Note

Between Comity and Accountability: Prosecuting Foreign Sovereigns After *Halkbank*

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Abstract

Immunity from a court's jurisdiction is an enticing prospect when facing criminal prosecution. Sovereign immunity generally protects foreign nations from the jurisdiction of courts of another sovereign state. State-owned enterprises have sought that same protection from the exaction of a criminal conviction abroad. A 2023 Supreme Court decision, Turkiye Halk Bankasi A.S. v. United States, *held that the federal statute governing foreign sovereign immunity does not apply to criminal cases, but only civil ones. Now, no statutory framework exists for courts to determine whether immunity applies to state-owned enterprises in criminal cases. This Note recommends a statutory solution to facilitate immunity determinations for foreign, state-owned enterprises that respects judicial authority, develops clear precedent, and complies with international law. This proposal assumes that immunity does not apply in criminal cases against state-owned enterprises, balancing international comity with accountability for criminal conduct.*

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Table of Contents

Introduction

Türkiye Halk Bankasi A.S. ("Halkbank"), a Turkish state-owned bank, began evading U.S. sanctions against Iran in 2012 and continued doing so through 2016, when one of the scheme's primary architects was arrested.[1] During that time, the bank assisted Iran in covertly transferring twenty billion dollars in restricted funds.[2] The United States has imposed various economic sanctions on Iran since the late 1970s.[3] The sanctions primarily aim to curb Iran's use of oil export profits to develop nuclear weapon technology by minimizing "Iran's access to international financial systems, [and] curtailing oil revenue."[4] The United States does this by imposing restrictions on trade with Iran and

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1 Kelly Bjorklund, *Trump's Inexplicable Crusade to Help Iran Evade Sanctions*, Foreign Pol'y (Jan. 9, 2021, at 06:01 ET), https://foreignpolicy.com/2021/01/09/trump-help-Iran-evade-sanctions-Turkey-halkbank/ [https://perma.cc/PWH2-HQ43].

2 Jonathan Stempel, *Halkbank Urges Immunity from US Prosecution in Iran Sanctions Case*, Reuters (Feb. 28, 2024, at 16:57 ET), https://www.reuters.com/legal/halkbank-urges-immunity-us-prosecution-iran-sanctions-case-2024-02-28/ [https://perma.cc/T4BM-FSZ9].

3 Zachary Laub, *International Sanctions on Iran*, Council on Foreign Rels.: Backgrounders (July 15, 2015, at 08:00 ET), https://www.cfr.org/backgrounder/international-sanctions-Iran [https://perma.cc/3CFF-FNPJ].

4 *Id.*

freezing Iranian assets.[5] Halkbank helped Iran circumvent these sanctions by converting Iranian oil and gas exports into accessible gold[6] and exploiting U.S. financial systems to launder the money.[7]

Despite warnings from U.S. sanctions officials, Halkbank continued to deceive and pay off law enforcement at home and abroad.[8] The entire scheme, one of the "biggest effort[s] to evade sanctions in history," threatened national security and legitimacy in international cooperation.[9] It pointed to corruption and political jockeying.[10]

Halkbank's efforts to help Iran avoid U.S. sanctions triggered a U.S. criminal investigation and indictment in 2019.[11] The ensuing litigation eventually reached the Supreme Court in *Turkiye Halk Bankasi A.S. v. United States* ("*Halkbank*").[12] Halkbank attempted to invoke immunity from criminal prosecution under the Foreign Sovereign Immunities Act ("FSIA"),[13] the statute that governs whether foreign sovereigns can be called into U.S. courts.[14] Halkbank's extensive illicit conduct warranted careful judicial review of the government's authority to criminally charge a foreign state-owned enterprise ("SOE"). In finding that the FSIA applies only to civil suits, *Halkbank* leaves questions of sovereign immunity in criminal cases to be decided by the common law.[15] This Note focuses on the implications of the gap in statutory coverage to assess the criminal prosecution of SOEs. The common law regarding foreign sovereign immunity is complex and often unclear.[16] The absence of

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5 *See id.*

6 Bjorklund, *supra* note 1.

7 *See* Leading Case, *Foreign Sovereign Immunities Act of 1976—Sovereign Immunity—*Turkiye Halk Bankasi A.S. v. United States, 137 Harv. L. Rev. 420, 420 (2023).

8 Bjorklund, *supra* note 1.

9 *Id.*

10 The scheme involved producing false documents, creating front companies, and bribing Turkish officials. *See* 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/BS3V-AFH3]. Additionally, Turkey's global crisis control included negotiations with President Trump to make the charges disappear. *See id.* This is not the only time a foreign enterprise evaded sanctions and compromised the U.S. financial system. *See* Press Release, U.S. Att'y's Off., S. Dist. of N.Y., Manhattan U.S. Attorney Announces Criminal Charges Against Société Générale S.A. for Violations of the Trading with the Enemy Act (Nov. 19, 2018), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-criminal-charges-against-soci-t-g-n-rale-sa-violations [https://perma.cc/ZK64-PJTF].

11 Press Release, U.S. Att'y's Off., S. Dist. of 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/97AA-29QP].

12 598 U.S. 264 (2023).

13 28 U.S.C. §§ 1330, 1604–1611.

14 *Halkbank*, 598 U.S. at 267–68.

15 *Id.* at 267.

16 *See infra* Section II.B.2.

statutory guidance exposes foreign sovereign immunity determinations in criminal cases to executive overreach and friction with international law.[17]

Part I of this Note examines the development of foreign sovereign immunity in the United States and its treatment in international law. Part II argues that the *Halkbank* decision to leave immunity determinations to the common law in criminal cases presents critical issues: the potential for executive overreach, a lack of clear precedent, and the failure to conform to customary international law. Finally, Part III recommends a statutory framework, tailored to the principles of international law, to govern foreign sovereign immunity in the U.S. criminal law context.

I. Background

Foreign sovereign immunity divests sovereign states' domestic courts of jurisdiction over another sovereign state, its organs and officials, and sometimes its instrumentalities.[18] An increasingly globalized world blurs the lines separating sovereign and nonsovereign action, complicating the application of foreign sovereign immunity.[19] This can be particularly challenging where criminal conduct arises, ranging from complex sanctions-evasion schemes[20] to environmental crimes.[21]

A. *Historical Overview*

The principle of sovereign immunity flows from notions of international comity and respect for state autonomy.[22] As a principle of

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17 *See infra* Sections II.B.1, II.B.3.

18 *See* Xiaodong Yang, State Immunity in International Law 2–3 (James Crawford & John S. Bell eds., 2012). States enjoying foreign sovereign immunity may be held accountable by other means, such as treaties which "contain a mechanism of reporting and monitoring," but these alternatives "remain[] fraught with uncertainties and confusions." *Id.* at 2.

19 *See* Anne van Aaken, *Blurring Boundaries Between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution* 1–2 (Univ. St. Gallen L. Sch., Working Paper No. 2013-17, 2013); Yohei Okada, *Can* Acta Jure Gestionis *Be Attributable to the State? A Restrictive Doctrine of State Responsibility*, 34 Eur. J. Int'l L. 383, 383–84 (2023).

20 *See, e.g.*, Turkiye Halk Bankasi A.S. v. United States (*Halkbank*), 598 U.S. 264 (2023).

21 *See, e.g.*, Information at 1, 3, 6–8, United States v. Eurobulk Ltd., No. 24-cr-00655 (S.D. Tex. Dec. 19, 2024) (charging a Greek ship management company for criminal falsification of records and violation of the Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901–1915).

22 *See* Leila A. Amineddoleh, *Kings, Treasures, and Looting: The Evolution of Sovereign Immunity and the Foreign Sovereign Immunities Act*, 46 Colum. J.L. & Arts 419, 422 (2023); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409 (1964) ("This Court has called 'comity' in the legal sense 'neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.'" (quoting Hilton v. Guyot, 159 U.S. 113, 163–64 (1895))); Stephen P. Mulligan, Cong. Rsch. Serv., LSB10563, Two Supreme Court Cases to Test Limits on Foreign

customary international law, sovereign immunity involves a state's ability to "enjoy[] exemption from or nonamenability to any outside authority."[23] Sovereign states generally remain free from the judicial scrutiny of courts outside of their borders absent the state's consent.[24]

U.S. courts have historically respected this principle. Judicial consideration of the United States's power to sue foreign sovereigns in its own courts emerged concretely with the case of *The Schooner Exchange v. McFaddon*.[25] The matter concerned a French warship and whether it could enjoy sovereign immunity from process, despite being physically located within U.S. territory.[26] The Court held that sovereign immunity protected the ship.[27] Chief Justice Marshall articulated an absolute view of sovereign immunity, in which all foreign states retain immunity unless the state explicitly or implicitly waives that protection.[28] Absolute immunity conferred broad protection for foreign states in U.S. territory, assuring "exemption of the person of the sovereign from arrest or detention within a foreign territory."[29]

As the world of foreign relations and interconnectivity evolved, so did the principle of sovereign immunity.[30] Chief Justice Marshall's opinion in *The Schooner Exchange* and the deference to absolute immunity framed sovereign immunity as a question of diplomacy rather than one submitted to judicial review.[31] The absolute immunity approach dominated "in an age when the distinction between sovereign and nonsovereign activities was less manifest."[32]

State-to-state relationships and activities changed over time, especially in the aftermath of World War II, and the need for exceptions increased.[33] The United States changed its position on sovereign

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Sovereign Immunity for Holocaust Harms 1 (2021) (explaining "comity" is "a legal doctrine that allows courts to abstain from jurisdiction out of respect for foreign sovereignty").

23 Yang, *supra* note 18, at 1.

24 *Id.* at 1–2.

25 11 U.S. (7 Cranch) 116 (1812); *see also* Ingrid (Wuerth) Brunk, *A Primer on Foreign Sovereign Immunity*, Transnat'l Litig. Blog (Apr. 13, 2023), https://tlblog.org/a-primer-on-foreign-sovereign-immunity/ [https://perma.cc/LH4R-SF8L] (describing history of this case).

26 *Schooner Exch.*, 11 U.S. (7 Cranch) at 135–36; *see* Brunk, *supra* note 25.

27 *Schooner Exch.*, 11 U.S. (7 Cranch) at 147.

28 *See id.* at 136 ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty . . . . All exceptions . . . must be traced up to the consent of the nation itself. They can flow from no other legitimate source."); *see also* Yang, *supra* note 18, at 3 ("During the nineteenth century, the predominant position, dubbed as the 'absolute immunity' doctrine, was that a State could not be brought before a foreign domestic court under *any* circumstance . . . .").

29 *Schooner Exch.*, 11 U.S. (7 Cranch) at 137.

30 *See* Yang, *supra* note 18, at 1–3; Brunk, *supra* note 25.

31 *See* Amineddoleh, *supra* note 22, at 421.

32 Yang, *supra* note 18, at 8.

33 *Id.* at 11.

immunity in 1952 as articulated in the "Tate Letter," written by Jack Tate, the U.S. State Department's Legal Adviser at the time.[34] Under the "restrictive theory" expounded by Tate, immunity covers the public acts of states, but not their private acts that mirror actions that any individual might take.[35] For example, imagine state *A* owns company *A*. When company *A* collects customs duties consistent with state *A*'s regulatory scheme, it could claim immunity.[36] On the other hand, when company *A* acts in its own private capacity, such as executing a commercial sale of goods, it does not enjoy immunity.[37]

B. Developments in Foreign Sovereign Immunity and the FSIA

Following the Tate Letter, sovereign immunity determinations were fraught with confusion between executive and judicial authority.[38] In response, the FSIA was passed, making the United States the first nation to enact a statutory codification of foreign sovereign immunity.[39]

Before the FSIA, the State Department used a two-path system to evaluate claims of sovereign immunity.[40] Path one permitted foreign governments to "request immunity directly from the State

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34 Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of Just. (May 19, 1952), *reprinted in* 26 U.S. Dep't State Bull. 969, 984–85 (1952) [hereinafter Tate Letter]; Amineddoleh, *supra* note 22, at 422.

35 Tate Letter, *supra* note 34, at 984 ("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*)."); *see also* Spencer Levitt & Andrea Cervantes, Int'l Just. Clinic, Univ. of Cal., Irvine, The Foreign Sovereign Immunities Act in the Age of Transnational Surveillance: Judicial Interpretation and Legislative Solutions 6 (2023), https://bpb-us-e2.wpmucdn.com/sites.uci.edu/dist/2/4290/files/2023/08/The-Foreign-Sovereign-Immunities-Act-in-the-Age-of-Transnational-Surveillance.pdf [https://perma.cc/BX33-MD3K].

36 *See* Alexander Orakhelashvili, *Jurisdictional Immunity of States and General International Law—Explaining the* Jus Gestionis *v.* Jus Imperii *Divide*, *in* The Cambridge Handbook of Immunities and International Law 105, 115 (Tom Ruys et al. eds., 2019) (defining activities such as regulation of trade and currency as sovereign acts).

37 *See* U.N. Convention on Jurisdictional Immunities of States and Their Property arts. 2(1)(c), 10(1), *opened for signature* Dec. 2, 2004, 44 I.L.M. 802 [hereinafter U.N. Convention on Jurisdictional Immunities] (not in force).

38 Luke Ryan, Note, *The New Tate Letter: Foreign Official Immunity and the Case for a Statutory Fix*, 84 Fordham L. Rev. 1773, 1780 (2016) (explaining that "the pre-FSIA procedure did not clearly divide authority between the executive and judicial branches").

39 *See* Brunk, *supra* note 25 (explaining how, after the FSIA was enacted in 1976, the United Kingdom, South Africa, Australia, Canada, and other countries have enacted statutes concerning foreign sovereign immunity).

40 *See* Ryan, *supra* note 38, at 1780. Note that sources often refer to this as a "two-step" framework. *See, e.g.*, *id.* This Note uses the phrase "two-path" as not all sovereigns sought suggestions of immunity from the Executive branch.

Department."[41] The Department of Justice then transmitted the Executive's approval of the request for immunity to the court where the action was pending.[42] Courts regarded State Department recommendations as binding.[43] Path two allowed foreign governments to "request immunity directly from a court," but it remained uncertain whether path one was a prerequisite for defendants to pursue path two.[44] During this era, the executive branch essentially maintained control over invocations of sovereign immunity,[45] an approach criticized as executive overreach.[46] This "haphazard, fast-and-loose manner" of State Department immunity evaluations prompted the passage of the FSIA.[47]

Congress enacted the FSIA to clarify the delegation of the authority over sovereign immunity and to shift greater power to the judiciary, rather than following the two-path framework.[48] The statute starts

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41 *Id.* An admiralty case, *Ex Parte Republic of Peru*, 318 U.S. 578 (1943), illustrates path one: The Court considered whether a Peruvian vessel seized by the District Court for the Eastern District of Louisiana was immune from an *in rem* suit. *Id.* at 579. The Secretary of State recognized Peru's claim of immunity, and the Court deferred to the Executive's preference as a question of policy. *Id.* at 589. The court explained, "[t]he case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State." *Id.* at 586–87. Note that the FSIA rendered obsolete the use of the two-path approach implemented in *Ex Parte Republic of Peru*. *See* Garb v. Republic of Poland, 207 F. Supp. 2d 16, 19, 22–24 (E.D.N.Y. 2002); *see also* Michael Cooper, Note, *Comity & Calamity: Deference to the Executive and the Uncertain Future of the FSIA*, 45 Brook. J. Int'l L. 913, 919 (2020) (submitting that *Ex Parte Republic of Peru* represents an abrogation of judicial interpretive duties to the point "that deference meant the court entirely abdicated its role as an adjudicative body").

42 *See* Ryan, *supra* note 38, at 1780.

43 *See id.*

44 *Id.* Additionally, an admiralty case decided several years after *Ex Parte Republic of Peru* shows the second path in the two-path framework. *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 34–35 (1945). The Court explained that "[i]n the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist." *Id.* The Court still relied heavily on executive deference, holding that a merchant vessel owned by Mexico was not immune from suit precisely because the State Department did not certify the claim of sovereign immunity. *See id.* at 36–38.

45 *See* Cooper, *supra* note 41, at 920 ("The sweeping deference granted to the executive eventually coalesced into a two-step procedure to determine whether foreign states would be granted immunity when [the] plaintiffs attempted to bring suit against them in US courts—a process . . . heavily predicated on State Department policy and action.").

46 *See id.* at 913–14; Levitt & Cervantes, *supra* note 35, at 6; Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 Va. J. Int'l L. 915, 929–30 (2011); Ryan, *supra* note 38, at 1776–77.

47 Cooper, *supra* note 41, at 923.

48 "Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602; *see also* Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004) ("[T]he FSIA . . . transferred primary responsibility for immunity determinations to the Judicial Branch."). Functionally,

from a base presumption of sovereign immunity.[49] Operationalizing the restrictive theory of sovereign immunity, the FSIA then carves out exceptions.[50] Besides a state waiving its immunity,[51] the FSIA's exceptions to sovereign immunity from suit in U.S. courts include certain commercial activity,[52] expropriation of property taken in violation of international law,[53] tortious injury,[54] and the enforcement of arbitral awards.[55] A separate set of complex exceptions applies when a state faces a lawsuit related to "state sponsor[ship] of terrorism."[56] If an exception applies, a foreign state or instrumentality must submit to the jurisdiction of U.S. courts.[57]

It is a matter of debate whether states must invoke immunity under the FSIA as a defense or whether district courts may consider immunity sua sponte.[58] Generally, once the foreign-state defendant has asserted FSIA immunity, the burden shifts to the plaintiff to contend that an exception applies.[59] The burden to prove its immunity, however,

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courts still look to guidance from the State Department when interpreting the FSIA, mostly in the form of amicus briefs. *See* Cooper, *supra* note 41, at 913–14.

49 "[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604.

50 *See id.* §§ 1605, 1605A, 1605B.

51 *Id.* § 1605(a)(1).

52 *Id.* § 1605(a)(2); *see, e.g.*, Glob. Marine Expl., Inc. v. Republic of France, 33 F.4th 1312, 1318–21 (11th Cir. 2022) (finding that France's "fundraising" and "contracting with organizations and businesses to carry out excavations of shipwreck sites" off the coast of Cape Canaveral qualified as "commercial" activity under the FSIA).

53 28 U.S.C. § 1605(a)(3); *see, e.g.*, *Altmann*, 541 U.S. at 692–96 (holding that the expropriations exception to the FSIA applied retroactively in the context of Austrian art theft from U.S. citizens who escaped Austria during World War II).

54 28 U.S.C. § 1605(a)(5); *see, e.g.*, Usoyan v. Republic of Turkey, 6 F.4th 31, 45–47 (D.C. Cir. 2021) (finding that tortious injury exception applied to Turkey when Turkish security guards harmed protestors during embassy protest in D.C. because Turkish government agent's tortious act in the United States was unrelated to a discretionary act grounded in social, economic or political policy).

55 28 U.S.C. § 1605(a)(6); *see, e.g.*, Process & Indus. Devs. Ltd. v. Federal Republic of Nigeria, 27 F.4th 771, 772, 776 (D.C. Cir. 2022) (finding that the arbitration exception applied when a project engineering company sought to enforce an arbitral award against Nigeria because requirements of an arbitration agreement, arbitration award, and treaty governing the award were all satisfied).

56 28 U.S.C. § 1605A; *see, e.g.*, Oveissi v. Islamic Republic of Iran, 879 F. Supp. 2d 44, 48 (D.D.C. 2012) (finding that the state-sponsored terrorism exception applied when Iranian General Gholam Ali Oveissi's grandson sued Iran for the General's assassination because Iran was designated as a state sponsor of terrorism at the time the assassination occurred).

57 28 U.S.C. § 1605.

58 William S. Dodge, *The Burden of Proving Foreign Sovereign Immunity*, TRANSNAT'L LITIG. BLOG (Oct. 1, 2024), https://tlblog.org/the-burden-of-proving-foreign-sovereign-immunity/ [https://perma.cc/HQ6U-VFZ8].

59 *Id.*

ultimately rests on the foreign state.[60] Once a state loses its presumption of immunity pursuant to an exception, the litigation proceeds.

The FSIA does not govern all forms of sovereign immunity. Instead, it focuses solely on states and their instrumentalities.[61] The Supreme Court has interpreted the statutory meaning of state instrumentality: "[O]nly direct ownership of a majority of shares by the foreign state satisfies the statutory requirement."[62]

Other forms of immunity have no statutory foundation and instead rely on the common law.[63] For example, in *Samantar v. Yousuf*,[64] the Supreme Court determined that matters of foreign official immunity remain questions of the common law.[65] In that case, Somalian natives sought to recover damages in U.S. federal district court under the Torture Victims Protection Act.[66] The plaintiffs claimed that the defendant, Mohamed Ali Samantar, had used his position as a high-ranking government official to direct Somali military forces to persecute members of the Isaaq clan in violation of their human rights.[67] Samantar argued that the FSIA granted him immunity.[68]

The Court distinguished an individual foreign official from a "state" or "instrumentality" within the meaning of § 1603 of the FSIA.[69] The scope of the FSIA only governs "foreign state[s],"[70] which includes "[a]n 'agency or instrumentality of a foreign state.'"[71] Individuals, the Court explained, do not possess the same "legal personality" as the "entit[ies]"

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60 H.R. Rep. No. 94-1487, at 17 (1976).

61 *See* 28 U.S.C. § 1603.

62 Dole Food Co. v. Patrickson, 538 U.S. 468, 474 (2003); *see also* H.R. Rep. No. 94-1487, at 15 (1976).

63 *See* Samantar v. Yousuf, 560 U.S. 305, 325–26 (2010).

64 560 U.S. 305 (2010).

65 *Id.* at 310, 325 (holding that the FSIA does not govern foreign official immunity because a foreign official acting on behalf of their state is not a "foreign state" within the meaning of the statute).

66 Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350); *Samantar*, 560 U.S. at 308.

67 Yousuf v. Samantar, 552 F.3d 371, 373 (4th Cir. 2009), *aff'd*, 560 U.S. 305 (2010).

68 *See Samantar*, 560 U.S. at 309–10.

69 *Id.* at 315–19.

70 "A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a).

71 The FISA states:

> An "agency or instrumentality of a foreign state" means any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

Id. § 1603(b).

Congress meant to cover in the FSIA's definition of "foreign state."[72] The Court ruled that foreign officials must seek immunity through the common law and that Samantar had no claim to statutory immunity.[73]

C. Foreign Sovereign Immunity in International Law

Concerning foreign sovereign immunity, customary international law[74] distinguishes between a state's public and private acts.[75] This concept can also be characterized as a line between sovereign and nonsovereign acts.[76]

International law, as reflected by the U.N. Convention on Jurisdictional Immunities of States and Their Property,[77] also treats state instrumentalities differently from the FSIA. The U.S. statute is unique in including agencies and instrumentalities as "states" for sovereign immunity purposes.[78] The FSIA's statutory definition of "state" recognizes SOEs as eligible for civil sovereign immunity where international law generally would not.[79] In international law, an SOE's ability to claim immunity instead depends on whether the relevant conduct possesses a sovereign nature.[80]

The case of *Jurisdictional Immunities of the State (Germany v. Italy)* ("*Jurisdictional Immunities Case*")[81] in the International Court of Justice ("ICJ") discussed the characterization of state conduct vis-à-vis immunity. Germany asked the ICJ to find that Italy had violated

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72 *Samantar*, 560 U.S. at 315 (quoting First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 625 (1983)).

73 *Id.* at 325–26.

74 The International Court of Justice recognizes "international conventions, . . . international custom, . . . the general principles of law recognized by civilized nations . . . [and] judicial decisions and the teachings of the most highly qualified publicists of the various nations" as sources of international law under its governing document. Statute of the International Court of Justice art. 38, ¶ 1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

75 *See* Orakhelashvili, *supra* note 36, at 114–16.

76 *See id.* at 106. This Note uses "public" and "sovereign," and "private" and "nonsovereign," interchangeably when referring to conduct.

77 *See, e.g.*, U.N. Convention on Jurisdictional Immunities, *supra* note 37, art. 2(1)(b)(iii). Though this U.N. Convention is not yet in force, it can nonetheless be considered indicative of international law. *See id.* at 802 (introductory note) ("The substance of the [U.N.] Convention reflects an emergent global consensus . . . .").

78 *Compare* 28 U.S.C. § 1603 (defining "state" as including state agencies and instrumentalities), *with* U.N. Convention on Jurisdictional Immunities, *supra* note 37, art. 2(1)(b)(iii) (qualifying that state "agencies or instrumentalities" fall within the meaning of "State . . . to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State"). *See also* State Immunity Act 1978, c. 33, § 14(1)–(2) (UK) (distinguishing "separate" entities from actual states or their organs for immunity purposes).

79 *See, e.g.*, U.N. Convention on Jurisdictional Immunities, *supra* note 37, art. 2(1)(b)(iii).

80 *See, e.g.*, *id.*

81 Judgment, 2012 I.C.J. 99 (Feb. 3).

Germany's sovereign immunity by permitting Italians to bring civil claims against Germany in Italian domestic courts.[82] The merits of the dispute concerned whether Germany owed reparations to Italian victims for actions of the Third Reich that constituted "grave violations of international humanitarian law."[83]

The issue centered not on the existence of sovereign immunity, but rather its scope.[84] The ICJ recognized the actions committed against Italian citizens by the German armed forces as atrocities.[85] Yet, it still upheld Germany's jurisdictional immunity from suit in Italian courts under customary international law.[86] Critically, the ICJ characterized the conduct of the German armed forces as public acts of state that warranted immunity.[87] An example of a state acting in a public, sovereign manner thus includes actions of its army during wartime.

Other sovereign actions that enjoy immunity include regulatory measures taken by a state, legislative activity of a state, and law enforcement activity.[88] The range of regulatory measures carried out by a state pursuant to its sovereign authority may be extensive, including "[r]egulating external trade, decreeing measures for the protection of the currency, concluding trade or payments agreements with foreign countries, [and] ordering or forbidding transfers of currency."[89] Critically, these regulatory actions are "sovereign" because "the State, whether of itself or through its agents, has a right of decision in the exercise of prerogatives that cannot be called into question, and is exercising its governmental authority."[90]

In contrast, the commercial activity exception of the FSIA presents a useful framework to consider what conduct may qualify as

82 *Id.* ¶ 37.

83 *Id.* ¶ 4. Note that this case concerns German armed forces as an organ of Germany, not a German majority-owned commercial entity.

84 *Id.* ¶ 58.

85 *Id.* ¶ 21.

86 The question of jurisdictional immunity in this case examined *specifically* the ability to bring claims in Italian domestic courts for tortious acts committed by German armed forces during armed conflict. *Id.* ¶¶ 78, 107.

87 *Id.* ¶¶ 60–61. This is a key distinction for the purpose of prosecuting SOEs, which frequently carry out nonsovereign conduct (*acta jure gestionis*). *See* Chimène I. Keitner, *International Law: Prosecuting Foreign States*, *in* 6 The Judges' Book 89, 95 (2022).

88 *See, e.g.*, BP Chemicals Ltd. v. Jiangsu Sopo Corp., 285 F.3d 677, 681 (8th Cir. 2002) ("Public acts, such as punishing criminals and printing money, emanate from the power inherent in sovereignty.").

89 Orakhelashvili, *supra* note 36, at 115 (quoting CA [Court of Appeal] Bruxelles (Belg.), Dec. 4, 1963, Pas. 1965, p. 42).

90 *Id.*

nonsovereign. Although not all private acts are commercial in nature, commercial acts are often classified as nonsovereign conduct.[91]

The Supreme Court's analysis of the meaning of "commercial activity" under the FSIA in *Republic of Argentina v. Weltover, Inc.*[92] sheds light on legally distinguishing public state actions from private ones.[93] The Court had to determine whether Argentina's issuance of bonds called "Bonods" for the purpose of stabilizing Argentine currency was "commercial activity."[94] Argentina argued that immunity should protect it from suit in U.S. courts because the goal of issuing such bonds had a "sovereign" purpose of aiding the national economy.[95] The Court rejected the argument because the proper analysis concerns the "nature" of the acts, not their "purpose."[96] Examining "nature" hinges on identifying whether a foreign sovereign is acting as a "regulator of a market" or as a "player within it."[97] Issuance of the "Bonods" was a commercial activity because a "private player" could hold and trade them and because they had the potential to generate income.[98] This kind of market participation is not conduct reserved for sovereign entities on the basis of their authority as sovereign states.

These examples are by no means exhaustive. There is frequently no clear line between public state activities and private ones.[99] Instead, these examples illustrate that analyzing whether conduct occurs pursuant to sovereign authority involves scrutinizing the nature of the conduct rather than its ultimate objectives.[100] This analysis harmonizes with an understanding of sovereign acts as "premised on the exercise of legal authority that is available to States and not to private entities."[101] Analysis can consider whether a private party is able to engage in such conduct and whether it is typical of commercial market participation.

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91 *See, e.g.*, U.N. Convention on Jurisdictional Immunities, *supra* note 37, art. 10(1); Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 99, ¶¶ 60–61 (Feb. 3); 28 U.S.C. § 1605(a)(2); Restatement (Third) of the Foreign Rels. L. of the U.S. § 451 (A.L.I. 1987); Saudi Arabia v. Nelson, 507 U.S. 349, 359–60 (1993).

92 504 U.S. 607 (1992).

93 *Id.* at 612–17.

94 *Id.* at 609. The issue came before a U.S. tribunal because the repayment of the bonds was done with U.S. dollars in U.S. markets. *See id.* at 609–10.

95 *Id.* at 615–17.

96 *Id.* at 614.

97 *Id.* at 614.

98 *Id.* at 614–15.

99 *See generally* Aaken, *supra* note 19 (discussing the blurred lines between public state activity and private commercial activity that yield legal uncertainty regarding sovereign immunity for SOEs and State Wealth Funds).

100 *See Weltover*, 504 U.S. at 614–17 (discussing that defining commercial activity under the FSIA looks to the nature of the conduct rather than the purpose).

101 Orakhelashvili, *supra* note 36, at 115.

This analysis is fact specific because something that appears facially commercial may still be a sovereign act preserving state immunity.[102]

II. The Problem

Considering the Supreme Court's decision in *Halkbank*, determinations of an SOE's claim to foreign sovereign immunity in U.S. courts now depend on the common law.[103] But leaving these decisions to the common law confronts difficulties, some of which the FSIA sought to address in the civil context. First, reliance on the common law risks a return to pre-FSIA executive overreach into judicial authority.[104] Second, a common law approach lacks reliable precedent because the FSIA has governed questions of foreign sovereign immunity since 1976.[105] Finally, searching for answers in the common law risks possible inconsistency with international law.[106]

A. Uncertainty from Halkbank

Though extensive litigation debating the scope of FSIA immunity has somewhat sharpened the lines of liability,[107] *Halkbank* definitively cabined this statute to civil cases.[108]

The case against Halkbank, a bank owned by the Republic of Turkey, began when the U.S. government filed suit against the SOE in the U.S. District Court for the Southern District of New York.[109] The government indicted Halkbank for "participat[ing] in transactions designed to extract surreptitiously Iran's oil and gas proceeds held at the bank" to make international payments for Iran "through the U.S. financial system," consequently evading U.S. sanctions.[110] The bank allegedly facilitated transfers of "approximately $20 billion worth of otherwise

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102 *See* Turan Petroleum, Inc. v. Ministry of Oil & Gas of Kaz., 406 F. Supp. 3d 1, 15 (D.D.C. 2019); Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic, 877 F.2d 574, 578–80 (7th Cir. 1989).

103 *See* Turkiye Halk Bankasi A.S. v. United States (*Halkbank*), 598 U.S. 264, 281 (2023).

104 *See supra* Section I.B.

105 *See infra* Section II.B.2.

106 *See infra* Section II.B.3.

107 *See* John B. Bellinger III, R. Reeves Anderson & Sally Pei, *Can You Be Sued Under the Foreign Sovereign Immunities Act?: A Primer for Foreign Governments and Their Agencies*, Arnold & Porter (Jan. 26, 2021), https://www.arnoldporter.com/en/perspectives/advisories/2021/01/can-you-be-sued-under-fsia [https://perma.cc/QR34-EJNQ].

108 *Halkbank*, 598 U.S. at 281 (holding that "the FSIA does not apply to criminal proceedings").

109 *See* United States v. Halkbank, No. 15 Cr. 867, 2020 WL 5849512, at *1 (S.D.N.Y. Oct. 1, 2020).

110 *Id.*

restricted Iranian funds" with one billion dollars "laundered through the U.S. on behalf of the Government of Iran and Iranian entities."[111]

The U.S. government prosecuted the case under the authority of 18 U.S.C. § 3231, the general federal criminal jurisdiction statute.[112] The relevant issue was whether Halkbank, as an "instrumentality of a foreign state,"[113] could claim immunity under the FSIA.[114] Halkbank argued that the FSIA granted it "absolute immunity from criminal prosecution in U.S. courts" as an SOE.[115] The district court denied Halkbank's motion to dismiss because it determined that the FSIA did not apply to criminal proceedings.[116] The Second Circuit affirmed, but rooted its reasoning in the commercial activity exception of the FSIA, implicitly assuming that criminal cases could trigger the FSIA.[117] The Supreme Court granted certiorari to clarify the scope of the FSIA.[118]

First, the Court acknowledged that foreign sovereign immunity law existed "as a matter of common law" and involved deference to the executive branch before enactment of the FSIA.[119] The Court admitted that, with the FSIA, Congress "sought to standardize the judicial process with respect to immunity for foreign sovereign entities," but limited this shift in power to apply only "in *civil* cases."[120] Though Halkbank relied on the broad notion of the FSIA's scope found in *Argentine Republic v. Amerada Hess Shipping Corp.*,[121] the Court chose instead to cite cases that qualified the FSIA's reach to touch only civil actions against a foreign state, like *Verlinden B.V. v. Central Bank of Nigeria*.[122]

The Court supported its decision by examining the statute's text as evidence that Congress intended for it to pertain solely to civil cases.[123] For example, the FSIA's jurisdiction and venue provisions explicitly refer

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111 *Id.*

112 *Id.* at *7; *see* 18 U.S.C. § 3231 ("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. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.").

113 28 U.S.C. §§ 1603(a)–(b), 1604.

114 Turkiye Halk Bankasi A.S. v. United States (*Halkbank*), 598 U.S. 264, 267 (2023).

115 *Id.*

116 United States v. Halkbank, No. 15 Cr. 867, 2020 WL 5849512, at *1, *4 (S.D.N.Y. Oct. 1, 2020).

117 *See* United States v. Turkiye Halk Bankasi A.S., 16 F.4th 336, 348–51 (2d Cir. 2021).

118 *Halkbank*, 598 U.S. at 268.

119 *Id.* at 270 (quoting Samantar v. Yousuf, 560 U.S. 305, 311 (2010)); *see also* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) ("[T]his Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.").

120 *Halkbank*, 598 U.S. at 272 (emphasis added).

121 488 U.S. 428, 439 (1989).

122 461 U.S. 480, 488 (1983); *Halkbank*, 598 U.S. at 272 (citing *Verlinden*, 461 U.S. at 488).

123 *See Halkbank*, 598 U.S. at 273.

to "civil action[s]"[124] and other language within the statute "relate[s] to civil cases alone."[125] This contextualizes the whole statutory scheme within the civil action sphere. The Court analyzed the statute's position in Title 28 of the U.S. Code, where civil procedure is housed, as illustrative that the FSIA does not influence criminal prosecutions—whose domain is Title 18.[126] In fact, as much as the FSIA discusses civil actions and related procedures, it does not refer to criminal ones even once.[127] Justice Kavanaugh, writing for the majority, concluded that "[t]he FSIA does not provide foreign states and their instrumentalities with immunity from criminal proceedings."[128] The Court left open the availability of common law immunity and remanded to the Second Circuit to consider whether Halkbank's arguments asserting common law immunity applied, even where the FSIA did not.[129]

The legal difficulty here arises from the uncertainty created by the Court's holding. By excluding criminal matters from the FSIA, the Court did to criminal prosecution of foreign sovereigns what *Samantar* did to foreign official immunity: excised these immunity decisions from a statutory framework and left them to the obscurity of the common law.[130]

Justice Gorsuch, disagreeing with the majority that the FSIA does not apply to criminal cases, highlighted the possible complications of leaving these determinations to the common law.[131] By remanding to decide if common law immunity applied, the Supreme Court bestowed upon the lower court the "unenviable task" of grappling with the common law related to sovereign immunity.[132] According to Justice Gorsuch and the amici curiae, this gave lower courts two complex paths for assessment: Either defer to the executive branch or apply principles of

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124 28 U.S.C. §§ 1330(a), 1391(f).

125 *See Halkbank*, 598 U.S. at 273 ("The Act prescribes detailed rules—including those governing service of 'the summons and complaint,' [28 U.S.C] § 1608(a)(1), along with 'an answer or other responsive pleading to the complaint,' [28 U.S.C.] § 1608(d), as well as for any judgment of default, [28 U.S.C.] § 1608(e)—that relate to civil cases alone.").

126 *Id.* at 274.

127 *Id.*

128 *Id.* at 280.

129 *Id.* at 280–81.

130 *See id.* at 280. *Samantar* held that the common law, and not the FSIA, governs foreign official immunity determinations. Samantar v. Yousuf, 560 U.S. 305, 325–26 (2010). Note that precedent established in post-FSIA cases concerning immunity of foreign-owned instrumentalities would reflect analysis within that statutory framework. Without additional, purely common law interpretations since 1976, courts may have to rely on pre-FSIA cases and make decisions based on common law doctrine that essentially froze after the FSIA's enactment.

131 *Halkbank*, 598 U.S. at 284–86 (Gorsuch, J., concurring in part and dissenting in part).

132 *Id.* at 285.

customary international law.[133] Each path has possible challenges. Deference to the executive clouds the separation of powers and exploring customary international law necessarily questions the weight of the executive branch's authority in the federal common law.[134] This leaves claims of immunity for SOEs facing criminal charges in flux.

On remand, the Second Circuit held that Halkbank had no immunity but did little to address the separation of powers concerns raised by Justice Gorsuch.[135] The Second Circuit embraced an approach of executive deference.[136] By relying on the executive deference embedded in the pre-FSIA common law,[137] however, courts will still face similar issues in the criminal context that the FSIA was intended to resolve.[138]

B. Problems with Resorting to the Common Law

1. Separation of Powers

Executive deference in foreign sovereign immunity decisions has been criticized as a misnomer for what is functionally "lawmaking"[139] and "executive control."[140] As Justice Gorsuch pointed out, this catalyzes the fear that resorting to the common law will oust the judiciary of its duty to decide whether immunity applies to foreign states.[141] His

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133 *Id.* at 286; Brief for Amici Curiae Ingrid (Wuerth) Brunk & William S. Dodge in Support of Neither Party at 24, United States v. Turkiye Halk Bankasi A.S., 16 F.4th 336 (2d Cir. 2021) (No. 20-3499) [hereinafter Brunk & Dodge Brief].

134 *See Halkbank*, 598 U.S. at 285–87 (Gorsuch, J., concurring in part and dissenting in part).

135 Ingrid (Wuerth) Brunk, *Second Circuit Holds for the Government in Halkbank Remand*, Transnat'l Litig. Blog (Oct. 29, 2024), https://tlblog.org/second-circuit-holds-for-the-government-in-halkbank-remand/ [https://perma.cc/3T8P-M22K]; *see* United States v. Turkiye Halk Bankasi A.S. (*Halkbank II*), 120 F.4th 41, 43 (2d Cir. 2024).

136 *Halkbank II*, 120 F.4th at 46–48; *see* Brunk, *supra* note 135.

137 *See supra* Section I.B.

138 *See supra* note 48 and accompanying text. Despite consistent opinions holding that the courts properly had jurisdiction to prosecute Halkbank, geopolitics still influenced the course of the case. The Department of Justice negotiated a deferred prosecution agreement with the bank. As of the time of publishing this Note, the judge reviewing the case had not yet approved the proposed settlement. *See* Devlin Barrett, *U.S. Reaches Tentative Deal Ending Prosecution of Turkish Bank*, N.Y. Times (Mar. 9, 2026), https://www.nytimes.com/2026/03/09/us/politics/us-turkey-halkbank-deal.html [https://perma.cc/W4KS-PPSG]; Bob Van Voris, *US Deal with Halkbank Questioned by Judge, Terror Victim Group*, Bloomberg (Mar. 11, 2026, at 12:13 ET), https://www.bloomberg.com/news/articles/2026-03-11/us-deal-with-halkbank-questioned-by-judge-terror-victim-group [https://perma.cc/T9W5-WHLF].

139 *See* Brunk & Dodge Brief, *supra* note 133, at 2 ("While the government often frames its arguments in terms of 'deference,' that is an inaccurate term. The government seeks the power to dictate the general rules of common law immunity and to exercise absolute control over the application of those rules to particular cases. That is not 'deference.' That is lawmaking.").

140 *See* Brunk, *supra* note 135.

141 *See* Brunk & Dodge Brief, *supra* note 133, at 2–3; *see also* Cooper, *supra* note 41, at 919–22 (discussing how the common law method of deferring to the executive branch effectively neutered

fear is not unfounded. Restoring the law of sovereign immunity to the whims of the common law has proven problematic in the past.[142] Cutting foreign official immunity out of the FSIA's purview in *Samantar* left lower courts with little guidance regarding where to locate the relevant common law and how to apply it.[143] Whereas the FSIA gives the judiciary greater power, common law immunity permits greater executive influence.[144] Decisions based on the common law also frequently grant immunity,[145] a trend that could prove troubling for successful criminal prosecution of SOEs.

A return to the two-path framework[146] to guide foreign immunity outcomes in courts places power back in the hands of the executive branch. Rather than basing immunity decisions on judicial application of a federal statute, courts would once again look to executive recommendations—or decisions based on them—as akin to binding precedent.[147] Because grants of immunity in the pre-FSIA era depended on whether the State Department affirmatively recommended it or not, foreign states manipulated "diplomatic pressure" to invite a "favorable suggestion

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the judiciary's power to decide issues of foreign sovereign immunity); Leading Case, *supra* note 7, at 420 (discussing how the FSIA intended to transfer power to make sovereign immunity determinations to the judiciary).

142 The decision in *Samantar* expelled determinations of foreign official immunity from the FSIA's reach. The Court offered similar reasoning to *Halkbank*—it explained that Congress did not explicitly demonstrate in the text and legislative history of the FSIA that it was meant to govern foreign official immunity. *See* Samantar v. Yousuf, 560 U.S. 305, 325 (2010). This proved problematic because "for years, the common law of state and foreign-official immunity was almost entirely supplanted by statutory interpretation of the FSIA." John B. Bellinger III & Stephen K. Wirth, *Foreign-Official Immunity Under the Common Law*, *in* The Restatement and Beyond 433, 443 (Paul B. Stephan & Sarah H. Cleveland eds., 2020); *see, e.g.*, Chuidian v. Phil. Nat'l Bank, 912 F.2d 1095, 1099–1103 (9th Cir. 1990) (holding that the FSIA could extend to individual foreign officials because to interpret otherwise "would amount to a blanket abrogation of foreign sovereign immunity").

143 *See* Bellinger & Wirth, *supra* note 142, at 448; William S. Dodge & Chimène I. Keitner, *A Roadmap for Foreign Official Immunity*, 90 Fordham L. Rev. 677, 680 (2021) (a return to the common law left U.S. courts "divided on how much deference to give the executive branch when it suggests immunity or nonimmunity . . . [and] unsure of which procedural rules to apply").

144 *See generally* Chimène I. Keitner, *Between Law and Diplomacy: The Conundrum of Common Law Immunity*, 54 Ga. L. Rev. 217 (2019) (discussing the need for clarity in how to apply the common law to immunity decisions after *Samantar* asserted that the FSIA did not apply to cases determining foreign official immunity).

145 "By our count, since *Samantar*, the executive branch has suggested immunity in twenty-two cases and nonimmunity in only two (including *Samantar* on remand)." Bellinger & Wirth, *supra* note 142, at 445.

146 *See supra* notes 40–45 and accompanying text.

147 United States v. Turkiye Halk Bankasi A.S. (*Halkbank II*), 120 F.4th 41, 43 (2d Cir. 2024) ("Under the common law . . . we defer to the Executive Branch's determination as to whether a party should be afforded common-law foreign sovereign immunity, and that deference applies regardless of whether the Executive seeks to grant or, as in this case, deny immunity . . . .").

of immunity."[148] Cases decided between the 1952 Tate Letter—which advocated for the implementation of the restrictive theory—and the 1976 enactment of the FSIA illustrate the continuation of executive overreach.[149]

Reinstating this case-by-case executive deference system[150] could expose the law of sovereign immunity in criminal cases against SOEs to politically motivated inconsistency.[151] The executive branch is particularly susceptible to such external pressure.[152] For example, had the judiciary followed presidential direction in the early stages of *Halkbank*, the Turkish bank would have stayed out of court, a result none of the holdings supported.[153]

To illustrate the danger of overt executive authority, imagine that state *A* owns bank *A* and state *B* owns bank *B*. The United States has a strong, interdependent trade relationship and maintains open diplomatic relations with state *A*. In contrast, the United States has some trade ties to state *B* but frequently condemns the state for alleged human rights violations and denounces its government for corruption. Now, bank *A* and bank *B* both engage in criminally prosecutable bribery and money laundering using U.S. financial systems. Both are caught,

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148 *See* Cooper, *supra* note 41, at 923; *Ex parte* Muir, 254 U.S. 522, 527–30, 533 (1921) (discussing the British Embassy's refusal to use "official diplomatic channels" to ask for immunity); Compania Espanola de Navegacion Maritima, S.A. v. Navemar, 303 U.S. 68, 70–75 (1938) (discussing the Spanish ambassador's efforts to appeal to the State Department before appearing before the Court in admiralty case).

149 Courts did not always apply the restrictive immunity consistently during this time, still allowing the State Department to heavily influence immunity outcomes. *See* John M. Niehuss, *International Law—Sovereign Immunity—The First Decade of the Tate Letter Policy*, 60 Mich. L. Rev. 1142, 1142–45 (1962) (analyzing inconsistency in the State Department suggestions and court decisions concerning the Tate Letter's policy aims of endorsing the restrictive theory of immunity). *Compare In re* Grand Jury Investigation of the Shipping Indus., 186 F. Supp. 298, 318–20 (D.D.C. 1960) (denying immunity to the Philippines where the State Department found the acts to be commercial in nature), *with* Weilamann v. Chase Manhattan Bank, 192 N.Y.S.2d 469, 472–73 (Sup. Ct. 1959) (granting immunity in deference to the State Department's suggestion even where bank's actions could have been deemed commercial within the restrictive theory).

150 *See, e.g.*, Republic of Iraq v. Beaty, 556 U.S. 848, 857 (2009) (giving the President flexibility to waive the FSIA's application to Iraq due to "unique circumstances").

151 Leading Case, *supra* note 7, at 420 (discussing how remanding *Halkbank* to analyze common law immunity "risks future inconsistent and hyperpolitical applications of foreign sovereign immunity in criminal cases in U.S. courts").

152 *See id.* at 426 ("In these years, which coincided with the Cold War era, the State Department opposed requests for immunity in cases against the Republic of Korea and the Philippines, but it did not oppose such requests in cases involving the Soviet Union and Czechoslovakia.").

153 *See* Lipton & Weiser, *supra* note 10 (discussing President Trump's efforts to suppress the prosecutorial investigation of Halkbank); Bjorklund, *supra* note 1; Ashley Schapitl, *Wyden Continues Investigation into Trump Interference in Halkbank Case on Behalf of Turkey*, U.S. Senate Comm. on Fin. (Mar. 11, 2021), https://www.finance.senate.gov/chairmans-news/wyden-continues-investigation-into-trump-interference-in-halkbank-case-on-behalf-of-turkey [https://perma.cc/96GF-JF89].

and the U.S. government decides to prosecute them both. Banks *A* and *B* invoke immunity as instrumentalities of state *A* and state *B*, respectively. State *A* and state *B*, knowing the executive has great influence over the success of the immunity claim, send high-ranking officials to speak with the U.S. Department of State—perhaps even the Secretary of State. Given the strength of trade ties with state *A* and in the interest of comity, bank *A* may end up with immunity, while bank *B* does not. State *A*'s status and relationship with the United States may shield its SOE in a way that state *B* cannot recreate when immunity depends on executive and foreign policy.[154]

Ultimately, yielding to executive deference in immunity decisions concerning criminal allegations may become highly politicized, with administrations granting or denying immunity where it is favorable.

2. *Unclear Precedent*

Moreover, these foreign policy considerations might create an unworkable precedent. Temporal gaps in the production of precedent—which is the usual aid in interpreting and applying the common law[155]—contribute to the risk that decision-making will become largely deferential to executive authority. As shown by the Second Circuit's reasoning in *United States v. Turkiye Halk Bankasi A.S.* ("*Halkbank II*"),[156] executive deference will be easier for courts to rely on because common law precedent concerning foreign sovereign immunity was essentially frozen in 1976 by the FSIA's enactment.[157] This undermines the countermajoritarian goal of circumventing politically influenced judicial decisions.

Categorizing the pre-FSIA test as "precedent" itself presents a logical fallacy. Functionally, deferring in each discrete case to an executive branch agency determination concerning immunity undermines the reliance interests and consistency usually generated by judicial precedent.[158] Merely because in *this* instance the executive has recommended a path of denying immunity does nothing to guarantee that, under parallel factual circumstances, it would do the same.[159] Precedent

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154 *See* Leading Case, *supra* note 7, at 426 (discussing inconsistent positions on immunity during the Cold War depending on which country requested it).

155 "The common-law tradition draws its strength from the development of doctrine through accumulated judicial practice." Dodge & Keitner, *supra* note 143, at 680.

156 120 F.4th 41 (2d Cir. 2024).

157 *See, e.g.*, *id.* at 47 (citing to various pre-FSIA cases or cases citing them to establish the common law's support of executive deference).

158 *See* Earl Maltz, *The Nature of Precedent*, 66 N.C. L. Rev. 367, 367–72 (1988) (explaining reliance interests, equality in application of the law, efficiency, and avoidance of arbitrary decision-making as justifications for adherence to judicial precedent).

159 *See Halkbank II*, 120 F.4th at 43, 47–48.

instructing courts only to defer to an agency will afford little authority to courts' own conclusions upon judicial review to determine this jurisdictional question.[160] Yet, if courts must still request—and follow—executive guidance in each case where a party claims criminal sovereign immunity should apply, previous decisions bind neither courts nor the executive. The common law only prescribes this formula to the extent that it tells courts to abandon their own independent reviews of jurisdiction where criminal defendants claim foreign sovereign immunity.[161]

With the FSIA, Congress chose to change how the federal government implemented this interplay between considerations of foreign policy and judicial power.[162] The issues identified in the deferential system paved the way for a statutory fix.[163] From a constitutional standpoint, Article III suggests that either Congress, the Courts, or both working in conjunction have authority to determine questions of jurisdiction concerning sovereign states.[164] Congress exercised its power in 1976 to make a codified solution that now has no reach in criminal prosecutions, leaving these determinations in the mire of pre-FSIA confusion.

3. *Conflict with Customary International Law*

Deference to executive authority in immunity decisions may lead to outcomes that put the United States at odds with international law.[165]

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160 *See id.* at 46 ("[W]e agree with the government and conclude that, under the common law, we defer to the Executive Branch's determination—which may be expressed, as here, by the initiation of a federal criminal prosecution . . . .").

161 In other cases, the Roberts Court has demonstrated a reluctance to shift power back to executive agencies, rather than courts, to interpret inherently legal questions. *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 385 (2024) ("The Framers . . . envisioned that the final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.'"). Deference to the executive branch, without independent judicial review of questions of law, has become a disfavored interpretive framework. *See id.*

162 H.R. Rep. No. 94-1487, at 7 (1976); *see* Paula Kates, *Immunity of State-Owned Enterprises: Striking a New Balance*, 51 N.Y.U. J. Int'l L. & Pol. 1223, 1225 (2019).

163 *See* Wuerth, *supra* note 46, at 927–28 (noting several disadvantages to executive deference used before the FSIA, such as application of "diplomatic pressure" by foreign states, inconsistent immunity determinations, and lack of guidance for courts when a state failed to request immunity from the State Department).

164 *See* U.S. Const. art. III, § 2. Though the Executive has constitutionally granted power over foreign affairs, nothing suggests that power should encroach on Congress's authority to determine the scope of federal courts' jurisdiction or the judiciary's power to interpret the scope of its own jurisdiction. *See id.* art. I, § 8, cl. 9; *id.* art. III, § 2, cl. 2.

165 Even the *Halkbank* decision itself has been viewed by some as an abrogation of international law principles concerning sovereign immunity. The decision on remand thoroughly discussed the common law and accepted executive deference but wasted almost no ink on the influence of international law. *See Halkbank II*, 120 F.4th at 43; *see also* Kate Yoon, Doruk Erhan & Chloe Miller, Features Essay, *On the Legality of Prosecuting State-Owned Enterprises:* Halkbank v. United States, Yale J. Int'l L. Online at 20 (Sep. 15, 2024), https-/yjil.yale.edu/posts/2024-09-15-on-the-legality-of-prosecuting-state-owned-enterprises-halkbank-v-united-states.pdf [https://perma.

The guidance of a statutory framework could assist courts seeking to reconcile domestic and international law. Notably, Congress crafted the contours of the FSIA with international law in mind.[166]

As the federal common law develops,[167] it should avoid running afoul of such law,[168] including customary international law and treaties. Despite debate over the role of customary international law in the federal common law, the Supremacy Clause still treats international law as the "supreme Law of the Land."[169] The common law and statutory analyses must consider the effects of customary international law, considering that it remains integrated in U.S. law.[170] Even under the FSIA, interpreting sovereign immunity does not happen in a statutory vacuum. In fact, states' national sovereign immunity legislation has been instrumental in developing the landscape of foreign sovereign immunity law internationally.[171] The common law of sovereign immunity similarly must be grounded in "the content of international law."[172]

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cc/Y5C9-5K2W] (discussing the need to consider international law to guide immunity decisions); Lori F. Damrosch, *Changing the International Law of Sovereign Immunity Through National Decisions*, 44 VAND. J. TRANSNAT'L L. 1185, 1188 n.10 (2011) (explaining that the United States often fails to adhere to international law as binding and comparing to other countries that do).

166 Section 1602 includes the findings and the declaration of purpose. It states that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. § 1602.

167 Justice Gorsuch did note that "whether customary international law survives as a form of federal common law after *Erie* is a matter of considerable debate among scholars." Turkiye Halk Bankasi A.S. v. United States (*Halkbank*), 598 U.S. 264, 287 (2023) (Gorsuch, J., concurring in part and dissenting in part).

168 *See* Wuerth, *supra* note 46, at 923 (explaining that foreign official immunities made with respect to the federal common law should not violate international law).

169 U.S. CONST. art. VI; *see also* The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . . For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the *customs and usages* of civilized nations . . . ." (emphasis added)).

170 *See* The Paquete Habana, 175 U.S. at 686–700, 708 (carrying out extensive analysis of customary international practices to inform whether Spanish fishing vessels taken by the United States were "exempt from capture as prize of war").

171 *See generally* Damrosch, *supra* note 165 (discussing the role of the FSIA and other national laws and judicial decisions in changing international views of foreign sovereign immunity and shaping custom).

172 Wuerth, *supra* note 46, at 923; Damrosch, *supra* note 165, at 1188 ("[I]nternational law—customary international law—is part of the relevant matrix of law that federal courts should consider, either in construing a statute enacted against the background of international law . . . or in addressing the nature of the sources that federal courts should consult when ruling on claims of immunity outside of the four corners of the [FSIA].").

International law concerning sovereign immunity yields three important points. First, the presumption of immunity is still the baseline for *states* and will be overcome only where internationally recognized exceptions apply.[173] Second, international law distinguishes between conduct that constitutes sovereign and nonsovereign acts.[174] Finally, international law supports that states and SOEs should be treated as juridically independent entities for the purposes of criminal prosecution in foreign domestic courts.[175]

First, to ensure that U.S. federal judicial decisions adhere to international law, domestic courts should avoid taking the restrictive approach beyond its international limitations.[176] The restrictive theory and its starting point of immunity may not reach criminal cases brought against foreign SOEs. Though the FSIA extends a state's legal personality to its SOEs in the civil context, international law does not necessarily recognize this same alter ego in either civil or criminal contexts.[177] In fact, international law still tends to give states *absolute* immunity from criminal prosecution in domestic courts of other sovereign states.[178] Where states are concerned, an even stronger baseline presumption of

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173 *See* Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. 99, ¶ 57 (Feb. 3) ("Exceptions to the immunity of the State represent a departure from the principle of sovereign equality.").

174 *Id.* ¶¶ 60–61 ("The Court considers that the terms '*jure imperii*' and '*jure gestionis*' . . . refer . . . to whether the acts in question fall to be assessed by reference to the law governing the exercise of sovereign power (*jus imperii*) or the law concerning non-sovereign activities of a State, especially private and commercial activities (*jus gestionis*). To the extent that this distinction is significant for determining whether or not a State is entitled to immunity from the jurisdiction of another State's courts in respect of a particular act, it has to be applied before that jurisdiction can be exercised . . . .").

175 *See* Transcript of Oral Argument at 48–49, Turkiye Halk Bankasi A.S. v. United States (*Halkbank*), 598 U.S. 264 (2023) (No. 21-1450) ("The reply brief drops all their reliance on their secondary sources and anything in customary international law because none of them apply to foreign government-owned corporations, which are separate juridical entities when they are performing nonsovereign functions like the banking function here."); Keitner, *supra* note 87, at 94.

176 *See* Dodge & Keitner, *supra* note 143, at 695 (arguing that the scope of foreign official immunity in U.S. courts should not be greater than what international law permits).

177 *See* U.N. Convention on Jurisdictional Immunities, *supra* note 37, art. 2(1)(b)(iii) (qualifying that a state's "agencies or instrumentalities" only fall within the meaning of "State . . . to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State"); Sydney E. Robson, Comment, *A Common Law Corporate Crisis: The Status of Common Law Criminal Immunities for Foreign State-Owned Enterprises in a Post-*Halkbank *Era*, 73 AM. U. L. REV. F. 303, 345 (2024).

178 *See* Megan Q. Liu, Note, *The Scope of Sovereign Criminal Immunity: Instrumentalities Under the Foreign Sovereign Immunities Act*, 60 COLUM. J. TRANSNAT'L L. 276, 294 n.107 (2021); Transcript of Oral Argument, *supra* note 175, at 3 ("The U.S. does not dispute that criminal trials against sovereigns were unthinkable in 1789, would violate international law today, are unprecedented anywhere, and would risk retaliation.").

immunity, like the one reflected in the FSIA, still applies to criminal prosecutions.[179]

Second, international law treats the public and private conduct of states as distinct. The restrictive theory itself supports this demarcation.[180] Importantly, however, classifications of conduct as sovereign or nonsovereign do not change from the civil to the criminal sphere.[181] This suggests that where the FSIA considers conduct to be nonsovereign, so too could a criminal prosecution. Comparing the *Jurisdictional Immunities Case* and the commercial activity exception of the FSIA,[182] immunity generally grants protection to official state conduct where it does not shield private, nonsovereign acts from legal exaction. The key question for whether to extend any form of immunity to an SOE facing criminal prosecution abroad should focus on whether its prosecutable conduct occurred in the exercise of sovereign authority to which it was entitled.[183]

Finally, international law also supports the premise that SOEs can be legally distinguished from their state owners.[184] The FSIA is somewhat unique in conferring state status on state instrumentalities.[185] Considering that the Supreme Court has confined the FSIA to the civil sphere, a status-based augmentation of *state* immunity does not inherently govern criminal prosecutions. Treating SOEs as primarily independent from the states that own them makes criminal accountability in other sovereigns' courts possible. It penalizes guilty SOEs without violating the sacrosanctity of sovereign immunity for "states *qua* states"[186] that grew with the rise of the modern nation-state.[187]

Interpreting and applying international law to sovereign immunity must strike a delicate balance between respect for state sovereignty and elimination of impunity. Courts should ensure that SOEs acting outside the bounds of sovereign authority may not assert that sovereign

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179 *See* Yoon et al., *supra* note 165, at 8.

180 *See* Tate Letter, *supra* note 34, at 984.

181 "The line dividing sovereign from non-sovereign acts indeed falls in the same place in relation to both civil and criminal proceedings, for it would be unsound to pretend that a particular act is an exercise of sovereignty if impleaded in civil proceedings but not if impleaded in criminal proceedings." Orakhelashvili, *supra* note 36, at 106.

182 *See supra* Section I.C.

183 *See supra* note 36 and accompanying text.

184 *See* Keitner, *supra* note 87, at 94.

185 The FSIA treats an SOE, such as a majority-owned bank, as an instrumentality of the state that can qualify for immunity. *See* 28 U.S.C. § 1603(b). This is different than how international law and other states treat SOEs for immunity purposes. *See supra* note 78 and accompanying text.

186 On remand, the Second Circuit acknowledged that Turkey as a state would have immunity at the common law: "It is undisputed in this case that the United States would not subject Turkey—a state *qua* state—to criminal prosecution." United States v. Turkiye Halk Bankasi A.S. (*Halkbank II*), 120 F.4th 41, 52 (2d Cir. 2024).

187 *See* Yang, *supra* note 18, at 2.

immunity shields them from consequences other private commercial entities would face for the same illegal conduct. Common law approaches grounded in dated U.S. precedent foster a challenging landscape to consistently achieve such a balance. Where domestic courts may bring criminal charges against foreign SOEs, a statute would give clearer guidance and develop more easily traceable precedent.

III. Proposed Solution

The United States has an interest in holding SOEs accountable for criminal activity. This interest is especially true for actions that are not state-sponsored—those of a nonsovereign nature.[188] An argument favoring comity and case-by-case determinations of immunity by the executive branch would yield inconsistency based on the ebb and flow of foreign relations. This Part argues that Congress should enact a statutory framework to guide judicial foreign sovereign immunity determinations in criminal prosecutions. The proposed statute mitigates the uncertainty that the common law generated by distinguishing between states and their majority-owned enterprises in accordance with international law.

A. *An FSIA for Criminal Cases*

Unlike the FSIA, which treats state agencies and instrumentalities as states for immunity purposes,[189] this proposed statute makes them legally distinct. Since international law supports giving absolute immunity to states,[190] the statute maintains a base presumption of immunity for states. SOEs like Halkbank, however, are presumptively nonimmune, leaving them with the burden of arguing for immunity under a narrow statutory exception.

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188 *See* Bartlett v. Baasiri, 81 F.4th 28, 30, 35, 37 (2d Cir. 2023). In *Bartlett*, a privately held bank placed on the U.S. Department of the Treasury's "Specially Designated Global Terrorist" list for allegedly laundering money for Hezbollah sought to escape suit. *Id.* at 30. After the suit against the bank commenced, the state of Lebanon acquired the bank and argued for "state instrumentality" status and immunity under the FSIA. *Id.* at 30–31. The Second Circuit held that sovereign immunity under the FSIA "may attach when a defendant becomes an instrumentality of a foreign sovereign after a suit is filed." *Id.* at 33. The Second Circuit at least recognized that such an interpretation of the timing to determine instrumentality status "will encourage gamesmanship." *Id.* at 36. "Under the restrictive theory, 'immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.'" *Halkbank II*, 120 F.4th at 47–48 (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983)).

189 28 U.S.C. § 1603(a).

190 *See supra* Section I.C.

This approach alleviates some of the concerns articulated in Justice Gorsuch's dissent in *Halkbank*.[191] First, it mitigates the potential for executive overreach. Next, using this statute avoids reliance on the dated and confusing common law of pre-FSIA foreign sovereign immunity.[192] A statute would sidestep the uncertainty of an early body of common law that was disrupted—or frozen—by adherence to the FSIA.[193] Finally, using this statute should ensure that the judiciary's interpretation of the common law does not violate key principles of customary international law.[194] Using the statute's guidance helps courts avoid *automatic* deference to the State Department's policy preferences, which are more vulnerable to inconsistency. This statute grounds independent judicial review of jurisdictional questions in characterizations of SOE actions as sovereign or nonsovereign, rather than in potentially volatile executive policy preferences. Such analysis will promote the development of a more consistent and workable body of precedent. The State Department can still appropriately inform the judicial understanding and application of foreign sovereign immunity with amicus briefs without raising separation of powers concerns.

1. Proposed Statutory Language

This proposed statutory language seeks to address the problems raised by *Halkbank* for foreign sovereign immunity in criminal cases by respecting both judicial authority and principles of international law. The text would be situated in Title 18 of the U.S. Code, near the federal criminal jurisdiction statute, 18 U.S.C. § 3231. The text of the statute would read as follows:[195]

> (1) **Declaration of Purpose.** The Congress finds that, under international law, foreign states are absolutely immune from criminal prosecution in the domestic courts. For the purposes of criminal prosecution, agencies and instrumentalities of foreign states are presumptively nonimmune from the jurisdiction of foreign courts insofar as their nonsovereign conduct

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191 Turkiye Halk Bankasi A.S. v. United States (*Halkbank*), 598 U.S. 264, 284–86 (2023) (Gorsuch, J., concurring in part and dissenting in part).

192 *See supra* Section II.B.2.

193 *Compare Ex parte* Republic of Peru, 318 U.S. 578, 586–87 (1942) (deferring to the executive branch), *with* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989) (affirming the FSIA as the "sole basis" to make foreign sovereign immunity determinations). Note that the analogous use of the common law in foreign official immunity determinations already yielded skepticism and criticism. *See, e.g.*, Wuerth, *supra* note 46, at 954; Ryan, *supra* note 38, at 1778.

194 *See supra* Sections I.C, II.B.3.

195 Where proposed statutory language is quoted from another source, the quotation is indicated, even if the quotation marks would not appear in an enacted statute.

is concerned. "[C]laims of foreign states to immunity" from criminal prosecution "should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."[196]

(2) **Definitions.** For the purposes of this chapter,

> (a) a "foreign state" means a foreign state as defined in 28 U.S.C. § 1603(a), except that "foreign state" does not include an agency or instrumentality of a foreign state as defined in 28 U.S.C. § 1603(b).
> (b) an "agency or instrumentality of a foreign state" means an agency or instrumentality as defined in 28 U.S.C. § 1603(b).

(3) **State Immunity.** Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from criminal prosecution in the courts of the United States and of the States.

(4) **Presumed Nonimmunity of State Agencies and Instrumentalities.** Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, an agency or instrumentality of a foreign state shall be immune from criminal prosecution in the courts of the United States and of the States only "to the extent that [it is] entitled to perform and [is] actually performing acts in the exercise of sovereign authority of the [foreign] [s]tate."[197]

> **Comment on section (4).** To evaluate whether acts are being performed in the exercise of sovereign authority of the foreign state, courts shall consider the factual underpinnings in accordance with the nature, not the purpose, of the conduct. Courts may, for example, consider whether the relevant conduct on which the alleged crime is based could have been undertaken by a private individual or whether *but for* the sovereign authority of state ownership, the state instrumentality would have lacked the power to act. The courts of the United States and the States shall have discretion to rule on the nature of the relevant acts

196 28 U.S.C. § 1602.
197 U.N. Convention on Jurisdictional Immunities, *supra* note 37, art. 2(1)(b)(iii).

> and whether they are being performed in the exercise of a state's sovereign authority.

First, the statute's Declaration of Purpose in section (1) expounds the importance of creating a statutory distinction between states and their agencies and instrumentalities for the criminal context. Doing so brings the prosecution of SOEs, such as Halkbank, into conformity with the principles of sovereign immunity set forth in international law.[198] Drawing on language used in the FSIA, the Declaration of Purpose also makes clear that the judiciary, not the executive branch, will drive these jurisdictional decisions.

The proposed statute defines SOEs as separate from their parent states in section (2). First, section (2)(a) cross-references the definition of "state" in § 1603(a) of the FSIA. It then explicitly leaves "agencies or instrumentalities"—which are included in the FSIA's meaning of "state"[199]—out of the scope of this statute's definition of foreign state. Then, section (2)(b) defines a state instrumentality in accordance with § 1603(b). The key difference with the FSIA is that an agency or instrumentality is not considered to be a sovereign state for the purposes of this statute. An SOE's claim to immunity thus depends primarily on the underlying conduct.

Next, section (3) establishes absolute immunity for sovereign states in accord with principles of international law.[200] This statute makes clear that international law plays a critical role by stating in section (3) that the statutory immunity is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act."

Unlike the FSIA, section (4) assumes that SOEs do not have a presumed claim to immunity because they are not treated as states. Rather than exempt certain SOE conduct from a baseline presumption of immunity, the proposed statute starts with a presumption of nonimmunity and prescribes exceptions for conduct that can be characterized as sovereign and thus immune from prosecution. In other words, when the SOE exercises the sovereign authority of the state that owns the enterprise, the SOE is immune from prosecution.[201] As with the FSIA, a defendant SOE bears the ultimate burden of proving that an exception granting immunity from criminal prosecution applies.[202]

Trying to contemplate and enumerate every possible form of nonsovereign conduct would prove untenable. The proposed statute,

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198 *See supra* Section II.B.3.

199 28 U.S.C. § 1603(a).

200 *See supra* note 178 and accompanying text.

201 *See supra* Section I.C.

202 *See* David P. Stewart, Fed. Jud. Ctr., The Foreign Sovereign Immunities Act 25 (2d ed. 2018).

therefore, does not attempt to do so. Instead, courts would have the discretion to evaluate the nature of the conduct in question. Defendant SOEs would bear the burden of proof to show that the underlying conduct had a sovereign nature.

The distinction between a base presumption of nonimmunity and the narrow exception for immunity in section (4) depends on the conduct of the SOE. The comment to section (4) articulates that the critical question turns on whether the acts possess a sovereign nature.[203] If the parent state directs its SOE's conduct in furtherance of some public act of state, the SOE can invoke immunity. If, however, the SOE has simply turned to criminal activity part and parcel to its conduct as a private market participant, it has no basis to claim immunity from justice. These factual determinations are left to judicial discretion, as the answer will determine if the court has jurisdiction to prosecute.

Proving that the underlying conduct possesses a sovereign nature calls for a fact-intensive examination of the conduct and its surrounding circumstances. For example, courts may factor in whether evidence shows that the sovereign state owner of the instrumentality explicitly directed the conduct pursuant to a state regulatory scheme. The invoking party must produce sufficient evidence to establish the underlying conduct's sovereign nature.

2. *Rationale*

First, by codifying decisions of foreign sovereign immunity for criminal cases, this statute aims to balance power between the executive and judicial branches. As the FSIA does, it places power to grant or deny immunity back into the hands of the judiciary.[204] It is the codification itself that removes the statute from the two-path system of executive deference found in the common law.[205]

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203 As in *The Paquete Habana*, U.S. courts can consider and implement international law to assist in judicial review. *See* The Paquete Habana, 175 U.S. 677, 686–700, 708 (1900). Once enacted, the courts would need to develop precedent interpreting the proposed statute, and they could readily draw on international instruments and court opinions as sources of customary international law to inform their decisions regarding what qualifies as sovereign or nonsovereign action. *See, e.g.*, U.N. Convention on Jurisdictional Immunities, *supra* note 37, art. 2(1)(b)(iii); Statute of the International Court of Justice, *supra* note 74, art. 38 (listing the sources of international law); *see also* Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. 99, ¶ 58 (Feb. 3) ("[T]he compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred."). The comment to section (4) of the proposed statute provides some guidance and entrusts courts to wisely conduct judicial review. Finally, FSIA precedent itself may help courts categorize conduct as sovereign or nonsovereign, given that the commercial activity exception suggests nonsovereign actions. *See* 28 U.S.C. § 1605(a)(2).

204 *See* H.R. Rep. No. 94-1487, at 7 (1976).

205 *See id.*

If an SOE did try to claim immunity, this statute still permits input from the State Department without deference. The FSIA itself operates in accordance with advice submitted by the executive branch in the form of amicus briefs.[206] Judicial acceptance of advice without automatic deference to executive suggestions of immunity shields immunity decisions from "executive lawmaking"[207] while still considering the dynamics of foreign policy. This approach honors the judicial role in determining jurisdiction and the executive function in developing foreign policy.

Next, this statute would foster the growth of precedent with a textual foundation. Precedent would yield examples where U.S. courts distinguish nonsovereign conduct from sovereign conduct of SOEs. Early analyses could also examine FSIA precedent to see, for example, when U.S. courts found that the commercial activity exception applied.[208] Although not all nonsovereign and thus prosecutable SOE activity fits into the commercial activity exception, much of it likely would. The factual consideration for the exception in section (4) of the statute thus has more recent precedent to lean on than those common law cases from before the FSIA. This is because the notion of separating sovereign and nonsovereign conduct aligns with the restrictive theory of immunity upon which the FSIA is based. Courts would generate a growing body of precedent interpreting the statute to say what constitutes sovereign and nonsovereign action instead of trying to glean a workable "precedent" from inconsistent pre-FSIA cases, which relied on executive branch determinations rather than judicial reasoning.[209]

Finally, the statute is written in accordance with prevailing norms of customary international law concerning foreign sovereign immunity.[210] Additionally, just as the FSIA contributes to the production of customary international law,[211] this new statute could catalyze the crystallization of international state practice concerning criminal foreign sovereign immunity for SOEs.[212] Specifically, it would generate more clarity on the divide between sovereign and nonsovereign conduct.

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206 *See* Cooper, *supra* note 41, at 913–14.

207 Wuerth, *supra* note 46, at 923–24, 929–30, 969–70.

208 *See supra* Section I.C.

209 *See supra* Sections I.B, II.B.

210 *See supra* Sections I.C, II.B.3.

211 *See* Damrosch, *supra* note 165, at 1188 (discussing the role of U.S. case law interpreting the FSIA in the formation of customary international law). The creation or "crystallization" of customary international law depends on "general practice among the States concerned" and that the principle be "accepted by [the States concerned] as law (*opinio juris*) among themselves." Int'l L. Comm'n, Draft Conclusions on Identification of Customary International Law, with Commentaries, at 122, U.N. Doc. A/73/10 (2018).

212 The growth of support for universal jurisdiction serves as some evidence that absolute immunity for criminal conduct should be a policy of the past in international law. *See generally* Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 Eur. J. Int'l L. 779 (2019) (empirical study of the expansion of universal jurisdiction).

Ultimately, a statutory framework would promote greater efficiency. Courts could quickly dispose of clear-cut cases involving no sovereign conduct by an SOE as presumptively nonimmune. With closer calls, the State Department could still share its opinion by filing an amicus brief explaining how an immunity decision might affect delicate foreign relations. Case law would develop within statutory confines, allowing the judiciary to apply the law based on precedent generated by interpretation of the statutory framework.

These interpretive precedents would also control for concerns about going beyond exceptions to sovereign immunity permitted by international law.[213] Ultimately, this statute would help strike a balance. States can retain a right to assert sovereign immunity within principles of customary international law, but impunity of criminal conduct by SOEs can be addressed. An SOE acting as a corporation would theoretically face the same criminal standards as private global corporations.

B. *Application of the Proposed Statute*

This Note uses a hypothetical to demonstrate a possible application of the suggested statutory framework. The hypothetical borrows and expands on examples from a commentary on the U.N. Convention on Jurisdictional Immunities of States and Their Properties.[214] First, assume state *A* has implemented this statute and imagine that it borders state *B*. State *B* has direct majority ownership of company *B*, which owns and operates a water company that is the exclusive provider of water within state *B*'s territory. Based on section (2) of the statute, company *B* is an "agency or instrumentality" as defined by § 1603(b) of the FSIA.

Now imagine that company *B*'s operation in state *B* incidentally has extensive adverse and criminally prosecutable environmental effects on state *A*'s bordering wetlands. State *A* calls company *B*, an SOE of state *B*, into its courts to be prosecuted under state *A* laws. Company *B* wants to invoke immunity from prosecution using the state *A* statute concerning foreign sovereign immunity for states. After determining that company *B* is not a state *qua* state, company *B* must prove under section (4) that it can claim state *B*'s immunity based on company *B*'s conduct possessing a sovereign nature.

213 The FSIA has been narrowed and limited by cases, suggesting the same would happen with a statute that operates to determine if foreign sovereign immunity can be granted in criminal cases. *See, e.g.*, Samantar v. Yousuf, 560 U.S. 305, 310 (2010) (holding that the FSIA does not govern determinations of foreign official sovereign immunity); Dole Food Co. v. Patrickson, 538 U.S. 468, 473–74 (2003) (holding that only majority direct-owned entities meet the FSIA definition of state "instrumentality" for immunity purposes).

214 Tom Grant, *Article 2(1)(*a*) and (*b*)*, *in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: A COMMENTARY 40, 50–52 (Roger O'Keefe & Christian J. Tams eds., 2013).

Though the provision of water can be privatized and commercialized, company *B* is acting in the exercise of state *B*'s sovereign authority as it provides water to state *B*.[215] It is operating only within state *B*'s territory pursuant to state *B*'s sovereign authority to nationalize its provision of water within its own borders. Company *B* can thus assume state *B*'s state status for immunity purposes only because it was "entitled to perform and [is] actually performing acts in the exercise of sovereign authority of the State."[216]

Now compare: Company *B* decided to expand its operations and signed a contract to provide water through several private companies incorporated in state *A*. Unfortunately, company *B* fails to conform to certain environmental regulations under state *A*'s law. The result is once again environmental damage that is criminally prosecutable based on company *B*'s failure to comply with state *A*'s regulations. State *A* seeks to prosecute company *B*. The question is whether company *B* can still claim immunity under section (4) of the statute. The answer is that it cannot. In contracting with private companies in state *A* to provide water, company *B* is now acting as a private market participant doing business in state *A*. The presumption of nonimmunity for nonsovereign activity of SOEs applies. Company *B* will remain subject to criminal prosecution in state *A*'s courts.

C. Defending a Statutory Solution

Skeptics of this approach may raise some objections. Critics might point to the constitutional delegation of power over foreign affairs to the executive.[217] Even though the executive branch has constitutional power over foreign affairs, in this context "deference" has not been merely deference, but rather full control over immunity determinations made under the common law. This "executive lawmaking,"[218] in the form of judicial deference, is more "blind obedience" than foreign policy.[219] Constitutional delegation of authority over foreign affairs does not oust the judiciary entirely from ruling on issues related to foreign policy, especially where they concern the judiciary's own jurisdiction.[220]

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215 *See id.* at 51.

216 U.N. Convention on Jurisdictional Immunities, *supra* note 37, art. 2(1)(b)(iii).

217 U.S. CONST. art. II, § 2.

218 Wuerth, *supra* note 46, at 923–24.

219 *See* Ryan, *supra* note 38, at 1774.

220 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("[I]t cannot of course be thought that 'every case or controversy which touches foreign relations lies beyond judicial cognizance.'" (quoting Baker v. Carr, 369 U.S. 186, 211 (1962))); *cf.* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) (overruling *Chevron* deference to executive agency interpretations of ambiguous statutory terms in favor of independent judicial review).

On the contrary, others might fear that even with a statutory framework, courts will continue to defer to executive suggestions. Yet, starting from a presumption of nonimmunity would encourage early dismissal of motions claiming immunity that have no basis. The State Department need not be involved. Where an SOE has a potentially viable claim to immunity, the executive branch can still communicate its concerns or preferences to courts through usual filing channels. The court still exercises its authority to employ a conduct-based analysis to reach a conclusion. Amicus briefs are informative tools for the judiciary but should not be treated as the formal executive suggestions of immunity used before the FSIA.[221]

Another response to the *Halkbank* decision proposes that criminal immunity in international law is treated differently than civil immunity.[222] This argument suggests that the presumption favoring absolute immunity remains strong in the criminal context and that any sovereign acting in its sovereign capacity should retain immunity.[223] The statute proposed here does not dispute this and only differentiates for application to SOEs in the criminal context, where much of the prosecutable activity falls under nonsovereign "commercial activity."[224] Although this perspective admits that *states* may violate criminal law with some degree of impunity, it should not offer that same refuge to SOEs unless acting with true sovereign authority.[225] Considering the United States does not want to expose itself *as a state* to prosecution in foreign courts, this policy balance maintains the respect for state sovereignty that most nation-states expect.

Giving SOEs absolute immunity based solely on status as a majority state-owned entity[226] would lead to impunity under a "blanket immunity regime."[227] Changes in how the international community interacts with corporate entities call for a departure from a presumption of absolute immunity for SOEs.[228] Consistent with the restrictive theory, this proposed statute recognizes meaningful limitations on immunity when SOEs undertake nonsovereign activity.

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221 *See supra* notes 40–45 and accompanying text.

222 *See* Yoon et al., *supra* note 165, at 9.

223 *See id.*

224 *See* Liu, *supra* note 178, at 276 (discussing the scope of sovereign immunity for state instrumentalities given the increase in corporate crimes).

225 *See* Yoon et al., *supra* note 165, at 20.

226 *See id.* at 8, 14–15; *see also* Dole Food Co. v. Patrickson, 538 U.S. 468, 473–74 (2003) (holding that FSIA immunity only covers majority state-owned SOEs, opening subsidiaries to greater liability).

227 Yoon et al., *supra* note 165, at 15.

228 *See* Kates, *supra* note 162, at 1223.

Conclusion

The Supreme Court's decision in *Halkbank* leaves determinations of state sovereign immunity for criminal cases in the difficult landscape of the common law. Reliance on a common-law-driven approach to sovereign immunity risks executive overreach and overbroad immunity for foreign, state-owned enterprises. Although not advocating for the dissolution of sovereign immunity altogether, this Note argues in favor of instituting clearer delineations to determine whether criminal conduct of SOEs merits immunity. A statutory framework controls for inconsistency in judicial decisions. Congress should craft a statutory solution that distinguishes states from their enterprises when assessing if immunity applies. The only exception should flow from a fact-intensive, conduct-based inquiry into whether the SOE's actions possess a sovereign nature. A statute can thus punish criminal conduct without going beyond what the contours of international law permit.