Rawls by a reference to outlaw states. See: Rawls, J. (1993). *The Law of People: With the Idea of Public Reason Revisited*. Harvard University Press.

Decides that humanitarian assistance and other activities that support basic human needs in Afghanistan are not a violation of paragraph 1 (a) of resolution 2255 (2015),¹⁸ and that the processing and payment of funds, other financial assets or economic resources, and the provision of goods and services necessary to ensure the timely delivery of such assistance or to support such activities are permitted...¹⁹

Beyond the multilateral sanctions (the UN framework), *Guidance Note on Overcompliance with Unilateral Sanctions and its Harmful Effects on Human Rights*, by the High Commissioner for Human Rights sets human rights norms as the sole criterion for lawfully permitted sanctions. In the guidance, over-compliance is considered as having negative impacts on the human rights of people. In the report, the Special Rapporteur emphasizes that under international law, including human rights treaty law, all states are required to observe their international obligations, including in the sphere of human rights. She further

Calls on states to review and lift all unilateral sanctions which are not authorized by the UN Security Council, are not in conformity with their international obligations, or the wrongfulness of which cannot be excluded in accordance with the law of international responsibility.²⁰

5. Human rights considerations as the criterion in exercising exceptions to the general rule of immunities pertain to all members of the international community. The international law of human rights is also the sole standard of the relationship between the sovereign and citizens of any country. This overlapping domain i.e., universality of human rights and its national application brings the conception of people, and their intrinsic rights, at the forefront of the discourse. Recalling the purpose of sanctions, namely the common good in both national and international domain, the assets of a nation must be preserved until it can be transmitted to a free and democratic state in the targeted country. With some caution, this observation could be justified by a reference to *smart sanctions* aiming at pressuring political leaders in non-democratic states and not the innocent people. The President of the Constitutional Court of Belgium eloquently illustrates the human rights aspects of freezing assets of a state as the means of sanctioning the country:

¹⁸ Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly for such persons' benefit, by their nationals or by persons within their territory.

¹⁹ Security Council resolution 6515 (2021).

²⁰ <https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures/resources-unilateral-coercive-measures/guidance-note-overcompliance-unilateral-sanctions-and-its-harmful-effects-human-rights>

It maybe stated that it is not sufficient that the policy of the targeted country justifies the imposition of economic sanctions. There should also at least be the hope that the measures taken may lead to the desired result.²¹

The immediate message of considering human rights standards in sanction regimes, either multilateral or unilateral ones, is a very important conception of common good. This means that sovereign assets belong to the nation, though they have been robbed by the corrupt political leaders. Assets belonging to companies and individuals associated with political leaders in corrupt non-democratic regimes, belong to the population, especially the vulnerable people. Those assets are blocked for the purpose of hampering the outlaw states, and their agents, not threatening the common good of people either nationally or internationally. Recalling “a need to take measures to prevent and suppress the financing of terrorism and terrorist organizations”, Security Council resolution 2161 clearly reiterates “The assets freeze measures are preventative in nature and are not reliant upon criminal standards set out under national law”.²²

The preventive nature of sanctions reiterates their purposes as well. To illustrate this assertion further, freezing measures aim to block the financial ability of outlaw states in suppressing their people and threatening international peace, hence their assets can be released once the outlaw regime is replaced by a democratic state. This means that *freezing cannot be converted to confiscation* in favor of a person or group of persons alleging to be the victims of terrorism.²³ Assets belong to the nation and must be returned to them, accordingly. Indeed, freezing measures are considered as countermeasures to bring the outlaw states and the ruling perpetrators to the terms of international law. The ILC in the commentary to Draft Articles on State Responsibility for Internationally Wrongful Acts favors this position:

Given the existence of a primary rule establishing an obligation under international law for a State, and assuming that a question has arisen as to whether that State has complied with the obligation, a number of further issues of a general character arise. These include:

(a) The role of international law as distinct from the internal law of the State concerned in characterizing conduct as unlawful....

(h) Laying down the conditions under which a State may be entitled to respond to a breach of an international obligation by taking countermeasures designed to ensure the fulfilment of the obligations of the responsible State under these articles.²⁴

²¹ The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights. Prof. Dr. Marc Bossuyt, President of the Constitutional Court of Belgium.

²² Security Council resolution 2161 (2014).

²³ Masih Alinejad plaintiff against the Islamic Republic of Iran, Seyed Ali Hosseini Khamenei, the Judiciary of Iran, and the Islamic Revolutionary Guard Corp. The District Court of Colombia, Case 1:19-cv-03599.

²⁴ Draft Articles on State Responsibility for Internationally Wrongful Acts, *International Law Commission*, 2001, p. 31.

This position illustrates how the frozen wealth of a state is released. Reclaiming of said assets depends on the fundamental change of the position of the state. In this perspective of international law permitting freezing countermeasures against the perpetrators, there shouldn't be any justification of confiscation of the assets in favor of a person or group of persons. Examples can clarify this contention further. In a dispute over confiscation of Russian's assets, Switzerland took the position that freezing assets cannot be considered as a step toward confiscation.²⁵ European Commission admits that freezing and confiscating property deprives criminals of their illegally acquired assets. Having said that, the Commission is of the opinion that *freezing assets means temporarily retaining property*, pending a final decision in the case. This means that the owner cannot dispose of their assets before the case is closed.²⁶ As the final word, Assets Freeze: Explanation of Terms, approved by the Al-Qaida Sanctions Committee on 24 February 2015, clearly defines the purpose of asset freezing measures:

The term "freeze" does not mean confiscation or transfer of ownership. Whatever person or State body is responsible for regulating frozen assets should make reasonable efforts to do so in a manner that does not result in their undue deterioration, provided that this does not conflict with the overall intention behind the freezing action - to deny listed individuals, groups, undertakings and entities the financial means to support terrorism.²⁷

6. Breaching the terms of authorised countermeasures against the perpetrators of heinous crimes such as the crime of aggression, terrorism, genocide, etc., creates responsibility under international law. Draft Articles on Responsibility of States for Internationally Wrongful Acts, in article 31 says that "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act". Upon democratic victory in countries previously under totalitarian regime, the people freed from the suppressive regime can search for the full reparation caused by the confiscation of their assets. In an article on unfreezing assets, Assets Freeze: Explanation of Terms, confirms this assertion: "Any assets that have been frozen solely as a result of the listing are no longer subject to the assets freeze". What happens is that the frozen assets confiscated by the internal law of the sanctioning state is conducive to responsibility for that state for its wrongful act in accordance with international law. Draft Articles on Responsibility on article 32 establishes such a wrongful act and responsibility driven from it.

Article 32. Irrelevance of internal law: The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

²⁵ Reuters, Swiss government: confiscation of Russian assets found unconstitutional, February 15, 2023.

²⁶ https://commission.europa.eu/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/confiscation-and-freezing-assets_en

²⁷ Assets Freeze: Explanation of terms, approved by the Al-Qaida Sanctions Committee on 24 February 2015. See details at https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/eot_assets_freeze_-_english.pdf.

Internal law cannot contradict international law and responsibility. Freezing assets is to be seen by no means as a step toward confiscation. Those assets remain as a trust in the sanctioning state until the oppressed people can free themselves from their dictatorial regimes. Assets are only a trust and nothing else, and hence should not be conceived as means for political bargaining and considerations.

Dear Mr. Delery,

Considering the above lines of argument, I believe the people of Iran have the right to hold the US responsible and resort to compensation only after a free and democratic government is established in their country. As a trustee, the US must hold the assets of the people of Iran in its temporary possession until the Iranian people can free themselves from tyranny. Then, such assets must be unfrozen and returned to people of Iran. International law openly acknowledges and supports this claim.

I humbly await a response to my argument.

Sincerely Yours,

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