The Scope of Sovereign Criminal Immunity: Instrumentalities Under the Foreign Sovereign Immunities Act

For over four decades since its enactment, the Foreign Sovereign Immunities Act (FSIA) has governed sovereign immunity in civil actions. There is no question that Congress set out a comprehensive framework to address claims for immunity in civil contexts. Yet courts must now determine whether foreign sovereign entities can raise similar claims in criminal contexts. With no guidance from the Supreme Court, lower courts have diverged in their answers to this question. Courts are divided on a number of issues: not only on whether the FSIA's general grant of immunity applies in criminal proceedings, but also if and how the enumerated exceptions apply.

This lacuna matters. Foreign sovereigns and their instrumentalities increasingly engage in corporate crime and economic espionage. Despite its pressing importance, the doctrine of sovereign criminal immunity is underdeveloped in legal literature. This Note seeks to remedy the gap. It argues that the FSIA does not extend to criminal cases. Instead, the scope of sovereign criminal immunity is better defined through a separate federal statute, 18 U.S.C. § 3231, which provides courts with broad jurisdiction over all offenses against the laws of the United States. This Note proposes a new statutory framework for criminal immunity and calls for greater obligations for all three branches of government.

INTRODUCTION

On October 15, 2019, Türkiye Halk Bankasi A.S. (Halkbank), Turkey's second-largest state-owned bank, was indicted on six counts of money laundering, bank fraud, and conspiracy to violate U.S. sanctions against Iran.[1] The conspiracy was described as "the largest Iran sanctions violation in United States history."[2] Between 2012 and 2016, Halkbank allegedly gave the Government of Iran access to over $20 billion-worth of oil and gas revenues that were restricted by U.S. and international sanctions.[3]

1. *See* Indictment ¶¶ 66–81, United States v. Türkiye Halk Bankasi A.S., 426 F. Supp. 3d 23 (S.D.N.Y. 2019) (No. 15 Cr. 867); Press Release, U.S. Attorney's Off., S.D.N.Y., Turkish Bank Charged in Manhattan Federal Court for its Participation in a Multibillion-Dollar Iranian Sanctions Evasion Scheme (Oct. 15, 2019), https://www.justice.gov/usao-sdny/pr/turkish-bank-charged-manhattan-federal-court-its-participation-multibillion-dollar [https://perma.cc/5M87-6RNC]; United States v. Halkbank, No. 15 Cr. 867, 2020 WL 4932772, at *1 (S.D.N.Y. Aug. 24, 2020); Eric Lipton, *U.S. Indicts Turkish Bank on Charges of Evading Iran Sanctions*, N.Y. TIMES (Oct. 15, 2019), https://www.nytimes.com/2019/10/15/us/politics/halkbank-turkey-iran-indictment.html [https://perma.cc/KE3Z-7WWV].

2. United States v. Türkiye Halk Bankasi A.S., 426 F. Supp. 3d 23, 26 (S.D.N.Y. 2019); *see also* Lipton, *supra* note 1.

3. *See* Press Release, U.S. Attorney's Off., S.D.N.Y., *supra* note 1.

United States v. Halkbank illustrates the high stakes involved in criminally prosecuting an instrumentality of a foreign state.[4] The illicit transactions could trigger a multi-billion-dollar penalty that would threaten the bank's viability.[5] Sanctions by the U.S. Department of the Treasury would cut the bank off from the U.S. financial system.[6] But most importantly, a criminal indictment, even more so than a civil complaint, is a "moral condemnation."[7] A criminal indictment against a foreign state counters the well-established principle that there is a "comity interest" in protecting the "dignity" of a foreign state.[8]

The Supreme Court has consistently recognized that actions against foreign sovereigns and their instrumentalities trigger foreign policy sensitivities.[9] The *Halkbank* saga was no exception; then-President Donald Trump's attempts to hamstring the investigations exemplify the tensions between the United States and Turkey at the

4. The Foreign Sovereign Immunities Act defines "instrumentality" as "a separate legal person, corporate or otherwise" which is either "an organ of a foreign state or political subdivision thereof" or "a majority of whose shares . . . is owned by a foreign state." 28 U.S.C. § 1603(b).

5. Lipton, *supra* note 1.

6. *How Iran Can Evade Sanctions This Time*, EURASIA DIARY (May 28, 2018, 5:30 PM), https://ednews.net/en/news/analytical-wing/285221-how-iran-can-evade-sanctions-this-time [https://perma.cc/TH8C-NFSN] (explaining "the United States can decide to exclude Halkbank and others from the U.S. financial system, and that will be a huge problem for the Turkish economy") (internal quotations omitted).

7. John Balzano, *Crimes and the Foreign Sovereign Immunities Act: New Perspectives on an Old Debate*, 38 N.C. J. INT'L L. & COM. REG. 43, 83 (2012) (quoting HAZEL FOX, THE LAW OF STATE IMMUNITY 87 (2d ed. 2008)). Of course, sovereigns and their instrumentalities also face financial and reputational dangers of a criminal indictment. *See* Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 128 (2008) ("The risk of indictment alone is devastating: a criminal indictment promises a swift market response, the ouster of leadership, millions of dollars in legal fees, and, of course, the possibility of conviction.").

8. Republic of Phil. v. Pimentel, 553 U.S. 851, 866 (2008) ("There is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause."); *see also* Balzano, *supra* note 7, at 83–84.

9. *See, e.g.*, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in [American] courts raise sensitive issues concerning the foreign relations of the United States . . . ."); The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 135 (1812) (noting questions of foreign sovereign immunity are "very delicate and important inquir[ies]").

time.[10] The U.S. Attorney for the Southern District of New York, Geoffrey Berman, was dismissed eight months after the indictment was returned.[11] The New York Times, citing Department of Justice officials, indicated a "key reason" for Berman's firing was his decision to pursue criminal charges against Turkish officials and the bank.[12]

With these looming stakes, Halkbank moved to dismiss all counts in August 2020.[13] The bank relied on its status as a Turkish state-owned instrumentality as a defense, asserting immunity from prosecution under the Foreign Sovereign Immunities Act of 1976 (FSIA or "Act").[14] Sovereign immunity prevents federal courts from exercising jurisdiction over foreign states.[15] In October 2020, the U.S. District Court for the Southern District of New York rejected Halkbank's arguments (*Halkbank I*), and a year later in October 2021, the Second Circuit affirmed (*Halkbank II*).[16] The Second Circuit was only the second federal appellate court to exercise criminal jurisdiction

10. For background on the political pressures, see generally Eric Lipton & Benjamin Weiser, *Turkish Bank Case Showed Erdogan's Influence with Trump*, N.Y. TIMES (Oct. 29, 2020), https://www.nytimes.com/2020/10/29/us/politics/trump-erdogan-halkbank.html [https://perma.cc/YY4A-UXY5]; Scott R. Anderson, Susan Hennessey & Quinta Jrecic, *The Halkbank Case Should Be a Very Big Deal*, LAWFARE (Oct. 31, 2020, 12:17 PM), https://www.lawfareblog.com/halkbank-case-should-be-very-big-deal [https://perma.cc/7CB4-7JY6] (noting the case "says a great deal about Trump's abuses of law enforcement, his financial entanglements abroad and his susceptibility to foreign influence").

11. Press Release, U.S. Dep't of Justice, Statement of U.S. Attorney Geoffrey S. Berman on Announcement by Attorney General Barr (June 19, 2020), https://www.justice.gov/usao-sdny/pr/statement-us-attorney-geoffrey-s-berman-announcement-attorney-general-barr [https://perma.cc/F4M9-77MP].

12. Lipton & Weiser, *supra* note 10; *see also* Jeffrey Lambe, *Barr and Trump Can't Get Their Stories Straight About Who Wanted U.S. Attorney Geoffrey Berman Fired*, L. & CRIME (June 20, 2020, 7:14 PM), https://lawandcrime.com/high-profile/barr-and-trump-cant-get-their-stories-straight-about-who-wanted-u-s-attorney-geoffrey-berman-fired [https://perma.cc/Q2JW-GJDT].

13. *See* Motion to Dismiss at 1, United States v. Türkiye Halk Bankasi A.S., No. 15 Cr. 867 (S.D.N.Y. Aug. 10, 2020), ECF No. 645.

14. Brief of Petitioner-Defendant at 1–2, United States v. Halkbank, No. 15 Cr. 867 (S.D.N.Y. Aug. 10, 2020), ECF No. 646.

15. Sovereign immunity is an affirmative *jurisdictional* defense but does not absolve the foreign sovereign of substantive wrongdoing on the merits. *See* Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004); *see generally* Chimène I. Keitner, *Prosecuting Foreign States*, 61 VA. J. INT'L L. 221 (2021).

16. *See generally* United States v. Halkbank, 2020 WL 4932772, at *1 (S.D.N.Y. Aug. 24, 2020); United States v. Türkiye Halk Bankasi A.S. (*Halkbank II*), No. 20-CR-3499 (2d Cir. Oct. 22, 2021).

over a sovereign instrumentality, holding that the bank could be criminally prosecuted in the United States.[17]

The crux of the issue is whether the FSIA applies in criminal contexts. Under the FSIA, "foreign states" are immune from suit unless one of the enumerated exceptions applies.[18] A court must ask whether the Act grants immunity from criminal prosecutions in general or whether an exception would allow such a charge. The Supreme Court has previously stated in *Argentine Republic v. Amerada Hess Shipping Corporation* that the jurisdiction granted when one of the FSIA exceptions applies is the "sole basis for obtaining jurisdiction over a foreign state."[19] But *Amerada Hess* and all other cases cited for the same proposition arose in *civil* actions. The Supreme Court has not yet addressed whether the FSIA controls in *criminal* proceedings against foreign states and their instrumentalities. In fact, it recently denied certiorari on this question.[20] There was no historical practice of applying the FSIA to instrumentalities in the criminal context until 2018.[21] Nowhere in the FSIA's text, structure, legislative history, or purpose is there explicit reference to criminal prosecutions.[22]

Because lower courts face serious difficulties in interpreting the FSIA and, even more so, because sovereign criminal immunity triggers foreign policy sensitivities, the doctrine remains underdeveloped.[23]

In spite of the fraught doctrine, the Department of Justice increasingly investigates and prosecutes state-sponsored sanctions

17. *See infra* note 37 and accompanying text. Petition for a Writ of Certiorari at *2, *In re* Grand Jury Subpoena, No. 18-948 (D.C. Cir. Jan 7, 2019), 2019 WL 302189.

18. *See* 28 U.S.C. § 1604.

19. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989); *see also* Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993); Schermerhorn v. State of Isr., 876 F.3d 351, 353 (D.C. Cir. 2017).

20. *In re* Grand Jury Subpoena, 139 S. Ct. 1378, 1378 (2019). The Supreme Court has not suggested the Act applies in criminal context, *see* Verlinden B. V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983) (noting the FSIA provides a "comprehensive set of legal standards governing claims of immunity in every *civil* action against a foreign state or its political subdivisions, agencies, or instrumentalities") (emphasis added).

21. *See infra* Sections II.A & II.B; *see also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 451 reporter's n.4 (2018) (noting that in 2018, "no reported court decision has dismissed an indictment or otherwise suppressed a criminal prosecution based on immunity conferred by the FSIA").

22. *See infra* Section I.A; JOSEPH DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 37–41 (2003).

23. For reasons that the core doctrine is underdeveloped, see *infra* Section I.B.

violations, corruption, and other offenses.[24] This "unmistakable trend toward the criminal prosecution of foreign organizations with ties to foreign governments" is no surprise, given increasing cross-border activity of sovereign instrumentalities.[25] Courts, in turn, must explicate the boundaries of sovereign criminal immunity more frequently than ever before. *Halkbank II*'s denial of the bank's motion to dismiss presented the core issue of prosecuting foreign sovereigns, and in doing so, reinforced the reasoning of a sister circuit court. The Second Circuit decision came on the heels of a D.C. Circuit opinion in 2018, the first circuit court to squarely confront criminal immunity of a foreign sovereign instrumentality.[26]

The D.C. Circuit explicitly addressed the scope of sovereign criminal immunity in *In re Grand Jury Subpoena* (*Grand Jury Subpoena II*).[27] The action began in the U.S. District Court for the District of Columbia as *In re Grand Jury Subpoena No. 7409* (*Grand Jury Subpoena I*).[28]

The case moved through all three levels of the federal judiciary. On July 11, 2018, a federal grand jury sitting in the District of Columbia issued a subpoena to a corporation from a foreign state (Country A).[29] Enforcing a grand jury subpoena is a part of the criminal process.[30] The subpoenaed records were in connection with the Special Counsel's Office's investigation into foreign interference with the 2016 Presidential Election.[31] The corporation moved to quash

24. *See, e.g.*, Indictment at 2, United States v. United Microelectronics Corp., No. 18 Cr. 456 (N.D. Cal. 2018).

25. Ingrid B. Wuerth, *The Mystery Grand Jury Case and Criminal Prosecutions of State-Owned Enterprises*, LAWFARE (Dec. 21, 2018, 11:26 AM), https://www.lawfareblog.com/mystery-grand-jury-case-and-criminal-prosecutions-state-owned-enterprises [https://perma.cc/H3EG-D3VD] (noting "criminal prosecution of foreign-state-owned enterprises" is "a topic of growing significance").

26. Petition for Writ of Certiorari, *In re* Grand Jury Subpoena, No. 18-948 (Jan. 7, 2019).

27. *In re* Grand Jury Subpoena (*Grand Jury Subpoena II*), 912 F.3d 623, 629–31 (D.C. Cir. 2019).

28. *In re* Grand Jury Subpoena No. 7409 (*Grand Jury Subpoena I*), No.18-41, 2018 WL 8334867, at *1 (D.D.C. Sept. 19, 2018).

29. *Id*. On February 28, 2019, the Memorandum Opinion, and five other Orders or Memorandum Opinions, were partially unsealed. See Notice, *Grand Jury Subpoena I*, No.18-41 (D.D.C. Feb. 28, 2019).

30. *See* United States v. Sells Eng'g Inc., 463 U.S. 418, 423 (1983) ("The grand jury has always occupied a high place as an instrument of justice in our system of criminal law—so much so that it is enshrined in the Constitution.") (citing Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959); Costello v. United States, 350 U.S. 359, 361–62 (1956)); U.S. CONST. amend. V.

31. *Grand Jury Subpoena I*, 2018 WL 8334866, at *1; *see supra* note 29 and accompanying text.

the subpoena, claiming, in relevant part, immunity under the FSIA.[32] The government argued that the FSIA does not apply outside of the civil context, and contended in the alternative that, if the Act applies, the exceptions must as well.[33] On September 19, 2018, Chief Judge Howell denied the motion and ordered the corporation to produce the subpoenaed records.[34] Assuming, without deciding, that the immunity provision of 28 U.S.C. § 1604 applied, the court went on to conclude that the FSIA's exceptions "which are not by their plain terms limited to civil cases, apply outside the civil context."[35] On December 18, 2018, the D.C. Circuit affirmed the lower court's decision in a brief opinion.[36] A second opinion on January 8, 2019 more fully explained the court's decision.[37]

The importance of the *Grand Jury Subpoena II* opinion cannot be overstated. Applying the FSIA to criminal contexts, the D.C. Circuit set up a jurisdictional immunity default with proceedings only permissible pursuant to the Act's enumerated exceptions. The judgment laid the foundation to assume that the FSIA applies in criminal contexts—an assumption which the Second Circuit would later build upon in *Halkbank II.* This Note explores the implications of the two circuit courts' exercise of jurisdiction and further argues that extending the scope of sovereign instrumentality immunity to criminal cases is improper under the FSIA. Instead, any restriction of criminal proceedings against a sovereign entity should come from a separate statutory framework.

The Note proceeds in three parts. Part I describes how the U.S. foreign sovereign immunity doctrine evolved and suggests reasons as to why courts have rarely addressed the FSIA in criminal proceedings. Though the Act covers the immunity of "foreign states," defined as including the sovereign itself, this Note focuses only on the criminal

32. *Grand Jury Subpoena I*, 2018 WL 8334866, at **1*. On January 31, 2019, a redacted version of the docket sheet in this matter was posted to the Court's website. Civil Docket for Case #: 1:18-gj-00041-BAH, Jan. 31, 2019, https://www.dcd.uscourts.gov/sites/dcd/files/FINAL_18gj41_PublicDocket_20190131.pdf [https://perma.cc/V84N-SK3J].

33. *Grand Jury Subpoena I*, 2018 WL 8334866, at *3.

34. *Id.* at *1; *see supra* note 29 and accompanying text.

35. *Grand Jury Subpoena I*, 2018 WL 8334866, at *7.

36. *In re* Grand Jury Subpoena, 749 F. App'x 1, 2 (D.C. Cir. 2018).

37. *Grand Jury Subpoena II*, 912 F.3d 623, 628–34 (D.C. Cir. 2019). The Supreme Court vacated a temporary stay of enforcement against the subpoena and denied certiorari. *See generally In re* Grand Jury Subpoena, 139 S. Ct. 914 (2019); *In re* Grand Jury Subpoena, 139 S. Ct. 1378 (2019).

immunity of sovereign agencies or instrumentalities.[38] Whether the FSIA bars criminal prosecution of instrumentalities raises several questions, which Part II identifies and explores. First, as a threshold question, does the Act apply as a blanket shield of immunity, covering both criminal and civil cases? If so, do the exceptions also apply? If the Act does not apply as a matter of statutory immunity, Part II then considers whether there is nevertheless common law immunity. To address these questions, Part III prescribes a solution to define the scope of sovereign criminal immunity.

I. FOREIGN SOVEREIGN IMMUNITY

This Part examines how foreign sovereign immunity developed in the United States—and why the doctrine is underdeveloped with respect to criminal prosecutions. Section I.A discusses how the FSIA evolved to codify immunity of foreign states and their instrumentalities in federal courts. In disputes over the scope and applicability of the FSIA, courts have approached the text as a matter of traditional statutory interpretation.[39] But there is a broader non-textual context to how the Act arose that is also worthy of inspection. Section I.B suggests reasons for why there is a lacuna in FSIA doctrine as applied to criminal contexts.

A. Codifying Foreign Sovereign Immunity in the FSIA

Foreign sovereign immunity in the U.S. evolved in three

38. The FSIA defines "foreign state" as the state itself, its political subdivisions, and its agencies or instrumentalities, with the latter category including "a separate legal person, corporate or otherwise." 28 U.S.C. § 1603. *See also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 452 reporter's n.12 (AM. L. INST. 2018) (noting that the FSIA "provides a broader definition of 'foreign state' than is typical under foreign and international practice, by including agencies and instrumentalities for most purposes"). To be clear, the Act does not treat agents and instrumentalities of the foreign state the same as the state. 28 U.S.C. § 1608(a)–(b). However, the FSIA nonetheless grants immunity to both. 28 U.S.C. § 1604.

39. *See, e.g.*, United States v. Halkbank, No. 15 CR. 867, 2020 WL 5849512 at *4 (S.D.N.Y. Aug. 24, 2020) ("Nothing in the text of FSIA suggests that it applies to criminal proceedings[.]") (citing United States v. Hendron, 813 F. Supp. 973, 975 (E.D.N.Y. 1993)); *Grand Jury Subpoena II*, 912 F.3d at 632 ("The text [of FSIA] easily resolves this issue in the government's favor."). The Supreme Court has refused to read "unexpressed requirement[s]" into the Act. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992).

distinct phases.[40] In the first phase, foreign sovereign immunity was absolute.[41] Courts traditionally trace the earliest phase to *Schooner Exchange v. McFaddon*, in which Chief Justice John Marshall declared "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute."[42] In 1810, Emperor Napoleon ordered his navy to forcefully seize an American schooner and later armed and recommissioned it as a French warship.[43] When the ship later docked in Philadelphia, the original owners filed an action to recover the vessel.[44] The Supreme Court refused to exercise jurisdiction over another sovereign state and held that "the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign."[45] Absolute sovereign immunity, more a "question[ ] of policy than of law,"[46] applied to all vessels, whether used for a public purpose or for commercial pursuits.[47]

In the second phase, toward the latter half of the twentieth century, the Department of State issued a letter (the Tate Letter) shifting the Executive Branch's position in line with an emerging

40. For a history of U.S. foreign sovereign immunity, see Peter D. Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 200 RECUEIL DES COURS 235, 252–71 (1986).

41. *See* Daniel T. Murphy, *The American Doctrine of Sovereign Immunity: An Historical Analysis*, 13 VILL. L. REV. 583, 583–91 (1968); Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 489, 495 (1992); *see also* Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 821 (2018) ("Prior to 1952, the State Department generally held the position that foreign states enjoyed absolute immunity from all actions in the United States.").

42. The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812); Samantar v. Yousuf, 560 U.S. 305, 311 (2010) (interpreting *Schooner Exchange* as "extending virtually absolute immunity to foreign sovereigns as 'a matter of grace and comity'") (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983)).

43. *Schooner Exch.*, 11 U.S at 117–18.

44. *Id.*

45. *Id.* at 146; *see also* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 569 (1993) (noting absolute foreign sovereign immunity "rested entirely on the Supreme Court's understanding of international law and precedent, without any reference to considerations of foreign policy or the desire of the United States Government").

46. *Schooner Exch*., 11 U.S. at 146.

47. *See* Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 574 (1926):

> We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans, and operates ships in the carrying trade, they are public ships in the same sense that war ships are.

international consensus of restrictive sovereign immunity.[48] Under the restrictive theory, immunity was not absolute. Instead, restrictive immunity permitted claims to proceed against foreign sovereigns for their commercial or "private acts," but maintained sovereign immunity for governmental or "public acts."[49] At the time, most of the cases at issue were suits by private citizens against foreign sovereigns, rather than government actions against other foreign sovereigns. The State Department would first determine immunity for public acts on a case-by-case basis and then request a court to recognize immunity.[50] The Supreme Court quickly adopted a rule of judicial deference to such requests.[51] It soon became apparent that immunity would be granted or denied less so on legal grounds than on foreign policy considerations.[52] Consequently, private litigants faced "considerable

48. This change was first announced in May 1952, when State Department Acting Legal Advisor Jack Tate sent the Acting Attorney General the "Tate Letter." Letter from Jack B. Tate, Acting Legal Adviser of the U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) [hereinafter Tate Letter], *reprinted in* 26 DEP'T ST. BULL. 984 (1952). Tate publicly discussed the Letter's authorship in a speech he delivered to the Association of the Bar of the City of New York in April 15, 1954, *reprinted in* Robert M. Jarvis, *The Tate Letter: Some Words Regarding Its Authorship*, 55 AM. J. LEGAL HIST. 465, 471 (2015) ("[W]ith so many states denying the existence of immunity where the foreign government engages in commerce, it would be difficult, even if desirable, to maintain the classical theory [of absolute immunity] as part of the customary [international law].").

49. The Tate Letter explains the difference between the absolute and restrictive theory of sovereign immunity:

> According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).

Tate Letter, *supra* note 48, at 984.

50. *See* H.R. REP. NO. 94-1487, at 7 (1976) [hereinafter HOUSE REPORT] (noting "when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court"); *see also* Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977 (Michael Sandler, Detlev F. Vagts & Bruno A. Ristau eds.), *in* John A. Boyd, U.S. PRACTICE DEP'T OF STATE, PUB NO. 8960, DIG. U.S. PRAC. INT'L L. 1017 (1977).

51. *See Ex parte* Republic of Peru, 318 U.S. 578, 589 (1943) (holding State Department's determination of foreign immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government"); Nat'l City Bank v. Republic of China, 348 U.S. 356, 360 (1955) ("As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit.").

52. The House Report to the FSIA explains that the State Department was often placed in an "awkward position." HOUSE REPORT, *supra* note 50, at 8. Although the Tate Letter ostensibly supported the restrictive theory of sovereign immunity by executive policy, exceptions to immunity were not always granted in practice because the State Department

uncertainty" as to whether their legal disputes would be permitted or blocked.[53]

In the third phase, Congress enacted the FSIA in 1976 to address these problems.[54] Both the House and Senate Reports viewed the Act as "urgently needed legislation" to accomplish multiple objectives.[55] A departure from previous practice, the Act sought to "transfer the determination of sovereign immunity" from State Department officials to federal judges, thereby "assuring litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process."[56]

The Act also codified the restrictive theory of sovereign immunity.[57] The FSIA thus acts as both a shield and a sword. The language of sections 1604 and 1605(a) *mirror* each other, with equal but opposite force. On the one hand, section 1604, the heart of the Act, first provides "a foreign state *shall* be immune from the jurisdiction of the courts of the United States."[58] Most relevant for this analysis, this general grant of immunity does not differentiate between criminal, civil, or administrative jurisdiction.[59]

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faced diplomatic pressures from foreign governments seeking immunity. *See, e.g.*, Rich v. Naviera Vacuba, S.A., 295 F.2d 24, 26 (4th Cir. 1961) (finding that the "grant of immunity issued by the Department of State should be accepted by the court without further inquiry").

53. HOUSE REPORT, *supra* note 50, at 9.

54. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602–1611 (1976)).

55. HOUSE REPORT, *supra* note at 50; S. REP. NO. 94-1310, at 8 (1976) [hereinafter SENATE REPORT]; *see also* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983) (stating the FSIA was passed "in order to free the Government from the case-by-case diplomatic pressures").

56. HOUSE REPORT, *supra* note 50, at 7; *see also Immunity of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims & Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 14 (1973) (statement of Charles N. Brower, Legal Adviser, Dep't of State) ("We at the Department of State are now persuaded . . . that the foreign relations interests of the United States . . . would be better served if these questions of law and fact were decided by the courts rather than the executive branch.").

57. *See* 28 U.S.C. § 1602 ("[S]tates are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned . . . .").

58. 28 U.S.C. § 1604.

59. The lack of differentiation is in stark contrast with the Act's common law jurisdiction counterparts. For example, the United Kingdom, Canada, and Australia have state immunity acts that explicitly exclude criminal proceedings. *See, e.g.*, Chimène I. Keitner, *Deciphering the Mystery Subpoena Case: Corporate Claims to Foreign Sovereign Immunity from U.S. Criminal Proceedings*, JUSTSECURITY (Dec. 31, 2018), https://www.justsecurity.org/62068/deciphering-mystery-subpoena-case-corporate-claims-foreign-sovereign-immunity-u-s-criminal-proceedings [https://perma.cc/A7DD-C9WT]; *see also* HAZEL FOX, THE LAW OF STATE IMMUNITY 503 (1st ed. 2002).

On the other hand, in enacting the statute, Congress "carve[d] out certain exceptions" to the statute's sweeping immunity that "are central to the Act's functioning."[60] When an exception applies, section 1605(a) provides that "a foreign state *shall not be* immune from the jurisdiction of the courts of the United States."[61] As clearly as Congress provided a general grant of immunity, it also intended to *deny* immunity for certain types of claims through the Act. The exceptions offer a federal forum for resolving claims resulting from matters ranging from commercial activity to acts of terrorism.[62] Congress constructed the mirrored language of sections 1604 and 1605(a) purposefully, and this Note argues that courts should interpret the language to reflect the same scope of immunity in the criminal context.[63]

If any enumerated exception to immunity applies,[64] the Act vests a federal district court with subject matter jurisdiction "over any nonjury *civil* action against a foreign state" under section 1330(a).[65] Section 1330(a) is the sole provision to confer subject matter jurisdiction in the Act. The debate here is whether this explicit conferral of only *civil* jurisdiction can be supplemented by additional criminal jurisdiction, or whether the provision simply reflects the inapplicability of the FSIA to criminal prosecutions.[66]

60. Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004).

61. 28 U.S.C. § 1605(a) (emphasis added).

62. In addition to certain suits in admiralty to enforce maritime liens, see 28 U.S.C. § 1605(b), the FSIA, as enacted in 1976, provided an exception to immunity in five cases: implicit or explicit waiver, commercial activity, expropriation, the determination of rights in property present in the United States, and non-commercial torts occurring within U.S. territory, *id.* § 1605(a). Since its adoption, the FSIA has been amended twice to include additional exceptions. In 1988, Congress added an exception for actions to enforce or confirm arbitration awards either issued in the U.S. or covered under an international agreement. *Id.* § 1605(a)(6). The second amendment added an exception to immunity for certain terrorist activities, as part of the Anti-Terrorism and Effective Death Penalty Act of 1996. *Id.* § 1605(a)(7).

63. *See* Est. of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479 (1992) ("[It is a] basic canon of statutory construction that identical terms within an Act bear the same meaning.").

64. 28 U.S.C. §§ 1605, 1607.

65. 28 U.S.C. § 1330(a) (conferring jurisdiction to U.S. courts over foreign sovereign entities in "any nonjury civil action . . . with respect to which the foreign state is not entitled to immunity"). The Act also functions as a federal long-arm statute and confers personal jurisdiction over a foreign sovereign "as to every claim for relief over which the district courts have jurisdiction." *Id.* § 1330(b).

66. *See infra* Section II.A.

B. Reasons Why the Doctrine Is Underdeveloped

The issue of criminal immunity under the FSIA has only recently been presented in reviewing courts, and it is a doctrine that remains strikingly underdeveloped. While some courts question if and how the FSIA applies to a rising number of prosecutions, the answers are inadequate. The Supreme Court has not addressed the issue, leaving individual appellate courts to interpret the Act at their own discretion. Some circuits have even chosen to avoid the issue entirely.[67] This Note acknowledges there may be three sensible reasons for the latent doctrine. Such reasons are only outlined here, but the debates presented are neither entirely exhaustive nor conclusive.

1. Why Charge a Foreign Entity?

A valid starting point is to ask: What is the point of charging a foreign state or its instrumentalities? After all, the indictment of Halkbank as a corporation *followed* the conviction of individuals in the same alleged scheme.[68] By January 2018, nine defendants were indicted, including Turkey's former Minister of Economy and three Halkbank executives.[69] One such executive was Mehmet Hakan Atilla, the Deputy General Manager of International Banking. His conviction and thirty-two-month sentence were affirmed by the Second Circuit in July 2020.[70] Why would prosecutors then separately charge the bank itself?

To answer this question, it is worth briefly considering corporate criminal responsibility from an international perspective.

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67. A growing list of circuit courts refuse to answer whether the FSIA applies in criminal contexts. Notably, the Ninth Circuit joined that list earlier this year and refused to wade into the murky waters of sovereign criminal immunity. United States v. Pangang Grp. Co., No. 19-10306, 2021 WL 3137951, at *1 (9th Cir. July 26, 2021) (noting that the Government and the sovereign instrumentality "sharply disagree as to whether and to which the immunity conferred by the FSIA applies in criminal cases," but ultimately holding that the Court "need not reach these issues"). *See also infra* notes 124–137 and accompanying text.

68. *See* Press Release, U.S. Attorney's Office, S.D.N.Y., *supra* note 1. For a detailed timeline of the case, see Ryan Goodman & Danielle Schulkin, *Timeline: Trump, Barr, and the Halkbank Case on Iran Sanctions-Busting*, JUSTSECURITY (July 27, 2020), https://www.justsecurity.org/71694/trump-barr-and-the-halkbank-case-timeline [https://perma.cc/9VA4-QFTL].

69. *See generally* Complaint, United States v. Atilla, No. 15 Cr. 867 (S.D.N.Y. 2017); Indictment, United States v. Zarrab, No. 15 Cr. 867 (S.D.N.Y. 2017); *see also* Lipton & Weiser, *supra* note 10.

70. United States v. Atilla, 966 F.3d 118, 121–22 (2d Cir. 2020).

When Congress enacted the FSIA, it sought to adhere to international law,[71] and courts have also turned to international practice when interpreting the Act and filling in its gaps.[72] Although holding corporations civilly liable for their actions is a universal practice, corporate criminal liability does not exist in many jurisdictions outside of the United States.[73]

Corporations are a legal fiction.[74] Jurists and lawmakers have created a legal personality distinct and separate from individuals who comprise them. Legal personality "means that corporations can sue and be sued, hold property and transact, and incur criminal liability in their own name and on their own account."[75] But from post-World War II military tribunals at Nuremberg to the modern International Criminal Court (ICC), international criminal tribunals have consistently been established only with jurisdiction to prosecute

71. *See, e.g.*, Samantar v. Yousuf, 560 U.S. 305, 319–20 (2010) ("[O]ne of the primary purposes of the FSIA was to codify the restrictive theory of sovereign immunity, which Congress recognized as consistent with extant international law."); Matar v. Dichter, 500 F. Supp. 2d 284, 291 (S.D.N.Y. 2007) ("It is therefore of critical importance that American courts recognize the same immunity defense for foreign officials, as any refusal to do so could easily lead foreign jurisdictions to refuse such protection for American officials in turn.") (quoting Statement of Interest of the United States of America at 22), *aff'd*, 563 F.3d 9 (2d Cir. 2009).

72. *See, e.g.*, Permanent Mission of India to the U.N. v. N.Y.C., 551 U.S. 193, 200 (2007) (considering "international practice at the time of [the FSIA's] enactment"); First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983) (stating that "the principles governing this case are common to both international law and federal common law" when addressing the applicability of the FSIA); *see also* Curtis A. Bradley & Mitu Gulati, *Mandatory Versus Default Rules: How Can Customary International Law Be Improved*, 120 YALE L.J. ONLINE, 421, 429–30 (2011).

73. *See generally* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996). Many international conventions recognize that some nations' domestic laws impose criminal liability on natural persons, but not legal persons. In such cases, these conventions require states to impose non-criminal sanctions. *See, e.g.*, Org. Econ. Co-Operation & Dev. [OECD], Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 3, Nov. 21, 1997, DAFFE/IME/BR(97)20 (entered into force Feb. 15, 1999):

> The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. . . . In the event that under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportional and dissuasive non-criminal sanctions.

74. *See, e.g.*, Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 Tulane L. Rev. 563, 563 (1987).

75. Celia Wells, *Corporate Criminal Responsibility*, *in* RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY 147, 147 (Stephen Tully, ed., 2005).

individuals, not corporations.[76] In fact, France's proposal to extend the ICC's jurisdiction to include the liability of corporations and other juridical entities failed.[77] Why? A simple, singular reason: Corporations, unlike natural persons, cannot be incarcerated.

As the International Military Tribunal at Nuremberg explained, "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[78] Courts and scholars have viewed corporations, "having no body, no soul, and no conscience," as incapable of acting with criminal intent necessary to justify criminal punishment.[79] Further, criminal sanctions have traditionally been justified by one or more of four rationales: rehabilitation, incapacitation, deterrence, and retribution.[80] But corporations neither repent their previous conduct nor reassess their future behavior.[81] Criminally prosecuting and punishing a legal construct not only fails to achieve, but may also even *undermine*, the rationales of criminal law.[82]

In the United States, however, corporate criminal liability is

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76. *See* John M. Eubanks, *Supreme Court Should Reject Corporate Impunity for Financing Terrorism*, ACS EXPERT F. (Oct. 2, 2017), https://www.acslaw.org/expertforum/supreme-court-should-reject-corporate-impunity-for-financing-terrorism [https://perma.cc/3REA-8WWK].

77. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

78. *The Nurnberg Trial 1946*, 6 F.R.D. 69, 110 (1947).

79. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 168 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013); *see also* L.H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 MICH. L. REV. 1508, 1509 (1982) ("These arguments [against corporate criminal liability] may be summarized quickly: a corporation has no mind of its own and therefore cannot entertain guilt; it has no body and therefore cannot act *in propia persona* . . . .") (citation omitted); 2 Int'l Comm'n of Jurists (ICJ), *Corporate Complicity & Legal Accountability* 57–58 (2008):

> National criminal laws were developed many centuries ago, and they are built and framed upon the notion of the individual human being as a conscious being exercising freedom of choice, thought and action. Businesses as legal entities have been viewed as fictitious beings, with no physical presence and no individual consciousness.

80. *See, e.g.*, Henry M. Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401 (1958); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 35–61 (1968).

81. Prosecutor v. Nahimana, Case No. ICTR–99–52–T, Judgement and Sentence, ¶ 1095 (Int'l Crim. Trib. for Rwanda Dec. 3, 2003) ("The Chamber considers that sentencing serves the goals of retribution, deterrence, rehabilitation, and protection of society."); Prosecutor v. Kupreskic, Case No. IT–95–16–T, Judgment, ¶ 848 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000.

82. *Kiobel*, 621 F.3d at 168 ("[C]riminal prosecution of the corporation can undermine the objectives of criminal law by misdirecting prosecution away from those [individuals] deserving of punishment.").

regularly pursued.[83] Federal courts have a stronger view of corporate criminal responsibility, which amounts to vicarious liability for any criminal act committed by agents of a corporation.[84] But corporations should be held substantively liable for both theoretical as well as procedural reasons. On a theoretical level, first, the consequences of organized action will likely be more severe than individual action.[85] Individual actions may be insufficient to hold any single director or officer liable under criminal law.[86] Second, prosecuting individuals may not effectively deter collective actions by a corporation.[87] Emphasizing corporate criminal liability may more likely result in "systemic reform."[88] Third, since corporations are widely regarded as a legal fiction, the United States specifically views corporations as "artificial creations of the State."[89] Corporations have license to externalize risk because shareholders' liability for the company's actions is limited.[90] In return, prosecutors believe that corporations "owe" certain responsibilities to the public, including an affirmative responsibility to cooperate with investigations.[91]

The rigorous nature of the so-called "United States model" of law enforcement creates very different incentives for a corporation's directors and officials.[92] Thus, beyond theory, a procedural argument

83. Diskant, *supra* note 7, at 130–31; *see* Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U. L.Q. 95, 99–100 (2004) (estimating a corporation may be charged with over three hundred thousand possible federal offenses).

84. *See, e.g.*, N.Y. Cent. & Hudson River R.R. Co. v. U.S., 212 U.S. 481 (1909) (finding for the first time that corporations may be held criminally liable for the acts of agents acting in the scope of their employment).

85. Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955, 961–62 (2008).

86. *Id.* at 962.

87. *Id.* at 963.

88. *Id.*

89. OECD, PUBLIC CONSULTATION ON LIABILITY OF LEGAL PERSONS: COMPILATION OF RESPONSES 46 (2016), https://www.oecd.org/daf/anti-bribery/Online-consultation-compilation-contributions.pdf [https://perma.cc/L4ZA-6AZQ].

90. For further information on limited liability and the risks of externalization, see generally Michael Simkovic, *Limited Liability and the Known Unknown*, 68 DUKE L.J. 275, 289–304 (2018); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 103–04 (1985).

91. OECD, *supra* note 89, at 46 (noting that corporations do not have a Fifth Amendment privilege and are often under an affirmative obligation to divulge). "From this perspective, one might conclude that corporations do not really have the right to defend themselves to the same degree as natural person." *Id.*

92. Certain scholars have used the term "United States model of corporate crime control or deterrence." *See generally* Jennifer Arlen & Samuel W. Buell, *The Law of Corporate*

may better support corporate criminal liability. Even if prosecutors target individuals and not the corporations themselves, the threat of prosecuting corporations is critical to obtain the cooperation necessary to investigations.[93] Corporations often have relevant information and knowledge on individual directors, officers, and even the foreign state itself as majority shareholder. The Department of Justice's internal guidelines for federal prosecutors pressure corporations to provide "all relevant facts relating to the individuals responsible for the misconduct" to qualify for cooperation credit.[94] U.S. corporate decision-makers are aware that corporations will be held liable when a criminal act has occurred within the corporation. Further, the financial and reputational harm that ensues from a criminal indictment is often too great for a corporation to bear.[95] All these pressures compel corporations to cooperate with prosecutors by self-reporting and providing evidence against individuals in the same scheme. Expectedly, when a corporation pleads guilty and cooperates, prosecuting the embroiled individuals becomes more straightforward.[96] When a foreign sovereign is involved, these information-forcing defaults prove even more helpful for prosecutors. The sovereign itself is often inaccessible, and any information the corporation provides helps clarify the sovereign's role. This

Investigations and the Global Expansion of Corporate Criminal Enforcement, 93 S. CAL. L. REV. 697 (2020); Frederick T. Davis, *The New French Ruling on Successor Liability Gives French Prosecutors New Leverage to Fight Corruption and Other Corporate Crime*, GLOBAL ANTICORRUPTION BLOG (Mar. 9, 2021), https://globalanticorruptionblog.com/2021/03/09/guest-post-the-new-french-ruling-on-successor-liability-gives-french-prosecutors-new-leverage-to-fight-corruption-and-other-corporate-crime/#more-17791 [https://perma.cc/YWA7-WX9P].

93. *See* Daniel C. Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295, 317–18 (2008) ("Corporate criminal liability is essentially an information-forcing penalty default that ensures that a corporation will fully cooperate with prosecutors in the investigation of individual criminal misconduct.").

94. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice to All U.S. Att'ys et al., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download [https://perma.cc/LAW8-T8QN]; *see* Katrice Bridges Copeland, *The Yates Memo: Looking for "Individual Accountability" in All the Wrong Places*, 102 IOWA L. REV. 1897, 1923 (2017) (arguing that the Department of Justice should conduct internal investigations of culpable individuals itself, and not rely on corporate internal investigations).

95. Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 414 (2007) ("[I]t is the rare corporation that will risk indictment by the Department of Justice (DOJ), let alone a trial. The financial risks are simply too great. Knowing this, the government has virtually unfettered discretion to exact a deferred prosecution agreement from a corporation."); *see also* Diskant, *supra* note 7, at 128.

96. Diskant, *supra* note 7, at 132.

information reporting may even allow for the deployment of other accountability measures, such as sanctions.[97]

The U.S. model may be unique in its methods for pursuing corporate criminal liability.[98] But some countries that traditionally made it difficult to prove corporate criminal liability have begun to change their principles. For example, the French legislature recently began to change its approach.[99] Instead of assigning prosecutorial discretion to judges, French criminal procedural laws now enable prosecutors themselves to investigate and decide whether to charge corporations.[100] As a result, the French Supreme Court (*Cour de Cassation*) has held state-owned entities liable for criminal activity and encouraged corporations to "self-report" information.[101] Similarly, the United Kingdom created so-called Section 7 liability, which imposes strict liability on corporations that fail to prevent acts of bribery.[102] These shifts are telling, indicating a growing consensus towards procedural flexibility and a more "U.S." approach to prosecuting sovereign crime.

2. Separating Sovereigns from Their Instrumentalities

There is a strong international consensus that foreign states themselves are immune from prosecution for their public governmental activities.[103] While it is useful to understand the

97. *See infra* Section I.B.3.

98. *See* Diskant, *supra* note 7, at 126.

99. *See* Frederick T. Davis, *Limited Corporate Criminal Liability Impedes French Enforcement of Foreign Bribery Laws*, GLOB. ANTICORRUPTION BLOG (Sept. 1, 2016), https://globalanticorruptionblog.com/2016/09/01/guest-post-unduly-limited-corporate-criminal-liability-impedes-french-enforcement-of-foreign-bribery-laws/#more-6926 [https://perma.cc/8F9D-2CB6].

100. Frederick T. Davis, *How France Is Modernizing Its Criminal Procedure and Streamlining Its Resolution of Corporate Crime Cases*, GLOB. ANTICORRUPTION BLOG (May 27, 2020), https://globalanticorruptionblog.com/2020/05/27/guest-post-how-france-is-modernizing-its-criminal-procedure-and-streamlining-its-resolution-of-corporate-crime-cases/#more-16002 [https://perma.cc/9Y52-HEU7].

101. *See, e.g.*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 25, 2020, 18-86.955 (Fr.), https://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/2333_25_45981.html [https://perma.cc/B25V-C2AU].

102. Bribery Act, (2010) c. 23, ¶ 7 (UK), https://www.legislation.gov.uk/ukpga/2010/23/section/7 [https://perma.cc/9GK6-6TCN].

103. *See, e.g.*, 28 U.S.C. § 1602; HOUSE REPORT, *supra* note 50, at 7 ("Under [the restrictive principle of sovereign immunity], the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) . . . . [The principle] is regularly applied against the United States in suits against the U.S. Government in foreign courts.").

immunity of both sovereigns and their instrumentalities, it is more important to separate the two analyses.

Indicting foreign sovereigns themselves under the FSIA exceptions could cause problematic reciprocity implications for the United States in foreign courts. Many common law countries have currently adopted a restrictive theory of sovereign immunity in civil cases but retained absolute *Schooner Exchange* immunity in criminal proceedings. Take, for example, section 2 of South Africa's Foreign States Immunities Act of 1981.[104] It provides that "[t]he provisions of [the] Act shall not be construed as subjecting any foreign state to the criminal jurisdiction of the courts of the Republic."[105] The United Nations General Assembly also passed a resolution that affirmed the international law framework governing State immunity under the United Nations Convention on Jurisdictional Immunities "does not cover criminal proceedings."[106] Some scholars have explained that absolute criminal immunity is "in line with the received position of jurists and courts," and that foreign states enjoy "absolute immunity in respect of criminal proceedings."[107] As a reciprocal matter, the United States, as a sovereign nation, is currently shielded from most criminal liability in foreign courts. Some countries have adopted statutes that "authorize their courts to exercise jurisdiction over a foreign defendant whenever the defendant's nation would do the same in analogous situations."[108] If federal courts hold foreign sovereigns criminally

104. *See* Foreign States Immunities Act 87 of 1981 § 2 (S. Afri.), https://www.gov.za/sites/default/files/gcis_document/201503/act-87-1981.pdf [https://perma.cc/GWK9-8A4E].

105. *Id*.

106. G.A. Res. 59/38, ¶ 2 (Dec. 2, 2004). The United Nations Convention on Jurisdictional Immunities of States and Their Property, in line with the FSIA, codifies the principle of restrictive immunity. The Convention enumerates certain exceptions to the general principle of sovereign immunity, including commercial transactions. *See also* Jones v. Ministry of Interior of the Kingdom of Saudi Arabia [2006] UKHL 26, [2006] 2 WLR 70, ¶ 26 (recognizing that the Convention is "the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases").

107. HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 311 (3d ed. 2013); *see also id.* at 89 (arguing that the shift from absolute to restrictive immunity in the Tate Letter was only in the civil context, and "left untouched the [absolute] position in criminal proceedings").

108. Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident, Alien Defendants*, 41 WAKE FOREST L. REV. 1, 49 (2006); *see also* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 93 (3d ed. 1996) ("[A] state court's assertion of judicial jurisdiction over residents of another U.S. state virtually never provokes retaliatory measures; in contrast, assertions over foreign defendants can result in retaliation from foreign nations.").

liable through the FSIA exceptions, there may be a danger that other countries would adjust their own explicit statutes.

Yet the same analysis for criminal liability of foreign sovereigns does not map directly onto sovereign instrumentalities. There is an international consensus that the immunity of the sovereign itself is separate from "purely commercial" sovereign entities; Elizabeth Verville, Deputy Legal Adviser to the Department of State, even testified to this point in 1987.[109] The FSIA grants general immunity to sovereign instrumentalities "only to the extent that they are entitled to perform acts in the exercise of sovereign authority and are acting in that capacity."[110] Even before the Act was enacted, the Department of Justice, part of the Executive Branch of the federal government, recognized that "a commercial enterprise owned or controlled by a sovereign is not immune from suit on a cause of action arising out of its business dealings."[111] While this doctrine still remains "unsettled" after the enactment of the FSIA, the D.C. Circuit has aligned with the Department of Justice in holding that foreign state-owned corporations may be criminally liable for their commercial activities.[112] As a result, both the Executive and part of the Judicial Branches make clear that there is reason to criminally prosecute sovereign instrumentalities.

3. Non-Judicial Tools to Sanction Sovereign Instrumentalities

A third reason why sovereign criminal immunity may be underdeveloped is because there are existing penalties separate from those resulting from litigation. If a foreign sovereign commits an illicit act in international markets, the Executive Branch may prohibit U.S.

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109. *Foreign Sovereign Immunities Act: Hearing on H.R. 1149, H.R. 1689, and H.R. 1888 Before the Subcomm. on Admin. L. and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 26 (1987) ("Even absolute immunity states generally agree that state-owned purely commercial entities may be sued abroad and establish them with the ability to sue and be sued generally."); *see also* Andrew Dickinson, *State Immunity and State-Owned Enterprises*, 10 BUS. L. INT'L 97, 124–27 (2009).

110. RESTATEMENT (FOURTH) OF U.S. FOREIGN RELATIONS LAW § 452 reporter's n.12 (AM. L. INST. 2019) (citing United Nations Convention on Jurisdictional Immunities of States and Their Property art. 2(1), G.A. Res. 59/38, (Dec. 2, 2004) (not in force)); *see also* European Convention on State Immunity art. 27, May 16, 1972, E.T.S. No. 074 (permitting proceedings in foreign courts against "any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued").

111. Brief for the United States as Amicus Curiae at 18, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) **(**No. 73-1288), 1975 WL 173732 (emphasis added).

112. *Grand Jury Subpoena II*, 912 F.3d 623, 630. (D.C. Cir. 2019).

trade, financial transactions, investment, and foreign aid.[113] Consider a recent example: on September 13, 2019, the Department of the Treasury imposed sanctions on Chinese state-owned companies.[114] A press release issued by the Treasury's Office of Foreign Assets Control (OFAC) indicated that a Chinese technology exporter supported Venezuelan president Nicolas Maduro's "illegitimate" regime through digital surveillance and other cyber operations.[115] As a result, all property and interests of the exporter were frozen under U.S. law.[116] Further, the exporter and its over 200 subsidiaries cannot conduct business with U.S. persons without authorization from OFAC.[117] Where sanctions and similar measures can be used to such wide effect, it is likely that the Executive Branch will choose not to pursue prosecutions for penalty or deterrence purposes. Because of these non-judicial tools, choosing to prosecute sovereign instrumentalities is better described as serving an important, albeit limited, function: to gather information.[118]

II. THE DIFFICULTIES OF APPLYING THE FSIA TO CRIMINAL CONTEXTS

As Part I demonstrated, the question of whether criminal cases are governed by the FSIA is underdeveloped. Recent courts have raised three main questions in a fitful attempt to define the scope of criminal immunity under the FSIA: Does the Act apply to criminal prosecutions as a source of protection? If yes, are criminal prosecutions nonetheless authorized by an exception? If no, should common law immunity apply in place of statutory immunity? This Part addresses the difficulty and dangers of the current debates—and

113. *See, e.g.*, DIANNE E. RENNACK, CONG. RSCH. SERV, R41438, NORTH KOREA: LEGISLATIVE BASIS FOR U.S. ECONOMIC SANCTIONS 5 (2018); *see also* Steven Arrigg Koh, *Criminalizing Foreign Relations: How the Biden Administration Can Prevent a Global Arrest Game*, JUSTSECURITY (Dec. 18, 2020), https://www.justsecurity.org/73853/criminalizing-foreign-relations-how-the-biden-administration-can-prevent-a-global-arrest-game [https://perma.cc/634E-CEUK] (noting that criminal justice "functions globally alongside six other foreign policy modalities (diplomacy, agreements, trade, economic sanctions, military force, and foreign aid)").

114. Press Release, U.S. Dep't of the Treasury, Treasury Sanctions CEIEC for Supporting the Illegitimate Maduro Regime's Efforts to Undermine Venezuelan Democracy (Nov. 30, 2020), https://home.treasury.gov/news/press-releases/sm1194 [https://perma.cc/AN7J-YA3K].

115. *Id*.

116. *Id*.

117. *Id*.

118. *See supra* Section I.B.1.

argues that more must be done to develop the doctrine of sovereign criminal immunity.

A. A Source of Protection

Section 1604 of the FSIA provides that a "foreign state shall be immune from the jurisdiction of the courts of the United States" without explicitly limiting the language to civil cases.[119] Courts must first answer whether section 1604's silence on criminal immunity—and the proximate statutory text—expressly excludes criminal proceedings from the Act's general grant of immunity.[120]

Foreign sovereigns argue no: The effect of section 1604 is to provide a blanket shield of civil *and* criminal immunity. If Congress wanted to exclude criminal cases, it would have done so expressly. After all, in a separate FSIA provision, Congress limited federal subject matter jurisdiction to only the civil context.[121] By comparison, the consciously open language of section 1604 is telling and demands an equally open interpretation.

The Government argues yes: Legislative history indicates that criminal immunity was "not the particular problem to which Congress was responding."[122] The House Report of the bill provided examples of "lawsuits" parties can maintain against a foreign state or its entities. These examples were both of a *civil* nature: a price dispute between an American businessperson and foreign state trading company, and a real estate contract dispute between an American property owner and a foreign government.[123] This Note concludes that the Government has the better of the argument—the FSIA does not grant sovereign criminal immunity.

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119. 28 U.S.C. § 1604.

120. *See generally* Brian Rosner, Natalie A. Napierala & Michael D. Sloan, *The Sound of Silence: Criminal Immunity for Foreign Sovereigns Under the FSIA, and Civil RICO Liability for Foreign Sovereigns in the Second Circuit*, LAW.COM: N.Y. L.J. (Oct. 3, 2018, 2:30 PM), https://www.law.com/newyorklawjournal/2018/10/03/the-sound-of-silence-criminal-immunity-for-foreign-sovereigns-under-the-fsia-and-civil-rico-liability-for-foreign-sovereigns-in-the-second-circuit [https://perma.cc/33FD-TM7G].

121. 28 U.S.C. § 1330(a).

122. Brief of Appellee at 18, *In re* Grand Jury Subpoena, 749 F. App'x 1 (D.C. Cir. 2018) (No. 18-GJ-0041) (quoting Samantar v. Yousuf, 560 U.S. 305, 323 (2010)).

123. HOUSE REPORT, *supra* note 50, at 8; *see also* United States v. Hendron, 813 F. Supp. 973, 976 (E.D.N.Y. 1993) ("The legislative history gives no hint that Congress was concerned that a foreign defendant in a criminal proceeding would invoke the Act to avoid a federal court's jurisdiction.").

Applying section 1604 to criminal prosecutions was almost unheard of before *Halkbank*. To date, the Southern District of New York remains the only court to explicitly answer the threshold question, and it resolved the tension in favor of the Government. But the long-awaited answer was unsatisfactory. District Judge Richard M. Berman penned only one paragraph on this contested topic and held, in conclusory manner, that the "FSIA does not *appear* to grant immunity in criminal proceedings"—with little further explanation.[124] In the midst of this confusion, the Second Circuit recently had the opportunity to clarify and explicate this issue. It chose not to. The Second Circuit, like the D.C. Circuit before it, punted on whether section 1604 itself applies as a source of protection.[125] While the circuit affirmed Judge Berman's decision, it deviated from the lower court's characterization of sovereign criminal immunity.

A look at another district court opinion in the Second Circuit provides better guidance. As early as 1993, the U.S. District Court for the Eastern District of New York found the FSIA "contains a panoply of provisions that are consistent only with an application to civil cases and not to criminal proceedings."[126] An individual director of a Polish state-owned corporation was indicted on conspiracy to illegally import assault weapons into the United States.[127] The defendant moved to dismiss the indictment, arguing that the FSIA grants him criminal immunity from the jurisdiction of U.S. courts.[128]

The district court rejected the defendant's arguments.[129] First, the court reasoned that section 1602, entitled Findings and Declaration of Purpose, refers to the rights of "foreign states and litigants."[130] The

124. *Halkbank I*, No. 15 CR. 867 (RMB), 2020 WL 5849512 at *4 (S.D.N.Y. Aug. 24, 2020) (emphasis added).

125. *Halkbank II*, No. 20-CR-3499, slip op. at 18 (2d Cir. Oct. 22, 2021) ("[W]e need not—and do not—decide whether § 1604 of the FSIA confers immunity on foreign sovereigns in the criminal context."). While the D.C. Circuit was the first court to mention sovereign immunity of instrumentalities in criminal contexts, it also avoided answering whether section 1604 applies in the criminal context. *Grand Jury Subpoena II*, 912 F.3d 623, 627 (D.C. Cir. 2019) ("Mindful of our obligation to avoid sweeping more broadly than we must to decide the case in front of us, we need not weigh in on this dispute."); *see also id.* at 625 ("[W]e find it unnecessary to supply a definitive answer.").

126. *See, e.g.*, *Hendron*, 813 F. Supp. at 975; *see also Grand Jury Subpoena II*, 912 F.3d at 630 (explaining that the Act's "relevant reports and hearings suggest Congress was focused, laser-like, on the headaches born of private plaintiffs' civil actions against foreign states").

127. *See generally Hendron*, 813 F. Supp. at 974.

128. *See generally* Motion to Dismiss, *Hendron*, 813 F. Supp. 973 (E.D.N.Y. 1993) (No. 92 CR 424), ECF No. 60.

129. *See Hendron*, 813 F. Supp. at 974.

130. *Id.* at 975 (citing 28 U.S.C. § 1602).

term "'litigant' ordinarily refers to a party in a civil suit," not to a government prosecutor in criminal contexts.[131] Next, the same section contained language that describes only civil, and not criminal, judgments: "commercial property may be levied upon the satisfaction of judgments."[132] Instead of language imposing a "sentence" or "fine," this language is consistent with a judgment in a civil case.[133] Further, various provisions outlined principles of civil procedure and remedies, which are not applicable to the Federal Rules of Criminal Procedure, including "attachment and execution of property,"[134] "punitive damages,"[135] "actual and compensatory damages,"[136] and "counterclaims."[137]

Because the doctrine is underdeveloped, courts must take one step away from criminal liability, and take recourse in other contexts to understand the core issue. The few circuits to consider the question of criminal immunity for foreign states have mostly done so in the context of civil liability under the Racketeer Influenced and Corrupt Organizations Act (RICO), a connection the D.C. Circuit and the Second Circuit explicitly recognized in *Grand Jury Subpoena II*.[138] To impose civil RICO liability, a plaintiff must establish that the predicate act underlying the violation is "any act which is indictable."[139]

Existing cases sufficiently shed light on the interaction of the RICO provision and the FSIA. Some circuits have opined, if a foreign state is criminally immune under the FSIA and cannot be indicted, then it cannot commit an "indictable" act for purposes of a civil RICO claim.[140] The Tenth Circuit reasoned from the FSIA's silence on sovereign criminal immunity that the statute did not provide immunity on predicate RICO offenses.[141] The court further noted that if

131. *Id.*

132. *Id*.

133. *Id*.

134. 28 U.S.C. §§ 1609–1611.

135. 28 U.S.C. § 1606.

136. *Id*.

137. 28 U.S.C. § 1607.

138. *Grand Jury Subpoena II*, 912 F.3d 623, 627 (D.C. Cir. 2019) (prefacing discussion of civil RICO by explaining "[t]he few circuits to consider this issue [of applying the Act to criminal proceedings] have reached differing conclusions, albeit in circumstances distinct from those here"); *Halkbank II*, No. 20-CR-3499, slip op. at 16 n.39 (2d Cir. Oct. 22, 2021) (citing civil RICO cases to support the proposition that "[o]other circuits to consider FSIA's availability in criminal cases have split").

139. 18 U.S.C. § 1961; *see also* Rosner, *supra* note 120.

140. *See, e.g.*, Southway v. Cent. Bank of Nigeria, 198 F.3d 1210, 1214 (10th Cir. 1999).

141. *Id*.

Congress intended the FSIA to apply to criminal indictments, Congress would have expressly amended the Act to state so.[142]

By contrast, the Sixth Circuit took the opposite approach and found that the FSIA's silence indicated a grant of "immunity to foreign sovereigns from criminal prosecutions."[143] The court rejected the Tenth Circuit's reasoning and instead accepted the contrary analysis set forth in *Gould v. Mitsui Mining & Smelting*.[144] There, the U.S. District Court for the Northern District of Ohio dismissed civil RICO claims against an French state-owned instrumentality and found it was immune from criminal jurisdiction under the FSIA.[145] The court began its analysis by reviewing section 1330(a), which serves as the basis of subject matter jurisdiction over nonjury *civil* actions when an exception applies.[146] Without explicit criminal jurisdiction over the instrumentality, the court held that the defendant was immune from criminal indictment.[147] The *Gould* court also concluded that the entire Act applied in criminal contexts as a broader matter.[148] In doing so, it principally relied on the statute's broad grant of immunity in section 1604.[149] Absent Congress amending section 1604's broad language to include only civil cases, foreign sovereigns were found to also enjoy criminal immunity under the Act. [150]

It is important to recognize that the Tenth and the Sixth Circuits did not have to read the RICO statute to address whether a foreign state is immune from criminal proceedings. After all, the RICO statute only specifies that the act—the "what"—and not the particular actor—the "who"—must be "indictable."[151] That is, the hypothetical possibility of the underlying act being criminally charged may suffice. It is not necessary that the particular foreign state defendant be indictable.[152]

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142. *Id.* at 1215.

143. Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 820 (6th Cir. 2002), *abrogated on other grounds by* Samantar v. Yousuf, 560 U.S. 305 (2010).

144. Gould v. Mitsui Mining & Smeling, 750 F. Supp. 838, 844 (N.D. Ohio 1990).

145. *Gould*, 750 F. Supp. at 843.

146. *Id*. at 843–44; *see also* Southway v. Cent. Bank of Nigeria, 198 F.3d 1210, 1214 (10th Cir. 1999) (citing 28 U.S.C. § 1330(a)).

147. *Gould*, 750 F. Supp. at 844.

148. *See generally id*. at 843–44.

149. *Id.* at 843.

150. Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 819 (6th Cir. 2002) (citing *Gould*, 750 F. Supp. at 844).

151. 18 U.S.C. § 1961.

152. Southway v. Cent. Bank of Nigeria, 198 F.3d 1210, 1215 n.6 (10th Cir. 1999); McNeily v. United States, 6 F.3d 343, 350 (5th Cir. 1993); Sedima S.P.R.L. v. Imrex Co., 473

B. A Source of Jurisdiction

Even assuming section 1604 applies as a source of protection to criminal proceedings, prosecuting a sovereign entity is nonetheless possible if the exceptions in sections 1605 and 1607 apply. In *Grand Jury Subpoena II*, the D.C. Circuit bifurcated these two steps: It avoided the question of whether the general grant of immunity in section 1604 applied but concluded that the Act's exceptions to immunity in section 1605(a) applied to "any case," including criminal cases.[153] Specifically, the circuit court explained that the corporation lacked immunity from the subpoena because the Act's commercial activities exception applied.[154] That is, "information sought through the [grand jury's] subpoena here concerns a commercial activity that caused a direct effect in the United States."[155] This unsettling, if clever, holding allowed the D.C. Circuit to engage in the FSIA analysis without providing a definitive answer on the circuit split.

Halkbank I later correctly applied the same scope of criminal immunity to sections 1604 and 1605 in a more consistent manner. In dictum, the Southern District of New York explicitly noted that if the Act provided immunity as a threshold matter, the exceptions would also support Halkbank's prosecution.[156] The district court did not, however, acknowledge the persuasive authority of the D.C. Circuit despite the Government's and Halkbank's briefings. To elide any reference to the D.C. Circuit seems strange, especially given the shared context of corporate criminal liability and the lack of other analogous cases.[157] It may have been intentional, however, as the D.C. Circuit's opinion proved contentious: Courts and commentators disagree first, on whether the exceptions apply as a matter of statutory interpretation,

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U.S. 479, 488 (1985). *Compare* John D. Corrigan, *Restricting RICO Under FSIA*, 84 ST. JOHN'S L. REV. 1477, 1492 (2010) ("[T]he predicate RICO offense itself must be indictable, not the party that committed it.") *with Keller*, 277 F.3d at 820 (explaining an earlier but unrelated decision that rejected civil RICO claims against the federal government on the ground that the government is not indictable).

153. *Grand Jury Subpoena II*, 912 F.3d 623, 632 (D.C. Cir. 2019).

154. *Id.* at 625–27.

155. *Id.* at 625–26.

156. *Halkbank I*, No. 15 Cr. 867, 2020 WL 4932772, at *4 (S.D.N.Y. Aug. 24, 2020) ("FSIA's commercial activity exceptions would clearly apply and support the Halkbank prosecution.").

157. *Compare Halkbank I*, 2020 WL 4932772, at *4 *with* United States v. Pangang Grp. Co., No. 11-cr-573 (N.D. Cal. Aug. 26, 2019), ECF No. 1223 at 10 (finding the D.C. Circuit's reasoning "persuasive" in an order denying motion to dismiss indictment filed by a Chinese state-owned instrumentality).

and second, on whether the courts have subject matter jurisdiction over sovereign instrumentalities outside of the FSIA.

1. Reading the Exceptions Through a Textualist Lens

Why did the exceptions apply in the first place? In answering this question in favor of sovereign instrumentalities, the D.C. Circuit looked to the text of the FSIA itself. As discussed, the language of section 1330(a) explicitly limits district court jurisdiction to only "nonjury civil action against a foreign state."[158] The circuit court reasoned that Congress "knows how to limit a provision to a 'civil action' when it wants to."[159] By contrast, there is no express direction that the exceptions to immunity apply in only civil actions. Section 1605(a) specifically extends the exceptions not merely to "civil actions" but to "any case" that falls within one of the listed circumstances.[160] The unqualified word "any" indicates that Congress extended the section 1605(a) exceptions to include criminal contexts.[161]

A contrary argument was raised by Halkbank in the Southern District of New York. The bank proffered that the exceptions to immunity are a poor fit for criminal cases. Out of all eight exceptions to immunity, most of them are limited to causes of actions in which money damages are sought,[162] property rights are at issue,[163] or criminal prosecutions would not be applicable.[164] Only two exceptions may permit criminal prosecutions: section 1605(a)(1), which applies when a sovereign implicitly or explicitly waived its immunity, and section 1605(a)(2), which applies when the action is "based upon a

158. 28 U.S.C. § 1330(a) (emphasis added).

159. *Grand Jury Subpoena II*, 912 F.3d 623, 632 (D.C. Cir. 2019).

160. 28 U.S.C. § 1605(a); *see also id.* §1607 (enumerating counterclaim-based exceptions to immunity that apply "[i]n any action").

161. *See* SAS Inst., Inc. v. Iancu, 138 S. Ct. 1348, 1354 (2018) ("[T]he word 'any' naturally carries 'an expansive meaning.' . . . . When used . . . with a 'singular noun in affirmative contexts,' the word 'any' ordinarily 'refers to a member of a particular group or class without distinction or limitation' and in this way 'implies *every* member of the class or group.'") (citing United States v. Gonzales, 520 U.S. 1, 5 (1997)).

162. *See* 28 U.S.C. § 1605A (providing a foreign state will not be jurisdictionally immune in any case "which *money damages* are sought against a foreign state 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 . . . for such an act") (emphasis added).

163. *Id.* § 1605(a)(3) (expropriation); *id*. § 1605(a)(4) (property in the United States).

164. *Id.* § 1605(a)(6) (arbitral agreements and awards); *id.* § 1605(b) (maritime liens); *id.* § 1607 (counterclaims).

commercial activity."[165] Halkbank, in its motion to dismiss, argued that all exceptions should not apply to the criminal context.[166] To do so would result in absurdity.[167] If a foreign state may not be sued for acts such as terrorism, expressly limited to "money damages," how could it be sued for financial crimes under the commercial activity exception?

Halkbank's concerns underscore the fact that the exceptions do not speak to criminal prosecutions. The exceptions were enacted to protect private plaintiffs' rights in litigating their own interests, with little to no regard to U.S. foreign relations.[168] Any statutory constraints, including limiting actions to "money damages," were likely enacted not out of solicitude for terrorism, but instead, to prevent a large number of claims.

There are no concomitant concerns in criminal cases. A decision to prosecute reflects a policy judgment. The Executive Branch has significant discretion to decide what cases are brought and whom to prosecute. When the Executive elects to bring a particular prosecution, courts assume that they have "assessed" foreign policy and "concluded that [the prosecution] poses little danger of causing international friction."[169] Civil litigants do not make such policy judgments. This government gatekeeping in criminal cases matters: It suggests that the exceptions were crafted with civil, rather than criminal, jurisdiction in mind.

2. Subject Matter Jurisdiction

Although the language of the Act provides little guidance on whether sovereign entities enjoy immunity in criminal contexts, one clause is clear: section 1330(a). Section 1330(a) is the only provision to provide subject matter jurisdiction in the FSIA—and it only does so over civil actions.[170] The question here is whether, under the existing

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165. *Id.* § 1605(a).

166. Mem. Law in Supp. of Def.'s Mot. Dismiss at 4, United States v. Halkbank, No. 15 CR. 867 (S.D.N.Y. Aug. 24, 2020).

167. *Id.*

168. HOUSE REPORT, *supra* note 50, at 8–10.

169. Pasquantino v. United States, 544 U.S. 349, 351 (2005):

> Although a prosecution like this one requires a court to recognize foreign law to determine whether the defendant violated U.S. law, it may be assumed that by electing to prosecute, the Executive has assessed this prosecution's impact on this Nation's relationship with Canada, and concluded that it poses little danger of causing international friction.

170. 28 U.S.C. § 1330(a).

statutory framework, another statute can provide subject matter jurisdiction over criminal sovereign actions.

In a civil case, the Supreme Court has previously interpreted the jurisdictional provision in section 1330(a) and the general grant of immunity in section 1604 as "work[ing] in tandem."[171] Plaintiffs in *Amerada Hess* sought relief in tort from the Argentine government.[172] During the Falkland Islands War between Argentina and the United Kingdom, Argentine aircraft attacked a neutral oil tanker owned by the plaintiffs.[173] The Act plainly provided immunity to Argentina for the public sovereign act.[174] The Court rejected plaintiffs' attempt to circumvent the Act's immunity by invoking subject matter jurisdiction under the Alien Tort Statute, and instead held that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts."[175] Read together, *Amerada Hess* and section 1330(a) yield the conclusion that U.S. courts do not have jurisdiction over sovereigns in non-civil actions.[176]

The D.C. Circuit departed from this reasoning and decided that the FSIA's protection and jurisdictional provisions do not necessarily "rise and fall together" in the criminal context.[177] The circuit court declined to apply *Amerada Hess* to criminal contexts; instead, it found that section 1330(a) merely *confers* jurisdiction over *some* civil cases and does not reach criminal actions.[178] In other words, courts could exercise criminal subject matter jurisdiction through a statute separate from section 1330(a) itself, as long as an enumerated exception applies.

Notwithstanding the circuit split on the statute as a whole, there was thin case law from before *Grand Jury Subpoena I* on what statute would confer criminal subject matter jurisdiction upon federal

171. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

172. *Id.* at 431–32.

173. *Id.* at 428.

174. *Id.* at 428–29.

175. *Id.* at 429–39 (explaining Congress decided to "deal comprehensively with the subject of foreign sovereign immunity in the FSIA" and the express provision in Section 1604 should "preclude a construction of the [Alien Tort Statute] that permits the instant action"). Even outside of *Amerada Hess*, the Supreme Court has consistently described the FSIA as "comprehensive." *See, e.g.*, Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134, 141 (2014) ("We have used th[e] term ["comprehensive"] often and advisedly to describe the Act's sweep . . . .").

176. *In re* Grand Jury Subpoena No. 7409, 2018 WL 8334867, at *5 (D.D.C. Sept. 19, 2018).

177. *Grand Jury Subpoena II*, 912 F.3d 623, 629 (D.C. Circ. 2019).

178. *Id.* at 628 (explaining that *Amerada Hess* was a civil action in which plaintiffs "sought to circumvent" sovereign immunity entirely).

courts, if the FSIA exceptions applied. The District Court of Puerto Rico was one of the only courts to acknowledge criminal subject matter jurisdiction.[179] Like the *Southway* and *Hendron* courts before it, the court held that the FSIA applied only to civil proceedings. But, in a footnote, the court found in *Deltuva* criminal subject matter jurisdiction in section 3231 of Title 18.[180] Section 3231, a non-FSIA statute of general criminal jurisdiction, provides that "the district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."[181] The D.C. Circuit was inspired by the *Deltuva* footnote. It concluded that there was "no conflict" between the Act and section 3231's jurisdiction.[182] Indeed, "the Act leaves intact the district court's criminal jurisdiction to enforce this subpoena."[183] The Second Circuit ruling followed the D.C. Circuit's logic.[184]

Although the two circuit courts are correct to look to section 3231 for criminal jurisdiction, the decisions may have overstated the extent to which section 3231 and the Act can "coexist peacefully" and supplement each other.[185] As a practical matter, the decisions effectively concluded that no foreign sovereign instrumentality may be criminally prosecuted unless one of the Act's enumerated exceptions applied. When the Executive Branch decides to prosecute an instrumentality under a criminal statute passed by Congress, jurisdiction should not be conditioned on the presence or absence of

179. *In re* Grand Jury Proceeding Related to M/V Deltuva, 752 F. Supp. 2d 173, 180 (D.P.R. 2010).

180. *Id.*

181. 18 U.S.C. § 3231; *see* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989). It is worth noting that the same concerns that the Supreme Court articulated with respect to the Alien Tort Statute applies with equal force to section 3231. Like the Alien Tort Statute, section 3231 "does not distinguish among classes of defendants" and "has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states." *Id.*

182. *Grand Jury Subpoena II*, 912 F.3d at 628. In its reasoning, the D.C. Circuit cited to Morton v. Mancari, 417 U.S. 535, 550 (1974), in which the Supreme Court stated that one statute should not imply a limited repeal of another when the two are reconcilable.

183. *Id.* at 631.

184. *Halkbank II*, No. 20-CR-3499, slip op. at 18 (2d Cir. Oct. 22, 2021) ("We think that the District Court plainly has subject matter jurisdiction over the federal criminal prosecution of Halkbank pursuant to § 3231."). The Second Circuit quotes extensively from the D.C. Circuit. *See, e.g.*, *id.* at 17–18 ("As one of our sister circuits recently observed, '[i]t is hard to imagine a clearer textual grant of subject-matter jurisdiction' – '[a]ll means all.' Indeed, § 3231 'contains no carve-out' that supports an exemption for federal offenses committed by foreign sovereigns, and 'nothing in the [FSIA's] text expressly displaces [§] 3231's jurisdictional grant.'" (quoting *Grand Jury Subpoena II*, 912 F.3d 623, 628 (D.C. Cir. 2019)).

185. *Grand Jury Subpoena II*, 912 F.3d at 631.

an exception—that is, whether the instrumentality has waived immunity or whether it engaged in a commercial activity.

This interpretation is counter to courts' long-standing interpretation that section 3231 affords a "broad and comprehensive grant [which] gives the courts named power to try every criminal case cognizable under the authority of the United States, [only] subject to the controlling provisions of the Constitution."[186] The unqualified language is not subject to specified conditions. It is perhaps the case that the D.C. Circuit sought to implement an additional "statutory hurdle[ ]" to this broad subject matter jurisdiction.[187] For example, the Eleventh Circuit noted that, generally speaking, a district court has jurisdiction to adjudicate criminal cases under section 3231.[188] But when a separate criminal statute provides an additional limit on subject matter jurisdiction, the plaintiff must prove the narrower requirement.[189]

Here, the FSIA cannot act as a separate statutory hurdle. It does not clearly provide criminal jurisdiction and cannot be characterized as a criminal statute. Indeed, some scholars have already criticized the Circuit's "hybrid" approach as impermissibly "graft[ing] provisions of a civil statute onto a grant of criminal jurisdiction . . . ."[190] As currently drafted, the FSIA should not deprive courts of the ability to hear a federal criminal case over sovereign instrumentalities.

Yet, *Grand Jury Subpoena II* and *Halkbank II* suggest a new openness to applying section 3231 to sovereign contexts. This point is the circuit courts' doctrinal innovation. Previous cases followed *Amerada Hess* and insisted that the FSIA dealt "comprehensively with the subject of foreign sovereign immunity."[191] The circuits responded by drawing a line between civil and criminal contexts and finding that

186. Simons v. United States, 119 F.2d 539, 544 (9th Cir. 1941); *see also* United States v. Spaulding, 802 F.3d 1110, 1128 (10th Cir. 2015) (Gorsuch, J., dissenting) (noting that Section 3231's "general grant of jurisdiction is unqualified"); McCoy v. United States, 266 F.3d 1245, 1252 n.11 (11th Cir. 2001) (noting that "[s]ubject matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231," and in almost all criminal cases, "[t]hat's the beginning and the end of the jurisdictional inquiry.") (internal citation and quotation marks omitted).

187. United States v. Tinoco, 304 F.3d 1088, 1104 n.18 (11th Cir. 2002).

188. *Id*.

189. *Id.* at 1104 n.18 ("46 U.S.C. § 1903 of the MDLEA creates an additional statutory requirement of subject matter jurisdiction—that the vessel at issue be subject to the jurisdiction of the United States—above and beyond the general jurisdictional requirement imposed upon district courts by 18 U.S.C. § 3231.").

190. Keitner, *supra* note 15, at 266.

191. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989).

existing Supreme Court case law "has no place" in the latter.[192] As such, courts may plausibly have broad criminal jurisdiction over sovereign instrumentalities in a non-FSIA statute, like section 3231.

C. Common Law Immunity

If the FSIA does not apply as a source of protection in criminal cases, would courts have unfettered jurisdiction over sovereign instrumentalities? Likely not. Some scholarship points to the extensive federal common law immunity to which sovereigns are also subjected.[193] Professor Chimène Keitner, in a recent article, argues that judges should necessarily resort to common law methods when a statute does not answer a question.[194] Since the FSIA does not directly address sovereign criminal immunity, the literature argues that the Act did not displace the pre-existing common law governing such immunity.[195] Under this position, foreign sovereign immunity applies to the exercise of criminal jurisdiction only as a matter of "common law," not of statutory law.

The trouble with a federal common law of sovereign criminal immunity is not that it is necessarily wrong, but that it is impractical. The Supreme Court has generally disfavored common-law lawmaking in the post-*Erie* era.[196] And any limited common law doctrine that exists is, simply put, messy.

When faced with the question of whether there is a common law of sovereign criminal immunity, scholars have turned to individual official immunity as an analogy.[197] There are many advantages for applying common law to both officials and sovereigns in criminal contexts, not least because there is little reason to presume that

192. *Grand Jury Subpoena II*, 912 F.3d 623, 629 (D.C. Cir. 2019).

193. Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 GEO L.J. 1825, 1848 (2018); *see* Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2d 61, 65–66 (2010).

194. *See* Keitner, *supra* note 15, at 225–70.

195. *Id.*

196. *See, e.g.*, Milwaukee v. Ill., 451 U.S. 304, 312 (1981) (cautioning that federal courts "are not general common-law courts and do not possess a general power to develop and apply their own rules of decision"); Ingrid Wuerth, *RIP Federal Common Law of Foreign Relations?*, LAWFARE (Aug. 15, 2018, 12:59 PM), https://www.lawfareblog.com/rip-federal-common-law-foreign-relations [https://perma.cc/7W4G-5WE3]. *But cf.* Daniel C. Richman, *Defining Crime, Delegating Authority – How Different are Administrative Crimes?*, 39 YALE J. ON REG. (forthcoming in 2021) (arguing that courts made considerable common-law lawmaking in the context of federal criminal law, and "[d]efenses are one area over which the Court has taken virtual ownership") (manuscript at 14).

197. Keitner, *supra* note 15, at 226 n.32, 267; Wuerth, *supra* note 193, at 1848.

Congress intended to codify both immunities in the FSIA.[198] That being said, important disadvantages are equally present. The Supreme Court held in a 2010 decision, *Samantar v. Yousuf*, that the immunity of foreign officials in U.S. courts was not governed by the FSIA.[199] Immunity may instead be granted under common law, but the Court did not take the opportunity to explain how.[200] For over a decade, lower courts have struggled to define what acts qualify as "official," and how much judicial deference should be afforded to the Executive Branch.[201] Asking courts to develop a common law of foreign sovereign immunity from criminal proceedings bears the same risks of uncertainty and inconsistency. At a time when sovereign prosecution cases are increasing, courts cannot afford to flounder for another ten years.

III. TOWARD A DEFINED SCOPE OF SOVEREIGN CRIMINAL IMMUNITY

In light of the foregoing difficulties, there are no easy answers for courts to determine whether a sovereign instrumentality can be criminally prosecuted. Courts already have tools, however, to address the problems laid out in Part II. At present, two circuit courts found jurisdiction to try criminal charges against a foreign sovereign under a separate statute, 18 U.S.C. § 3231. This suggests that the FSIA is not the sole basis to obtain jurisdiction over foreign sovereigns in every context. As discussed in Section II.B above, the circuit courts' reasoning becomes problematic when it extends the FSIA—a non-criminal statute—to supplement the general jurisdictional basis for federal criminal prosecutions under section 3231. Practically and theoretically, the FSIA cannot apply in criminal proceedings against foreign instrumentalities. It is therefore critical that the scope of

198. *See* Samantar v. Yousuf, 560 U.S. 305, 320 (2010) ("[W]e do not think that the Act codified the common law with respect to the immunity of individual officials.").

199. *See Samantar*, 560 U.S. at 310 n.3; *see also* United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) (discussing head-of-state immunity); Ye v. Zemin, 383 F.3d 620, 627 (7th Cir. 2004) ("[T]he immunity of foreign leaders remains the province of the Executive Branch. The Executive Branch's determination that a foreign leader should be immune from suit even when the leader is accused of acts that violate jus cogens norms is established by a suggestion of immunity.") (emphasis omitted).

200. *Samantar*, 560 U.S. at 324 ("Even if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law."); *see also* Curtis A. Bradley, *Conflicting Approaches to the U.S. Common Law of Foreign Official Immunity*, 115 AM. J. INT'L L. 1, 1 (2021) ("Although the Court did not say so specifically, scholars have generally assumed that this common law should be treated as federal common law.").

201. *See generally* Bradley, *supra* note 200, at 6 (identifying "at least four questions left open after *Samantar*").

sovereign criminal immunity be defined through a new statutory framework.

This Note proposes an initial (but by no means exclusive) multi-step framework, with obligations for all three branches of Government. A court would first begin with 18 U.S.C. § 3231's general grant of criminal jurisdiction over foreign sovereign instrumentalities. The initiation of criminal prosecution implies a determination by the Executive Branch that the instrumentality is not entitled to immunity. Although this determination should not lightly be disturbed, courts are not required to accord absolute deference to the Executive Branch's views. Under limited circumstances, Congress could enact a new criminal immunity statute enabling sovereign instrumentalities to assert an immunity defense. This structured analysis will help strike the proper balance between competing interests that arise when a sovereign instrumentality is criminally prosecuted.

A. Presumption of Criminal Jurisdiction

The Supreme Court will likely find that the FSIA neither approves nor precludes criminal proceedings as a threshold matter. This reading best accords with the Act's text and legislative history. As this Note has suggested, drafters of the Act did not have in mind sovereign immunity from criminal prosecution.[202] Instead, Congress was "focused, laser-like, on the headaches born of private plaintiffs' civil actions against foreign states."[203] Fitting the Act into criminal actions is "a little bit of trying to put a square peg into a round hole."[204] As such, the Supreme Court or the Department of Justice could, and should, ask Congress to amend the FSIA. Congress could insert supplemental language in Title 28 to clarify that the FSIA does not apply to any actions that are not civil in nature.

To define the scope of criminal immunity for sovereign instrumentalities, a better starting point is 18 U.S.C. § 3231. Section 3231's plain text provides subject matter jurisdiction over any case based on an indictment specifying an "offense against the laws of the United States."[205] Since the FSIA likely does not apply, there are no clear applicable restrictions on when the Executive Branch initiates

202. *See supra* Part I.

203. *Grand Jury Subpoena II*, 912 F.3d 623, 630 (D.C. Cir. 2019).

204. In oral argument, the Government argued that the FSIA does not apply to criminal cases. Transcript of Oral Argument at 7:15–17, *Grand Jury Subpoena II*, 912 F.3d 623 (D.C. Cir., Dec. 14, 2018) (No. 18-3071); *see also supra* Sections II.A and II.B.

205. 18 U.S.C. § 3231.

criminal proceedings against a foreign state instrumentality. In practice, this scope of criminal immunity functions as a return to the politics-driven days of the Tate Letter—but in a more focused manner.

Crucially, none of the concerns that impelled Congress to depart from the Tate Letter and enact the FSIA in civil contexts apply to federal criminal cases.[206] Why? A couple key points bear emphasis. First, criminal prosecutions are brought within the confines of current doctrine. When sovereign instrumentalities are prosecuted, the prosecutions serve a limited—usually informational—purpose that reduces the possible numbers of cases.[207] The Government would be able to manage the limited matters on a case-by-case basis.

Second, the Executive Branch, not private litigants, drives criminal prosecutions against sovereign instrumentalities. This is an important distinction. It is reasonable for courts to worry about private litigants who initiate suits against sovereign entities. Private plaintiffs often pursue their own litigation interests, and courts must provide a necessary backstop. As between private litigants and courts, courts are better placed to protect U.S. foreign policy interests.

But when the United States brings a criminal proceeding in its sovereign capacity, courts assume that Department of Justice prosecutors have already weighed the value of domestic proceeding against any foreign policy concerns. And implicit in the Government's decision to prosecute is its determination that the instrumentality is not immune from U.S. courts.[208] After all, as between the Executive Branch and courts, prosecutors are best positioned to take into account international comity and even mitigate any potential conflict.[209] The Executive, not the Judiciary, is regarded as the "sole organ of the federal government" in foreign policy.[210] Even the Supreme Court appreciated its own limits in *Pasquantino v. United States*. There, the case was brought by the U.S. government on behalf of the Canadian government for a violation of a federal wire fraud statute. In upholding the prosecution, the Court recognized the "foreign policy concerns

206. *See supra* notes 49–54 and accompanying text.

207. *See supra* Section I.B.1.

208. *See, e.g.*, United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) ("[B]y pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity.").

209. Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 371 n.148 (2019) (providing examples in which the Executive has the option to reduce conflict—for instance, bilateral and multilateral treaties provide rules to facilitate cooperation between the sentencing State and the administering State in the transfer of sentenced persons).

210. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

animating [this case], concerns that we have neither aptitude, facilities nor responsibility to evaluate."[211]

All this presumes intra-Executive unanimity.[212] The Department of Justice should coordinate with other executive agencies, particularly the State Department, through internal governmental channels. For example, prosecutors could disclose investigations and indictments to the Office of the Legal Adviser and other State Department regional bureaus. Such coordination is not impractical. It already exists in other transnational contexts, such as extradition, in which prosecutors are required to consult with the Department of Justice's Office of International Affairs (OIA), with additional assistance from the State Department.[213] Even outside the extradition context, some scholars have noted that the OIA acts as a "clearing house" for criminal questions that implicate foreign affairs.[214] Similar processes would apply when prosecutors determine

211. Pasquantino v. United States, 544 U.S. 349, 369 (2005) (citing Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)) (internal quotations omitted); *see also* Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507, 527 (2016) (arguing that *Pasquantino* "leaves very little room, if any, for courts to disapprove of extraterritorial prosecutions because of a sense that they might cause intergovernmental frictions between the United States and a foreign country").

212. For an illustration of agreement between the Departments of Justice and State, see Brief for the U.S. as Amicus Curiae Supporting Resp't at 39–43, Medellin v. Dretke, 544 U.S. 660 (2005), 2005 WL 504490 (jointly signed by both Departments). However, the two Departments may sometimes have conflicting goals and disagree. *See* Koh, *supra* note 209, at 392–93:

> [E]very agency has some degree of 'tunnel vision' as it pursues its statutory mandate . . . In foreign affairs prosecutions, DOJ will doggedly pursue its federal law enforcement mission—which will tend toward more expansive readings of treaties, federal statutes, and doctrine—with an eye toward preserving cooperative law enforcement relationships with foreign national counterparts, but likely lacking comprehensive awareness of and sensitivity to diplomatic considerations. The State Department, likewise, will have its own incentives for cultivating diplomatic relations, sometimes at the expense of criminal accountability in specific cases.

213. U.S. Dep't of Just., Just. Manual § 9-15.210 (2018), https://www.justice.gov/jm/jm-9-15000-international-extradition-and-related-matters [https://perma.cc/7ZZC-HA2M] ("The Criminal Division's Office of International Affairs (OIA) provides information and advice to Federal and State prosecutors about the procedure for requesting extradition from abroad."); *see also* Amy Jeffress, Samuel Witten & Kaitlin Konkel, *International Extradition: A Guide to U.S. and International Practice*, ARNOLD & PORTER PUBLICATIONS (Nov. 10, 2020), https://www.arnoldporter.com/en/perspectives/publications/2020/11/international-extradition-a-guide [https://perma.cc/8D3C-X5VR] ("In the United States, executive-branch responsibility for overseeing the extradition process is shared by the Department of State's Office of the Legal Adviser (specifically the Office of Law Enforcement and Intelligence) and the Department of Justice's Office of International Affairs (OIA) . . . .").

214. Koh, *supra* note 209, at 371 n.146.

whether to initiate criminal proceedings against a sovereign instrumentality.

B. A New Sovereign Criminal Immunity Statute

In the face of the broad jurisdictional grant of section 3231 and the lack of FSIA restraint, Congress could enact a new immunity statute to clarify the scope of criminal immunity. A new criminal immunity statute would circumscribe the Executive's general jurisdiction over "all offenses against the laws of the United States" under section 3231.[215] The statute should not displace all of section 3231 jurisdiction, but rather should allow sovereign instrumentalities to assert an immunity defense under limited circumstances.

Sovereign immunity should be granted to instrumentalities whose actions are classed as solely governmental (thereby not at all commercial). In defining "governmental acts," Congress should draw upon the FSIA's legislative records. The FSIA House Report makes clear that the governmental character of an act is defined by reference to its "nature" rather than to its "purpose."[216] For example, employment of diplomatic, civil service, or military personnel would constitute a governmental act; but not the employment of American citizens or third country nationals.[217]

Taken together, section 3231 and the new statute would effectively "flip" the FSIA. As an initial matter, section 3231 provides subject matter jurisdiction in criminal prosecutions. Then, as consistent with current practice, the new criminal immunity statute would provide an additional "statutory hurdle."[218] It would not disrupt section 3231's jurisdiction over private commercial activities. But if a sovereign instrumentality raises the statute as an affirmative defense, the burden would be on the Government to prove that the instrumentality did not engage in public governmental acts.

Adopting a new statute would effectively short circuit a State Department determination. Such a process is not problematic. Courts have previously allowed the contours of common law sovereign immunity to be substantially shaped by statute.[219] Moreover,

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215. 18 U.S.C. § 3231.

216. HOUSE REPORT, *supra* note 50, at 14.

217. *Id.* at 16.

218. United States v. Tinoco, 304 F.3d 1088, 1104 n.18 (11th Cir. 2002); *see generally supra* notes 179–183 and accompanying text.

219. *See, e.g.*, Price v. United States, 174 U.S. 373, 375–76 (1899) ("It is an axiom of our jurisprudence. The government is not liable to suit unless it consents thereto, and its liability

sovereign criminal immunity is not an area in which courts give binding deference to the Executive.[220] It is entirely appropriate, even apt, for Congress to provide legislative direction regarding the scope of executive power, including in the criminal arena. Courts can then ensure that executive power does not exceed this legislative scope. The practical advantage to enacting a new statute is that it gives courts somewhere concrete to look for applicable rules. Equally important, the new statute would also provide courts "a great deal of latitude" in statutory construction and determine what a "governmental activity" is.[221] Thus, while a limited sovereign criminal immunity statute would allow the Executive to retain prosecutorial discretion under section 3231, the final step of this framework also ensures that sovereign instrumentalities are not prosecuted for all their acts, including their public governmental acts.

CONCLUSION

Whether sovereign instrumentalities can be criminally prosecuted raises a number of questions. Courts have fitfully explored whether the FSIA extends to criminal cases, and this Note has primarily argued that it does not. The stakes of this critique are high, given the rising number of criminal sovereign proceedings. If lower courts continue to reach contrary conclusions on whether the Act governs criminal cases, foreign policy tensions would be triggered. Sovereign criminal immunity should be elaborated to accord with 18 U.S.C. § 3231. A new statutory framework, with obligations for all three branches of government, would better define the scope of sovereign criminal immunity.

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in suit *cannot* be extended beyond the plain language of the statute authorizing it.") (emphasis added).

220. In contrast, courts defer to the Executive Branch's recognition of foreign governments. *See, e.g.*, Mingtai Fire & Marine Ins. Co. v. United Parcel Serv., 177 F.3d 1142, 1147 (9th Cir. 1999); Lafontant v. Aristide, 844 F. Supp. 128, 132–33 (E.D.N.Y. 1994).

221. HOUSE REPORT, *supra* note 50, at 16.

* J.D. Candidate, 2022, Columbia Law School. Thank you to the staff of the *Journal* for their editorial assistance, to Emilie Sims for helpful comments and her friendship, and to the Hon. Katherine Polk Failla for teaching that inspired this Note. I owe my deepest debt of gratitude to Dan Richman, who provided incisive and invaluable guidance throughout the writing process. I end with thanks to my Mom, Dad, Nana, and Yaya for their biased love and support. All errors are my own.