

## **State Dinners & Summons: Mr. Modi's Trip to New York**

**Kanwar Vivswan and Sanjeevi Seshadri**

In 2005, the United States of America denied Mr. Modi a visa while he was the Chief Minister of Gujarat. Today, Mr. Modi is the Prime Minister of India and is a state guest of the United States, yet, he still faces challenges in the land of the free. A New York federal District Court issued a summons to Mr. Modi on September 25, 2014. The summons was issued pursuant to a complaint by the American Justice Centre [AJC], an American NGO, that sought compensatory and punitive damages for “crimes against humanity; cruel, inhuman, or degrading treatment or punishment; extrajudicial killing; wrongful deaths; negligence; public nuisance; battery; and intentional infliction of emotional distress” allegedly perpetrated by Mr. Modi.<sup>1</sup>

The complainant states that under international law, Mr. Modi can be prosecuted for the said crimes in the U.S. under the principle of universal jurisdiction, whereby a state may exercise jurisdiction over serious crimes (such as genocide, torture and war crimes) even if there exists no connection, based on territory or nationality.<sup>2</sup>

In this post, it will be argued that the complainant has failed to establish in the lawsuit whether civil universal jurisdiction (under which damages are being claimed in this case) has the same scope as criminal jurisdiction in enforcing these international law norms. In this regard, we argue that the summons against Mr. Modi is not sustainable under international law because of the following reasons:

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<sup>1</sup> See Ankit Panda, *US Federal Court Issues Summons Against Narendra Modi*, THE DIPLOMAT (Sept. 26, 2014), <http://thediplomat.com/2014/09/us-federal-court-issues-summons-against-narendra-modi/>.

<sup>2</sup> See *AJC et al. v. Modi*, No. 14 Civ. 778 (S.D.N.Y. Sept. 25, 2014), [http://www.thehindu.com/multimedia/archive/02126/Class\\_lawsuit\\_agai\\_2126838a.pdf](http://www.thehindu.com/multimedia/archive/02126/Class_lawsuit_agai_2126838a.pdf).

## A. Alien Tort Statute

The present suit has been filed under the Alien Torts Statute [ATS] which provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>3</sup> Passed as a part of the Judiciary Act of 1789, the ATS in the early 1980s was read by the U.S. courts to cover cases involving violations of universally recognized obligatory norms of international law.<sup>4</sup> The United States Supreme Court recently reexamined the ATS in *Kiobel*.<sup>5</sup> Noting that all laws had a presumption against extra-territoriality,<sup>6</sup> the Court concluded after looking at the history<sup>7</sup> and text of the statute,<sup>8</sup> that there exists no evidence to rebut that presumption in the case of the ATS.<sup>9</sup> The ATS was enacted for protection against three primary offences as identified by Blackstone: the violation of safe conducts, infringement of the rights of ambassadors, and piracy.<sup>10</sup> The negative policy implications of extra-territorial application of the ATS was highlighted by states such as the UK, Australia and Switzerland who cautioned that broad assertions of extra-territorial jurisdiction under ATS would expose foreign nationals to uncertain and costly proceedings in foreign courts.<sup>11</sup>

Some believe that universal civil jurisdiction may become a rule of customary international law over the course of time. However, it has not yet done so and therefore cannot be accorded the same status as universal criminal jurisdiction. Hence, Mr. Modi cannot be prosecuted under the ATS.

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<sup>3</sup> 28 U.S.C. § 1350 (2006).

<sup>4</sup> See generally *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>5</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

<sup>6</sup> See *id.* at 1664.

<sup>7</sup> See *id.* at 1666.

<sup>8</sup> See *id.* at 1669.

<sup>9</sup> See *id.* at 1661.

<sup>10</sup> *Id.* at 1670.

<sup>11</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

## **B. Torture Victim Protection Act**

The complainant has also claimed jurisdiction under the Torture Victim Protection Act [TVP Act]. The TVP Act was enacted in 1992 shortly after the ATS regained prominence. It provides civil remedies for only two international law torts *viz.* torture and extra judicial killings. The United States enacted this law in order to fulfill its obligations under the Convention against Torture which requires states to prosecute suspected torturers found within their territory. The TVP Act allows for exercise of jurisdiction without the traditional requirement of proving a nexus with the United States.

The application of the TVP Act would be untenable in this case. Firstly, the Act clearly requires that the suit should not be time barred. Secondly, the complainant must exhaust local remedies before pursuing a suit in U.S. courts. In the instant case both of these requirements have not been fulfilled.

The complaint is made in regards to the role Mr. Modi had in the 2002 riots. However, they have brought the complaint on September 2014, meaning that 12 years have passed. Therefore, the suit is time barred and hence not maintainable because the TVP Act explicitly states, “No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.”<sup>12</sup>

On the second point the relevant provision of the Act states that:

A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.<sup>13</sup>

The complainant has nowhere mentioned in the petition whether it has exhausted available remedies in India before approaching the courts in the United States. Furthermore, it has to be

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<sup>12</sup> 28 U.S.C. § 1350(c) (2006).

<sup>13</sup> 28 U.S.C. § 1350(b) (2006).

noted that the Special Investigation Team, which was constituted by the Supreme Court of India, had concluded that it had not found sufficient evidence to justify placing Modi on trial. Zakia Jaffri, a long standing activist, who lost her husband in the riots, placed an application before the Gujarat High Court protesting the conclusions made by the report as well as its validity. The matter therefore remains *sub-judice*. Thus, the available remedies in the place where the conduct has occurred have not been satisfied.

### **C. Immunity as a UN Delegate**

Section 11(a) of the Convention on the Privileges and Immunities of the United Nations makes it clear that while performing mandated functions, and during the journey to and from the place of meeting, the representatives of members to the UN shall enjoy immunity from legal process of every kind including arrest or detention. Section 14 of the convention explains that the rationale behind such immunity is to safeguard the independent exercise of the functions of the representatives. Therefore, Mr. Modi, being a delegate of a member state of the UN, will be cloaked under this Convention's immunity. The United States Government confirmed its commitment to this stance when it said that delegates to the UN General Assembly enjoy immunity while in New York to attend the UN event.<sup>14</sup>

### **D. Immunity as a State Head**

Immunity from prosecution is available to heads of state under customary international law. There are two types of immunities available: *ratione personae* and *ratione materiae*. *Ratione personae* provides civil and criminal immunity to heads of state for acts done in both, a private as well as official capacity.<sup>15</sup> It is available irrespective of whether the acts were

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<sup>14</sup> See Charu Sudan Kasturi, *Immune now but test ahead-Fallout of case against Modi in US*, The Telegraph (Sept. 26, 2014), [http://www.telegraphindia.com/1140927/jsp/frontpage/story\\_18878344.jsp#.VC6MZmeSw7U](http://www.telegraphindia.com/1140927/jsp/frontpage/story_18878344.jsp#.VC6MZmeSw7U).

<sup>15</sup> See *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* Case No. [2006] UKHL 26 (H.L. June 14, 2006), at <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones-1.htm>

performed before or during the term of office. Since *ratione personae* is based on the office of the individual concerned, it is only available for the duration of the individual holding office. On the other hand, in the case of *ratione materiae*, the protection is available even after the person ceases to perform acts of the state, provided that the acts were done in an official capacity. The implication of this is that even when an individual ceases to hold a post, he loses his immunity *ratione personae*, but is still protected under the *ratione materiae* immunity. However, it is to be noted that there has been an evolving rule of customary international law that excludes the application of *ratione materiae* in the case of international crimes.<sup>16</sup>

As was noted by the ICJ in its decision in *Arrest Warrants*,<sup>17</sup> heads of state enjoy personal immunity from being tried in foreign courts on the ground that the immunity *ratione personae* bars all criminal and civil proceedings. Furthermore, there is a general acceptance that the heads of the government also enjoy the same kind of immunity as the head of the states.<sup>18</sup> Therefore, the summons is in violation of Mr. Modi's *ratione personae* immunity.<sup>19</sup>

## **Conclusion**

The issuance of the summons by the Federal Court of New York is not only sans jurisdiction, but also precluded by the immunities afforded to Mr. Modi. However, the summons and its accompanying rejection by the United States Government, is particularly interesting considering the United States in 2005 denied Mr. Modi a visa on similar grounds. This entire episode sheds light upon the pressures of international relations, and how international relations interact with international law.

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<sup>16</sup> See Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-139, Pre-Trial Chamber I (Dec. 12, 2011).

<sup>17</sup> See Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.), 2002 I.C.J. 1 (Judgment Order of Feb. 14) [hereinafter Arrest Warrant Case].

<sup>18</sup> See Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia, *supra* note 15.

<sup>19</sup> See Kasturi, *supra* note 14.