Fall 2012

Crimes and the Foreign Sovereign Immunities Act: New Perspectives on an Old Debate

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Cover Page Footnote
International Law; Commercial Law; Law

This article is available in North Carolina Journal of International Law and Commercial Regulation: http://scholarship.law.unc.edu/ncilj/vol38/iss1/4
Crimes and the Foreign Sovereign Immunities Act: New Perspectives on an Old Debate

By John Balzano†

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I. Introduction

Does the Foreign Sovereign Immunities Act (FSIA)¹ provide the rule on jurisdiction over a foreign sovereign, its political subdivisions, agencies, or instrumentalities for criminal prosecutions or for civil suits based upon actions that might be deemed criminal in nature?² A 2002 report by an American Bar

† All views expressed herein and any errors are those of the Author. I would like to thank Frances Foster for mentoring me in the publication of this article. I would also like to thank the Editorial Staff of the North Carolina Journal of International Law and Commercial Regulation for their superb editorial assistance.

Association (ABA) working group noted that cases dealing with these questions have emerged and that these issues have "not insignificant policy implications." Furthermore, because it has become clear that entities can commit a number of serious crimes, it would seem that there is a considerable amount at stake here. May a corporation, the majority of the shares of which are held by a foreign state, be immune from criminal liability for financial or environmental crimes? Can branches of foreign central banks flout our criminal laws? If the FSIA does not answer these questions, how should one design policy and law that will?

Asking these questions seems particularly pertinent now, because of recent developments related to the scope of the FSIA and transnational litigation in U.S. courts generally. The Supreme Court has most recently resolved the question of whether the FSIA covers foreign officials, answering in the negative and chipping away at the inclusiveness that used to pervade interpretations of the statute. In other words, the recent decision in Samantar v.

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5 See generally Dole Food Co. v. Patrickson, 538 U.S. 468, 477 (2003) ("A Corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares.").

Yousuf indicates that the text of the FSIA should not be read creatively and that courts should be careful not to include juristic persons or entities that do not find an express basis in the FSIA’s text. Thus, former foreign officials must face the risk of civil suits on the basis of conduct that is fairly uniformly acknowledged to be illegal under international law, such as genocide, extrajudicial killing, and torture.

The Supreme Court may also soon decide whether private corporations could face similar liability under statutes like the Alien Tort Statute. In addition, in a recent high-profile case, New York authorities showed the world that even the head of the International Monetary Fund (IMF) and a French presidential hopeful, Dominique Strauss-Kahn, could be brought to trial for serious criminal violations of local laws, when they charged him with the alleged rape of an employee in the New York hotel where he was staying. In these significant developments, individual accountability—whether because an official or entity associated

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7 v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) (“We think that the text and structure of the FSIA demonstrate Congress’ intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.”); Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983) (stating that the FSIA “contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities”).

8 130 S. Ct. 2278 (2010).

9 Id. at 2281, 2292-93.


11 Mike Sacks, Supreme Court to Rule on Corporate Personhood for Crimes Against Humanity, HUFFINGTON POST (Oct. 17, 2011), http://www.huffingtonpost.com/2011/10/17/supreme-court_n_1015953.html. Although the Kiobel decision remains outstanding at the time of this article, the Court did decide the companion case, Mohamad v. Palestinian Authority, 132 S. Ct. 1702 (2012) (holding that the Torture Victim Protection Act only allows for damages against the torturer himself). See also Warren Richley, Torture Victim’s Family Can’t Sue PLO for Damages, Supreme Court Says, CHRISTIAN SCI. MONITOR (Apr. 18, 2012), http://www.csmonitor.com/USA/Justice/2012/0418/Torture-victim-s-family-can-t-sue-PLO-for-damages-Supreme-Court-says.

with the state has engaged in conduct that is so contrary to the most basic and fundamental norms that it cannot be deemed official or because the entity or individual is not engaged in governmental or official conduct at all (i.e., private conduct)—appears to have a slight edge over immunity. What do these developments mean, if anything, for the debate about the FSIA’s criminal jurisdiction?

While few and far between relative to other FSIA litigation, cases directly or indirectly related to the FSIA’s coverage of criminal actions have arisen and continue to arise, primarily in the lower courts. On some issues, a circuit split has developed, which raises the possibility that the Supreme Court will address the issue before Congress takes action. It took almost twenty years before the circuit split over the FSIA’s coverage of foreign officials ripened and was finally resolved, however. The question of criminal jurisdiction may approach that point as well.

This Article examines the contours of the debate that has arisen with regard to the FSIA’s criminal jurisdiction in different contexts and argues that, as questions are raised as to the coverage of the FSIA in the courts, Congress should act to correct the situation and clarify the FSIA’s scope. It argues that the FSIA does not cover criminal immunity, but that Congress should, on the basis of international law’s trajectory and related U.S. jurisprudence and public policy, adopt a standard of restrictive criminal foreign sovereign immunity in the future. This Article also suggests specific issues Congress should consider when amending the FSIA. In particular, Congress should take account of the ongoing debate about foreign sovereign immunity that

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12 See John Eligon, Lawyers Say Strauss-Kahn is Covered by Diplomatic Immunity, N.Y. TIMES, Sept. 27, 2011, at A19 (quoting victim’s lawyers’ response to defense’s motion to dismiss on grounds of immunity: “Strauss-Kahn’s claim of diplomatic immunity will clearly fail because: (1) he is not a diplomat; (2) according to his own story, he was in New York on ‘personal’ business; (3) he, not the I.M.F., paid for his room at the Sofitel; and (4) he was obviously acting in his personal capacity when he violently attacked [the victim].”).

13 See infra Parts III and IV.

14 See infra Part II.

15 Samantar v. Yousuf, 130 S. Ct. 2278, 2283-84 n.4 (2010) (describing Courts of Appeals cases beginning with Chuidian v. Philippine Nat. Bank, 912 F.2d 1095, 1103 (9th Cir. 1990)).
recent decisions have spawned both domestically and internationally, keeping in mind that restrictive immunity is often an uncomfortable but necessary compromise in both balancing trends of individual accountability under international law and preserving foreign relations and the “dignity” of the state.

A brief note on definition and scope is appropriate here. As used in this article, crimes could include domestic law crimes and international law crimes, which should not imply that either of these two categories is mutually exclusive. Crimes under international law might include terrorism, genocide, torture, war crimes, and crimes against humanity. These actions are criminalized by international law (as crystallized by the Rome Statute of the International Criminal Court) but may be civilly actionable in some way under U.S. law, such as under the Alien Tort Statute or the Torture Victim Protection Act. Furthermore, similar actions, if committed inside the United States, would likely be criminal in some form. However, this category of human rights abuses is not excepted from the FSIA’s blanket grant of immunity, at least in the civil context. Thus, even if the FSIA covers crimes, it is unlikely that any of its exceptions applies for


17 See Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632, 1640 (2011) ("Denial of sovereign immunity, to be sure, offends the dignity of a State; but not every offense to the dignity of a State constitutes a denial of sovereign immunity. The specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent.").

18 Rome Statute, supra note 16, arts. 5-9.


20 See Douglass Cassell, Empowering United States Courts to Hear Crimes within the Jurisdiction of the International Criminal Court, 35 NEW ENG. L. REV. 421, 428-30 (2000) (discussing what the author believes to be the present, but incomplete, portions of U.S. criminal law that would make it possible to try crimes like genocide, crimes against humanity, and war crimes committed both inside and outside of the United States.); see also Melina Milazzo, Time is Now to Clarify U.S. Criminal Jurisdiction over Contractors, HUM. RTS. FIRST BLOG (May 24, 2011), http://www.humanrightsfirst.org/2011/05/24/time-is-now-to-clarify-u-s-criminal-jurisdiction-over-contractors/ (discussing the criminal jurisdiction of U.S. courts over government contractors abroad).

such behavior, as courts have declared that the commission of these acts may not be tantamount to a waiver of sovereign immunity.\textsuperscript{22} That debate notwithstanding, this Article intends to focus primarily on the former category—criminal behavior under U.S. law for acts committed within U.S. borders—although there may be implications for the latter category as a result of this analysis.

This Article is divided into five additional sections. The first section discusses the general bases for debate about the FSIA’s criminal jurisdiction and scholarly literature that has discussed the question, whether directly or indirectly. The second section discusses specific cases that have directly or indirectly touched upon the FSIA’s connection to criminal behavior. The third section discusses how the case of \textit{Samantar} can help resolve questions related to the FSIA’s criminal jurisdiction. The fourth section discusses the primary considerations in designing a possible amendment to the FSIA for purposes of criminal jurisdiction, and identifies some issues and guidelines that Congress should consider in drafting that amendment. The final section, the conclusion, offers some additional support for such an amendment and thoughts on its timing.

\section*{II. The Bases for the Circuit Split}

By way of brief background, the FSIA, enacted in 1976, was meant to codify international law on foreign sovereign immunity.\textsuperscript{23} It has become part of a line of similar statutes from common law jurisdictions that put decisions about foreign sovereign immunity in the hands of the judiciary, rather than the political organs of government.\textsuperscript{24} Like other domestic statutes and multi-lateral level treaties concerning foreign sovereign immunity, the FSIA is part of a movement to codify a restrictive approach to foreign

\textsuperscript{22} See, e.g., \textit{Smith v. Socialist People’s Libyan Arab Jamahiriya}, 101 F.3d 239, 243-44 (2d Cir. 1996).

\textsuperscript{23} See \textit{Permanent Mission of India v. City of New York}, 551 U.S. 193, 195, 199-200 (2007) (noting that one of the FSIA’s main objectives was the “codification of international law at the time of ... enactment”).

\textsuperscript{24} \textit{H.R. Rep. No. 94-1487}, at 7 (1976) (noting that in enacting the FSIA, “U.S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency”).
sovereign immunity. The FSIA provides a broad grant of immunity to foreign states, their political subdivisions, and their agencies and instrumentalities—which includes majority state-owned enterprises, but now excludes governmental officials. This broad grant of immunity is subject to exceptions, however, primarily for the private and commercial conduct of states and their instrumentalities, as set forth in Sections 1605 and 1607 of the FSIA. In this way, the FSIA encapsulates the restrictive theory of foreign sovereign immunity.

The broad grant of immunity in Section 1604 states:
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 the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter. It makes no distinction between civil, criminal, or administrative jurisdiction. However, as the remainder of this Article will discuss, different interpretations amongst the courts about whether the immunity granted in 1604 is for civil jurisdiction only exist based on the exceptions to immunity in Sections 1605 and 1607, the text of other provisions, and the legislative history of the statute. The exceptions to immunity present in Sections 1605 to 1607 also do not distinguish between civil and criminal cases, although they are arguably better suited for civil cases.

No Supreme Court case has directly addressed the meaning of the term “jurisdiction” in Section 1604. In a passing reference in one case, the Supreme Court noted that the FSIA governs “civil”

27 Von Merhen, supra note 25, at 40.
29 Von Merhen, supra note 25, at 37-38.
31 See id.
actions, but that the language was neither exclusive nor did it relate to the holding of the case at hand. In that case, *Verlinden B.V. v. Central Bank of Nigeria*, the Court specifically addressed the FSIA’s constitutionality with respect to its creation of federal jurisdiction for cases that arguably arise under state law, but which the Court concluded may be said to arise under federal law for purposes of Article III of the Constitution. It is true, as other courts have noted, that the Supreme Court characterized the FSIA as a civil statute, but the Court went no further in explaining that reference.

Commentary on the FSIA likewise provides no clear answer as to the statute’s connection with criminal jurisdiction. Some commentators merely conclude that the FSIA is a civil statute without detailed analysis. Others conclude that, at the very most, Section 1604 exempts entities covered by the FSIA from criminal jurisdiction. For example, in her book, *The Law of State Immunity*, Hazel Fox notes that FSIA is in line with what she characterizes as international law’s prohibition on criminal prosecutions of foreign states. She includes the FSIA with other statutes from common law countries, which “exclude[]” their application to criminal proceedings. She also notes the pervasive

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35 Id.
36 Id. at 488 (stating that the FSIA “contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities”).
37 Id. at 488-89.
40 Id.
silence of the FSIA as to criminal jurisdiction and highlights the fact that it expressly confers jurisdiction on the federal courts for civil actions.\footnote{Hazel Fox, The Law of State Immunity 320 (2d ed. 2008) [hereinafter Fox, 2nd ed.]. The textual provision Fox quotes will be discussed in greater detail at a later point in this Article. See infra Part III.} In addition, she notes that civil actions based on criminal activity may be permitted under the FSIA in certain circumstances, but dismissed where the conduct allegedly commercial they are based upon reaches a certain level of destructiveness.\footnote{Id. at 37.}

On the other hand, Joseph Dellapenna, in his treatise, *Suing Foreign Governments and Their Corporations*, notes that no one seems to have contemplated bringing a criminal prosecution against a foreign state; that the FSIA’s text and legislative history are silent on the criminal question; and that courts that have considered the issue have concluded that the FSIA does not apply.\footnote{Joseph Dellapenna, *Suing Foreign Governments and Their Corporations* 37-41 (2d ed. 2003).} Professor Dellapenna also sets forth three reasons why one might conclude the FSIA has no criminal dimension. The first reason is the silence in the statute regarding criminal proceedings, in comparison to the “detailed provisions” regarding civil proceedings.\footnote{Id.} Secondly, Dellapenna notes that the provision creating original jurisdiction in the federal courts mentions “civil” actions only.\footnote{Id.} Thirdly, Dellapenna points out that the FSIA is codified in the “civil procedure” title of the U.S. code.\footnote{Id.} While very little scholarship has emerged beyond that of Dellapenna and Fox (although some recent articles do raise points similar to those of Fox),\footnote{See Chimene Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 Yale J. Int’l L. Online 1, 1 (2010). As will be discussed below, there is emerging scholarship on whether “indictable” acts required for civil RICO claims are permitted under the FSIA’s text. See infra Part III.A. At least one article has concluded that they are not permitted because, *inter alia*, there is no jurisdiction over criminal claims against foreign sovereign. See John D. Corrigan, Note, *Restricting RICO under FSIA*, 84 St. John’s L. Rev. 1477, 1495-96 (2010) (concluding that foreign states should}
emerging international criminal law movement, and in relation to that trend, the potential for a more restrictive approach to the criminal immunity of states and their officials.  

Federal courts are unsure of the FSIA’s criminal law reach as well. A split has emerged amongst the circuits as to whether the FSIA grants foreign states, their political sub-divisions, and their agencies and instrumentalities immunity from the criminal jurisdiction of U.S. courts. The majority of the courts of appeals that have confronted the question have concluded either that the FSIA does not pertain to immunity from criminal jurisdiction or have gone to great lengths to avoid addressing the merits of the issue altogether. The Sixth Circuit concluded that section 1604 does include criminal jurisdiction and that sovereigns are indeed immune from all criminal actions because the exceptions under Sections 1605 and 1607 are only meant for civil actions. One district court in the Fifth Circuit held that Section 1604 confers criminal immunity. The Tenth Circuit has concluded that Section 1604 does not pertain to criminal jurisdiction. The Eleventh Circuit views the statute as a civil one, and a district court within its ambit recently used that conclusion to deny immunity for a criminal prosecution. As recently 2010, a district
court within the First Circuit concluded that the FSIA has no relevance in criminal actions. The Ninth and D.C. Circuits have characterized the statute as a "civil" one and therefore appear to be leaning strongly away from the conclusion that Section 1604 includes criminal jurisdiction. The Second Circuit has attempted to avoid the issue altogether, although there are district courts within its ambit that have concluded that the FSIA is an entirely civil statute and those that have held that at least Section 1604 covers immunity from criminal jurisdiction. Nonetheless, in many cases, these courts are not facing the same precise question, and so it is necessary to understand the contexts in which the question of criminal jurisdiction arises.

III. Cases Addressing the FSIA's Criminal Coverage

A. Cases Directly Addressing Section 1604

One of the first, if not the first case, to address the effect of the FSIA's conferral of criminal immunity (or lack thereof), was Gould, Inc. v. Mitsui Mining & Smelting Co., wherein the court was forced to consider whether a civil action pursuant to the Racketeering Influenced and Corrupt Organizations Act (RICO) could stand under the FSIA. The plaintiff, Mitsui Corporation, sued, inter alia, a corporation owned by the French government for misappropriating and utilizing trade secrets. The civil RICO statute requires that the predicate actions underlying the alleged RICO violation be "indictable." The plaintiff averred that the

54 In re Deltuva, 752 F. Supp. 2d 173, 177-80 (D.P.R. 2010).
58 Id. at 841.
59 Id. at 840-41.
60 Id. at 844.
defendant corporation’s actions constituted mail and wire fraud. Therefore, the court determined that in order to decide whether a civil RICO claim was possible against a qualifying sovereign entity under the FSIA, it had to analyze, first, whether the FSIA’s coverage included criminal jurisdiction and, second, how that determination would affect a plaintiff’s ability to bring a civil RICO claim.

On the first question, the court based its analysis solely on the FSIA’s text and legislative history. It concluded that Section 1604 is sufficiently broadly worded to encompass both civil and criminal actions and that nothing in the legislative history refuted that conclusion. Thus, according to the court, foreign states generally have immunity from criminal prosecution. However, the court also noted the FSIA only expressly confers jurisdiction on federal district courts to adjudicate cases that fall within one of the FSIA’s exceptions in civil actions. For this reason, the court concluded that a federal district court could not take jurisdiction over a criminal matter, even if the matter might conceivably fall within one of the FSIA’s exceptions. The court ultimately determined that for an act to be “indictable” within the meaning of RICO it would need to be an act for which the actor could be convicted. An immune sovereign could not, in reality, be convicted of anything, so no action was possible.

Interestingly, the Mitsui court took pains to carve out an avenue for criminal responsibility of individuals associated with the state, but it did not delineate the exact contours of this point. Specifically, the court noted that individual officials acting outside of the scope of their official authority might render themselves susceptible to criminal prosecution. This idea connects to an ultra vires loophole in civil suits against foreign officials in U.S.

61 Id. at 841.
62 Id. at 843.
63 Gould, 750 F.Supp at 843-44.
64 Id. at 844.
65 Id; see also 28 U.S.C. § 1330(a) (2006).
67 Id.
68 Id.
69 Id.
courts, which can also apply to certain U.S. officials.\textsuperscript{70} The underlying principle is that abusive official actions strip the individual official of his derivative immunity from the state. This is also the idea that underlies the removal of immunity in constitutional tort cases when an official’s actions are “under the color of law,” but in violation of a clearly established constitutional right so that the government officer cannot be said to be acting officially, and therefore, is personally liable.\textsuperscript{71} The act is seen as so unconstitutional that it cannot be official.

In another case, this construct was utilized by the government in arguing against criminal immunity for a Liberian official under the FSIA in a prosecution according to the federal criminal statute executing the U.N. Convention on Torture.\textsuperscript{72} The government argued that it was not prosecuting the defendant for acting in his official capacity, but rather for acting in his personal capacity “under the color of law” or, rather, acting in a way that abused his position under the law.\textsuperscript{73} The court ultimately dismissed the defendant’s arguments for immunity because it concluded that the FSIA did not apply to criminal actions.\textsuperscript{74}

The Sixth Circuit later generally agreed with Mitsui’s holding. In Keller v. Central Bank of Nigeria,\textsuperscript{75} the plaintiff, a sales representative for “mobile hospital and medical centers,” was defrauded out of approximately $28,000 by individuals pretending to enter into an agreement with him for the exclusive rights to distribute his facilities in Nigeria.\textsuperscript{76} The plaintiff brought suit against individual and sovereign plaintiffs, alleging civil RICO claims, and common law tort and contract claims.\textsuperscript{77} Like in

\textsuperscript{70} See infra note 282 (citing cases using the ultra vires analysis).

\textsuperscript{71} See Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); see also Ex Parte Young, 209 U.S. 123, 159-60 (1908) (concluding that enforcing an unconstitutional enactment strips an official of any immunity and subjects him to suit in a personal capacity).


\textsuperscript{73} Id. at *39-40.

\textsuperscript{74} Id. at *40-41.

\textsuperscript{75} 277 F.3d 811 (6th Cir. 2002).

\textsuperscript{76} Id. at 814-15.

\textsuperscript{77} Id. at 814.
Mitsui, the Sixth Circuit Court of Appeals concluded that Section 1604's grant of immunity included criminal jurisdiction.\textsuperscript{78} In doing so, the circuit relied on the statements of the Supreme Court that the FSIA is the \textit{exclusive} means for obtaining jurisdiction over a foreign sovereign in U.S. courts, and on the broad language in Section 1604.\textsuperscript{79}

Proceeding to the question of indictable acts,\textsuperscript{80} the \textit{Keller} court rejected the plaintiff's argument that RICO concerns itself with acts rather than actors.\textsuperscript{81} Citing to Sixth Circuit precedent that agencies of the federal government are not subject to civil RICO claims because they are not "indictable" entities,\textsuperscript{82} the \textit{Keller} court stated that it would be disingenuous to conclude that the federal government is immune from civil RICO suits, but not a foreign government.\textsuperscript{83} The holding, thus, might have a comity-related basis\textsuperscript{84}—although the court did not expressly articulate that reasoning. Like in \textit{Mitsui}, however, the court noted that officials might still be subject to civil RICO suits if they acted \textit{ultra vires} or outside of the scope of their official authority.\textsuperscript{85}

In contrast, the Tenth Circuit in \textit{Southway v. Central Bank of Nigeria}\textsuperscript{86} reached a different result.\textsuperscript{87} There, the plaintiffs sought to recover certain investment funds from the Republic of Nigeria and its central bank, which two employees had allegedly stolen in a scam to collect money from an over-invoiced contract for oil drilling machinery.\textsuperscript{88} Suit was again brought under the civil RICO

\textsuperscript{78} \textit{Id.} at 820.
\textsuperscript{79} \textit{Id.} at 819-20.
\textsuperscript{80} \textit{See id.} at 820. The court also considered whether indictable acts can be commercial activity. \textit{Id.} This will be discussed in a later section. \textit{See infra} Part III.B.
\textsuperscript{81} \textit{Keller}, 277 F.3d at 820-21.
\textsuperscript{82} \textit{Id.} (citing Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991); McNeily v. United States, 6 F.3d 343, 350 (5th Cir. 1993)).
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{See infra} note 255 and accompanying text.
\textsuperscript{85} \textit{See Keller}, 277 F.3d at 821 ("We note that although a foreign sovereign is not indictable, and therefore not amenable to civil RICO claims, the same conclusions may not follow for individuals who commit criminal acts; such unlawfulness may indicate that they were acting without the authority of the sovereign.").
\textsuperscript{86} 198 F.3d 1210 (10th Cir. 1999).
\textsuperscript{87} \textit{See id.} at 1212.
\textsuperscript{88} \textit{Id.} at 1212-13.
statute, 18 U.S.C. §§ 1961-68. The defendants moved to dismiss on sovereign immunity grounds under the FSIA, arguing: (1) the acts on which the claim was predicated were not "indictable" because foreign sovereigns cannot be indicted or (2) alleged criminal acts of that kind do not fall under the FSIA's commercial activity exception.

The court rejected both arguments. It concluded that the FSIA does not address criminal acts and, therefore, a civil RICO claim could stand: "If Congress intended [defendants]...to be immune from criminal indictment under the FSIA, then Congress should amend FSIA to expressly so state." The court also concluded that because Congress and the executive had not expressly granted sovereign immunity for criminal acts, a court could not grant that immunity in the first instance. The court held that, essentially, there is no immunity unless expressly conferred by the political branches. Clarifying its holding, the court stated:

[W]e do not hold that FSIA confers criminal jurisdiction over foreign sovereigns. We simply conclude that because FSIA does not address criminal sovereign immunity, Defendants' argument that they enjoy criminal sovereign immunity under the FSIA, and thus cannot commit indictable acts for purposes of a civil RICO claim necessarily fails.

90 Id.
91 Id. at 1214-15.
92 See Southway, 198 F.3d at 1214-15 (“The executive and legislative branches of our government are the principal players in the field of foreign relations and international comity, and consequently are much better equipped than a court of law to address the question of foreign sovereign immunity in the criminal context.”).
93 Id. The court also distinguished the Sixth Circuit precedent cited by the court in Keller relating to the indictability of federal agencies. Id. at 1215 n.5. It did so based on the distinct history of the doctrines of foreign sovereign immunity and domestic immunity. Id. The latter being absolutely immune unless it consents to suit, and the former being immune at the prerogative of the domestic sovereign. Id. This distinction is not necessarily meaningful as applied to acts the nature of which are essentially the same—government-associated entities acting in the same manner that any private entity would. This is not to question the prerogative of Congress to grant or deny immunity under RICO for federal agencies, but the foreign/domestic sovereign distinction is less meaningful in the context of restrictive immunity for "private" actions.
94 Id. at 1214 n.4.
The court did not expressly consider the possibility that a common law rule derived from international law might grant the defendants immunity, or that it might limit the capacity of a foreign sovereign (or derivative entity) to commit an act that is indictable under municipal (domestic U.S.) law. In sum, Southway, Keller, and Mitsui addressed the issue of the FSIA’s criminal coverage as a threshold for reaching the question of whether the immunity could attach to the indictable acts necessary for a civil RICO claim, which requires an “indictable act.” But, as the next section will argue, it is questionable as to whether they even needed to reach that issue.

Some district courts have had occasion to directly address the question of the FSIA’s criminal coverage in the context of an actual criminal prosecution. In the case of *In re Grand Jury Proceedings Related to M/V Deltuva* a ship flying a Lithuanian flag and owned by the Lithuanian Shipping Company, which was carrying commercial cargo bound for the U.S. port at Puerto Rico, was boarded by the Coast Guard and found to be in violation of the Act to Prevent Pollution from Ships because it discharged oil while at sea. As the Lithuanian Shipping Company is majority-owned by the Lithuanian government, the Lithuanian Ministry of Transportation filed a letter with the Department of Homeland Security confirming that the vessel was owned by Lithuania and asking that it be released, but the executive took no further action on the case. Ultimately the Department of Justice (DOJ) took up the case for criminal prosecution. The Lithuanian

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95 See Southway, 198 F.3d at 1214 n.4 (“Lest any confusion exist, we do not hold that the FSIA confers criminal jurisdiction over foreign sovereigns. We simply conclude that because FSIA does not address criminal sovereign immunity, Defendants’ argument that they enjoy criminal sovereign immunity under the FSIA, and thus cannot commit indictable ‘acts’ for purposes of a civil RICO claim, necessarily fails.”).

96 See, e.g., American Bonded Warehouse Corp. v. Compagnie Nationale Air France, 653 F. Supp. 861, 864-65 (N.D. Ill. 1987) (concluding that Air France was subject to suit under RICO because it was engaged in a commercial activity in the same way as any private player in the market would, regardless of the fact that company was majority owned by a foreign sovereign).


98 Id. at 175-76.

99 Id.

100 Id. at 176.

101 Id.
government sought an order quashing the grand jury subpoena. The court declined to consider any of those because they were not appropriate until the motion to dismiss phase.

The U.S. government asserted that the FSIA does not apply to criminal cases, or if it does, then the exception for commercial activity in Section 1605 applied to grant jurisdiction over the vessel. Lithuania asserted that the FSIA applies to both criminal and civil actions and that no exception applied. The court noted a split of authority concerning the scope of coverage of the FSIA, analyzing various district court cases from other circuits, including Mitsui and a case concluding that the FSIA has no criminal application, United States v. Hendron.

The Hendron case involved the criminal prosecution of an officer of a company that was wholly-owned by the Polish government. The defendant was indicted on charges of "conspiracy, importation into the United States of assault weapons, importing arms without a license, and the transaction of business involving proceeds of unlawful activity." The defendant argued that the court should dismiss the indictment against him because during the time that he engaged in the questionable activity, he was doing so in his role as an officer for that state owned company. The district court did an exhaustive analysis of the language used in various provisions in the FSIA, its exceptions to immunity, and its remedies and concluded that the phrasing and design of those provisions implied application to

102 Id. at 174.
103 Deltuva, 752 F. Supp. 2d at 174.
104 Id. at 176.
105 Id. at 180.
106 Id.
107 Id. at 180.
110 Id.
111 Id.
only civil cases.112

In Deltuva, utilizing the textual analysis from Hendron and Mitsui, the court was unable to find any basis in the text of the FSIA itself or its legislative history to support its application to criminal proceedings.113 Further, it relied on the language from Verlinden and United States v. Noriega,114 indicating that the FSIA is only a civil statute.115 Finding no other basis on which to quash the subpoena, the court denied the defendant's motion.116 Again, there was no consideration of an alternate source of criminal sovereign immunity for the Deltuva absent, perhaps, intervention by the executive.117 The docket reflects that the DOJ ultimately withdrew the prosecution and the case was closed.118

B. Cases Addressing Civil Suits on the Basis of Criminal Behavior

After a court addresses whether Section 1604 applies to criminal jurisdiction, it must next address what effect the application of the exceptions in Sections 1605 and 1607 have. Are those exceptions only for civil cases? Even if one assumes that Section 1604 does not include the criminal jurisdiction of the courts, the same question can arise as to whether behavior that is criminal in nature can be the basis for a civil claim under, for example, the commercial activity exception.

It is not entirely clear why there is considerable debate regarding this matter, because when private parties are involved, conduct that is criminal in nature can often be the subject of a civil claim.119 Criminal assault can, for example, be the subject of a civil suit.120 And, fraud, which is criminal, can invalidate a

112 Id. at 974-77.
114 117 F.3d 1206 (11th Cir. 1997).
115 Deltuva, 752 F. Supp. 2d at 178-80.
116 Id. at 180.
117 See id. at 179-80.
118 USCA Judgment as to Notice of Interlocutory Appeal Filed by PC Lithuanian Shipping Company; Voluntarily Dismissed, No. 3:10MC00223 (Feb. 16, 2011).
119 See WAYNE R. LAFAVE, CRIMINAL LAW 15-16 (3d ed. 2000) (discussing the interaction between the criminal law and the civil law).
120 Compare People v. Goetz, 497 N.E.2d 41, 44-45 (N.Y. 1986) (describing
contract in the civil context. A difference in this context for entities that have a sovereign connection would seem to undercut the purpose of the FSIA exceptions because they were meant to provide for suit when the sovereign or sovereign connected party acts just as any other private party would. Yet, courts have repeatedly addressed whether criminal behavior can properly be the subject of civil claims under the FSIA.

Before proceeding to the lower court decisions, there are two U.S. Supreme Court decisions that give significant guidance as to the spectrum of activities characterized as commercial under the


An Arizona appellate court opinion explains this well:

"It is not uncommon to find allegations in civil action complaints that charge defendants with a violation of a criminal statute." ... Indeed, criminal and civil statutes contain different burdens of proof, and whether a defendant is liable civilly based upon certain acts is a separate inquiry from whether he or she may be convicted in a criminal proceeding... As the [appellant] points out, [an Arizona statute] makes it a felony for "[a] person charged with performance of any duty under any law relating to elections [to] knowingly refuse[,] to perform such duty, or... in his official capacity, [to] knowingly act[] in violation of any provision of such law." Yet parties may nevertheless initiate civil proceedings and seek civil remedies for any harm arising out of an election official's action or inaction that also would give rise to criminal culpability....

In addition, there are many "other instances in which civil remedies are permitted for acts which also carry criminal penalties, e.g., wrongful death actions and murder or manslaughter criminal charges and criminal prosecution under [Arizona Statutes] § 45-112 and civil actions for damages for diverting water from a stream."


See In re Grand Jury Proceedings Related to M/V Deltuva, 752 F. Supp. 2d 173, 180 n.3 (D.P.R. 2010) ("The Court also finds it appropriate to note that, even if FSIA were to apply, as the M/V Deltuva was engaged in delivering a commercial shipment of goods to the United States at the time when it was detained, the commercial activity exception to FSIA would likely apply in the instant case to grant this Court subject matter jurisdiction." (citing 28 U.S.C. § 1605(a)(2)).

As the Supreme Court has noted, the FSIA is confusing because, although it defines “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act,” it does not define the term “commercial” itself. In the first decision, Republic of Argentina, et al. v. Weltover, the Court made it clear that the issuance of bonds for sovereign debt purposes is commercial activity if courts correctly divorce the nature of the activity, the issuance of “garden-variety debt instruments,” from its arguably sovereign purpose—a government’s issuance of bonds to back its assumption of the “risk of currency depreciation in cross-border transactions”—a distinction which the FSIA expressly instructs courts to make. The general rule that the Court announced was that commercial activity for purposes of the FSIA occurs whenever a “foreign government acts, not as a regulator of the market, but in the manner of a private player within it.”

In the second case, Saudi Arabia v. Nelson, the Court concluded that when a Saudi hospital used the police to punish and torture a would-be whistleblower whom the hospital had recruited from the United States, it was acting in a distinctly sovereign capacity because it was using its police power. The court made this decision over the objection of other justices who saw the running of a hospital and the punishing of whistleblowers as activities in which any private player in the market could engage. Justice White, in his concurrence in judgment, posited that if the hospital had used a gang of thugs, rather than the police,

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124 28 U.S.C. § 1603(d) (2006). The Section goes on to state: “The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” Id.
126 Id.
127 Id. at 615.
128 Id. at 609.
129 Id. at 611.
130 Id. at 614.
132 Id. at 360-61.
133 See, e.g., id. at 366 (White, J., concurring); id. at 378-79 (Stevens, J., dissenting).
the majority’s conclusion might have been different.\textsuperscript{134}

For purposes of this discussion these two decisions are relevant because together they caution courts to disregard purpose or motivation to the greatest extent possible, and because in \textit{Nelson} it was not the wrongful, arguably criminal, nature of the activities that made the FSIA’s exceptions inapplicable, but rather the fact that the majority considered it a police power, and therefore, sovereign activity.\textsuperscript{135}

Turning to decisions in the lower courts, there is a debate about whether the illegal nature of activities disqualifies them from falling within the FSIA’s commercial activity exception. At one end of the spectrum is the view espoused most recently in a case in the Southern District of New York against several Saudi organizations and Saudi princes for giving money to charitable organizations that supported terrorist activities, \textit{Burnett v. Al Baraka Inv. & Dev. Corp.}\textsuperscript{136} There, the court concluded that, in order for conduct to satisfy the commercial activity exception under the FSIA, it must be a commercial activity, which a private party can engage in “lawfully.”\textsuperscript{137} It based this holding substantially on the Second Circuit’s decision in \textit{Letelier v. Republic of Chile},\textsuperscript{138} wherein that court rejected the conclusion that a Chilean airline’s transportation of individuals and explosives to carry out an assassination of a political opponent on U.S. soil was a commercial activity.\textsuperscript{139} The \textit{Letelier} court also concluded that the carriage of passengers and materials is a commercial activity, but that nucleus of fact was not the heart of the plaintiff’s allegations against the airline.\textsuperscript{140} Rather, the plaintiff accused the airline of conspiring to engage in state-sponsored terrorism to assassinate a political opponent.\textsuperscript{141} This reasoning seems hopelessly at odds with the FSIA’s strict prohibition on conflating

\begin{itemize}
\item \textsuperscript{134} \textit{Id.} at 366-67 (White J., concurring).
\item \textsuperscript{135} \textit{Id.} at 361 (”However monstrous such abuse undoubtedly may be. . . . a foreign state’s exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.”).
\item \textsuperscript{136} 349 F. Supp. 2d 765, 792-94 (S.D.N.Y. 2005).
\item \textsuperscript{137} \textit{Id.} at 793.
\item \textsuperscript{138} 748 F.2d 790 (2d Cir. 1984).
\item \textsuperscript{139} \textit{Id.} at 797.
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} \textit{Id.}
\end{itemize}
the purpose of the activity with its nature for purposes of determining whether it is commercial.

Over ten years after *Letelier*, in *Burnett*, the district court seemed to ignore both Supreme Court precedent that had made the nature versus purpose distinction clearer, as well as a recent amendment to the FSIA that permitted suits on the basis of state-sponsored terrorism. Instead, the *Burnett* Court emphasized that, even though the Second Circuit had concluded that in the domestic context money laundering is a "quintessential economic activity," it is simply not the case for the FSIA statutory scheme. *Burnett*’s holding is puzzling and troubling on two levels. First, if fully implemented, *Burnett* would require courts to go through the difficult threshold step in commercial activity cases of determining whether the activity in question is one that a party can engage in lawfully. This requirement finds no basis in the FSIA’s text, its legislative history, or other case law. Second, it disconnects the FSIA from other common law civil claims in a way that is not warranted. Although, for Article III purposes, claims finding jurisdiction under the FSIA arise under federal law, the claims brought under the commercial activity section find their bases in domestic law, i.e., state contract/tort law or federal/state statutes,

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142 *Burnett*, 349 F. Supp. 2d at 793.

143 See id. (demonstrating that this question will be part of the analysis by arguing that "[t]he Second Circuit has made very clear that, for purposes of the FSIA, a commercial activity must be one in which a private person can engage lawfully").

144 See, e.g., Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (2006) (stating that a foreign state will be subject to liability if plaintiff’s cause of action arose from commercial activity carried out by the foreign state); Republic of Argentina v. Weltover, 504 U.S. 607, 611 (1992) ("[O]ur analysis is therefore limited to considering whether this lawsuit is (1) ‘based . . . upon an act outside the territory of the United States’; (2) that was taken ‘in connection with a commercial activity’ of Argentina outside this country; and (3) that ‘caused a direct effect in the United States.’"); Callejo v. Bancomer, 764 F.2d 1101, 1108, (5th Cir. 1985) ("In determining whether the commercial activity exception applies, the critical question is usually whether the relevant activity is commercial or sovereign in nature—whether it is a jure gestionis or a jure imperii, a private or a public act."); H.R. Rep. No. 94-1487, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6614-15 (stating that what is critical in determining whether a sovereign state falls under the commercial activity exception is the activity itself).

which do often permit civil and criminal claims on the same set of facts.  

On appeal from the district court’s decision in *Burnett*, the Second Circuit cited *Letelier*, but then rejected that court’s reasoning because applying the FSIA’s tort and commercial activity exceptions to the Saudi princes’ terrorist funding activities would have conflated the nature versus purpose distinction. Specifically, the plaintiffs in *Burnett* had merged the purpose of the act, which was funding terrorism, with the nature of the act, which was giving away money. This reasoning would have arguably reversed the holding in *Letelier*, because the carriage of persons and materials could have been separated from the assassination. Ultimately, however, the Second Circuit declined to consider whether a criminal act (e.g., money laundering) could ever be considered commercial for the purposes of the FSIA. It concluded that the Saudi Princes’ acts fell outside of the commercial activity exception because giving money away to charity is not by nature a commercial activity.

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148 *See id*. ("This argument [i.e. the Princes' funding of terrorist groups was a commercial activity] fails because 'it goes to purpose, the very fact the Act renders irrelevant to the question of an activity's commercial character.'").

149 *See id* at 92. It is also notable that prior to the Second Circuit’s holding, another case in the Southern District of New York directly disagreed with the *Burnett* court’s holding. *Kensington Int’l Ltd. v. Societe Nationale De Petroles du Congo*, 05 Civ. 5101 (LAP), 2006 U.S. Dist. LEXIS 14264, at *40-42 (S.D.N.Y. Mar. 31, 2006), *rev'd in part, vacated in part sub nom.*: *Kensington Int’l Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007). At issue in that case was the misappropriation of natural resources, namely, stolen oil from the Congo. 2006 U.S. Dist. LEXIS 14264 at *2-4. The Second Circuit cursorily dismissed the issue of whether the oil was stolen as irrelevant to its analysis, which turned on whether the cause of action was based on an activity in the United
The Ninth Circuit Court of Appeals has perhaps the most convincing analysis on this issue. The primary case, Adler v. Federal Republic of Nigeria, involved an illegal agreement between Nigerian officials to convert Nigerian government funds for their own personal use. The plaintiff, an American citizen, sued the Nigerian government for the money he had expended to bribe various officials. The government claimed that activity for an illegal purpose could not be commercial in nature within the meaning of the FSIA’s commercial activity exception. The Ninth Circuit rejected the defendant’s contentions.

The first noteworthy aspect of the Ninth Circuit’s decision is that the court did not appear to think it necessary to consider the breadth of Section 1604 and the FSIA’s criminal jurisdiction before proceeding to the question of whether otherwise criminal acts could form the basis for a commercial activity in a civil action against a foreign state. Instead, the Circuit focused its attention on the nature of the activity, which, it emphasized, was in conformity with the Supreme Court’s relevant jurisprudence. Where the activity is of such a nature that any private player could engage in it, then the state is acting as a private player and not as a “regulator” or in another specifically sovereign capacity. Therefore, the key question is whether the activity is “the type... by which a private party engages in trade and commerce.” Thus, the Circuit ultimately concluded: that “[w]hen the Nigerian officials offered [plaintiff] a cash commission for participating in an enterprise for mutual advantage they did essentially what every private party does in the open market (notwithstanding the fact...
that their precise undertakings were illegal.” The Ninth Circuit maintained, however, that “[n]ot all criminal activity falls within the FSIA’s commercial activity exception.” It cited cases in which murder, assassination, and the making of unauthorized telephone calls were not considered commercial activities.

Although the Supreme Court’s explication of the FSIA’s nature versus purpose distinction was grounded more on the premise (or distinction) that commercial activity occurs when the sovereign-related entity is acting as any other private actor in the market, the Ninth Circuit’s holding that criminal motives can be also largely irrelevant to the commercial nature of activity is consistent with that framework. Civil actions for otherwise criminal behavior, which is commercial within the meaning of the FSIA’s provisions, do not interfere with public functions of the state, and therefore do not violate the spirit of the commercial activity exception. Part of what makes the Ninth Circuit’s analysis helpful—and what other courts in civil RICO cases should consider—is that it focuses more on the acts in question than on the actors. With some exception, the FSIA itself

159 Id. at 875-76.
160 Id. at 875.
161 Berkovitz v. Iran, 735 F.2d 329, 332 (9th Cir. 1984).
162 MCI Telecomm. Corp. v. Alhadhood, 82 F.3d 658, 664 (5th Cir. 1996).
164 Alder, 219 F.3d at 875.
165 Republic of Argentina v. Weltover, 504 U.S. 607, 610 (1992) (“In accord with that description, we conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are “commercial” within the meaning of the FSIA.”).
166 E.g., Alder, 219 F.3d at 875 (“The fact that the contract was for an illegal purpose, and therefore was unenforceable, does nothing to destroy its commercial nature.”).
167 See Foreign Sovereign Immunity Act, 28 U.S.C. § 1602 (2006) (“The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would . . . protect the rights of both foreign states and litigants.”).
168 See Alder, 219 F.3d at 874 (“It also instructs that ‘the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.’” (quoting 28 U.S.C. § 1603(e) (2006))).
focuses primarily on the activity when determining whether suit is permitted. It is not productive to engage in a rather circular debate in the FSIA context on whether the actor could be indicted. Furthermore, in many cases, there will not even need to be commentary on whether the actions of a foreign sovereign could constitute a crime because the criminal and civil causes of action may have materially different standards or burdens of proof.

This also makes sense in light of the FSIA's terrorism exception, which allows private citizens to sue foreign officials for compensation for death and property damage caused by terrorist activities abroad. In rejecting the argument that the "rule of lenity" applies to the terrorism exception, the D.C. Circuit made a compelling common-sense argument:

[Defendant] fails to recognize that it is a defendant in a case brought under the state-sponsored terrorism exception of FSIA, which waives immunity only for civil claim. The fact that the state-sponsored terrorism exception incorporates a definition from a treaty that covers 'penal matters' does not change the fact that [defendant] here is susceptible to solely civil penalties. Because FSIA is not a criminal statute, and [defendant] is not a criminal defendant, the rule of lenity has no application.

Most of the debate about the "criminality" of actions could be put aside unless the criminal nature of a set of facts in a civil claim has a significant implication or implications regarding, perhaps, the interference with a sovereign's immunity for other claims or prosecutions. In the commercial activity cases described above,

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170 See Southway v. Cent. Bank of Nigeria, 198 F.3d 1210, 1219 (10th Cir. 1999) (holding that it was irrelevant for the purposes of the FSIA's commercial activity exception whether the defendant's alleged racketeering was criminal).


172 Vine v. Iraq, 459 F. Supp. 2d 10, 16 (D.D.C. 2006) ("The most recent of the [FISA] exceptions . . . provides that a foreign state 'shall not be immune from the jurisdiction of courts of the United States or of the States in any case' where 'money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act.'"), rev'd sub nom. Republic of Iraq v. Beaty, 556 U.S. 848 (2009).

173 Id. at 18 n.6.
no court has been able to point to a particularly salient implication, although that may ultimately depend on how one decides to treat the idea of restrictive criminal sovereign immunity.

C. Criminal Law Violations Incidental to Official Conduct?

There is another class of cases in which a foreign official, or someone claiming to be, has violated domestic criminal law by performing an act that he or she argues falls under the cloak of official authority or within the range of his or her official functions.

In one type of case, the official has violated U.S. law by exercising discretion that might exempt her from suit under the tort provisions of the FSIA. The FSIA’s discretionary exemption comes from the Federal Tort Claims Act (FTCA), which it is interpreted in line with, and provides that the provision permitting tort suits against a foreign state or its agencies shall not apply to “any claim based upon the exercise or performance or failure to exercise... a discretionary function regardless of whether the discretion be abused.”

Courts examining cases in which illegal conduct is alleged to have been “discretionary” in this sense have exhibited discomfort with the circumstances and found various ways to rule that exemption inapplicable. In Letelier v. Republic of Chile, the United States District Court of the District of Columbia concluded that criminal activity—the Pinochet government’s brutal killing of Chile’s former ambassador to the United States on U.S. soil—could not qualify the official for the discretionary function exemption, because, as the court bluntly and broadly concluded: “there is no discretion to commit, or to have one’s officers or

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174 Joseph v. Office of the Consulate Gen. of Nigeria, 830 F.2d 1018, 1026 (9th Cir. 1987) (citing Olsen v. Government of Mexico, 729 F.2d 641, 646-47 (9th Cir. 1984), abrogated by Joseph v. Office of the Consulate Gen. of Nigeria, 830 F.2d 1018 (9th Cir. 1987)) (“The existence of a discretionary function under the FSIA is generally analyzed under the principles developed pursuant to the Federal Tort Claims Act’s (“FTCA”) discretionary function exception.”).


agents commit, an illegal act.”

Similar reasoning was applied in Liu v. Republic of China, in which a widow sued for wrongful death on the basis of her husband’s assassination on U.S. soil by Taiwanese intelligence authorities. In examining the assassin’s behavior under the discretionary function exemption, the court employed the Supreme Court’s two-part test under the FTCA, asking (1) if there was an element of choice in the official’s actions and (2) if the decision was grounded in social, economic, or political policy. Relying in part on Letelier’s reasoning, the court concluded the assassin had no discretion to violate the Republic of China’s rule against murder, and therefore the defendant failed on the first prong of the test.

In the case of Gerritsen v. de la Madrid Hurtado, the plaintiff alleged tort causes of action for assault and battery on the basis of being assaulted with a weapon, struck and kidnapped by consular employees after distributing leaflets critical of the Mexican government in front of the Mexican consulate. The Ninth Circuit ignored the consular employees’ criminal or illegal conduct, concluding instead that they could not be considered discretionary because they were “operational” activities as opposed to “planning level” decisions or “decisions to establish

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177 Id. at 673 (“While it seems apparent that a decision calculated to result in injury or death to a particular individual or individuals, made for whatever reason, would be one most assuredly involving policy judgment and decision and thus exempt as a discretionary act under section 1605(a)(5)(A), that exception is not applicable to bar this suit. As it has been recognized, there is no discretion to commit, or to have one’s officers or agents commit, an illegal act. . . . Whatever policy options may exist for a foreign country, it has no ‘discretion’ to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.” (citing Hatahley v. United States, 351 U.S. 173, 181, (1956); Cruikshank v. United States, 431 F. Supp. 1355, 1359 (D. Haw. 1977)).

178 892 F.2d 1419 (9th Cir. 1989).
179 Id. at 1421.
180 Id. at 1431.
181 Id.

183 Id. at 1513.
government policy.\textsuperscript{184}

The proposition that emerges from the above cases is that, when behavior is violent or destructive, the discretionary function exemption is more likely to be held inapplicable. For example, in the case of \textit{Joseph v. Office of the Consulate General of Nigeria},\textsuperscript{185} which did not involve a criminal prosecution or conduct alleged to be criminal, the Ninth Circuit concluded the "purely destructive" behavior of consular employees of Nigeria living in a rental property was not considered exempt when the damage that they caused to the property was the basis for claims of trespass, waste and conversion.\textsuperscript{186} In contrast, in \textit{MacArthur Area Citizens Ass'n v. Republic of Peru},\textsuperscript{187} a citizen group attempted to sue the Peruvian government for turning a building in a residential zone of the District of Columbia into a Navy Chancery in violation of public law and regulation.\textsuperscript{188} The court concluded that the discretionary exemption applied, and in so doing, decided that \textit{Letelier}'s holding that criminal activity could not be discretionary was inapplicable because (1) the D.C. government had not cited Peru for any criminal violation of zoning regulations and (2) the criminal act did not rise to the level of culpability of an act \textit{malum in se}.\textsuperscript{189}

The Ninth Circuit's decision in \textit{Risk v. Halvorsen}\textsuperscript{190} attempted to make the distinction between the destructive and violent crimes and the more \textit{malum in prohibitum} offenses even clearer.\textsuperscript{191} In that

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\textsuperscript{184} \textit{Id.} at 1517-18 (quoting Olsen v. Government of Mexico, 729 F.2d 641, 647 (9th Cir. 1984) (citations omitted), \textit{abrogated} by Joseph v. Office of the Consulate Gen. of Nigeria, 830 F.2d 1018 (9th Cir. 1987) ("This circuit employs a test which distinguishes between the 'planning level' of governmental activity and those acts designed to carry out policy, the 'operational level.' Because decisions at the planning level establish governmental policy, they are not actionable. But where decisions occur at the operational level, the discretionary function exemption provides no protection from liability even though such decisions or acts may involve elements of discretion.").

\textsuperscript{185} 830 F.2d 1018 (9th Cir. 1987).

\textsuperscript{186} \textit{Id.} at 1026-27. The consular employees inhabiting the property had broken or removed various appliances and fixtures. \textit{Id.} at 1020.

\textsuperscript{187} 809 F.2d 918 (D.C. Cir. 1987), \textit{vacated in part}, 823 F.2d 606 (D.C. Cir. 1987).

\textsuperscript{188} \textit{Id.} at 919, 922 n.4

\textsuperscript{189} \textit{Id.} at 921-23, 922 n.4.

\textsuperscript{190} 936 F.2d 393 (9th Cir. 1991), \textit{aff'g} Risk v. Kingdom of Norway, 707 F. Supp. 1159 (N.D. Cal. 1989).

\textsuperscript{191} \textit{Id.} at 395-97.
}
case, the plaintiff brought a tort suit against Norway and Norwegian consular officials in the United States for allegedly conspiring to assist his ex-wife to leave the United States with his two children in violation of a custody order from the California Superior Court. The order granted the plaintiff and his ex-wife joint custody and prohibited them from leaving the country with the children. Nevertheless, the consulate had issued documents permitting the plaintiff's ex-wife and children to do so. Upon Norway's assertion of the discretionary function, the plaintiff made an ultra vires argument that acts that would constitute crimes in the United States could not be discretionary functions.

The court found the discretionary function exemption to apply. Again, the court seemed unconcerned with the actual criminality of the acts, but it did note that certain purely destructive or particularly heinous acts could not be considered discretionary functions. The court determined that an act that was purely destructive—i.e., the destruction of property used for a consular residence—could not be brought within the discretionary exemption because such activity hardly falls within the range of activity typically engaged in to run a consular residence. That was also true of violent and heinous acts, such as the murders of a former Chilean official and the political opponents of the Republic of China on U.S. soil, sanctioned by neither U.S. nor international law. The Norwegian officials' actions, which amounted to the issuance of travel documents to Mr. Risk's ex-wife, were not so heinous and destructive as to disqualify them from the discretionary exemption.

Should foreign sovereigns also have license to authorize
violations of federal law? In the *United States v. Kashmiri*\(^{203}\) the defendant was charged under the U.S. criminal code with the crime of providing material support to terrorists and terrorist organizations behind the November 2008 attacks on Mumbai, India.\(^{204}\) The defendant argued that he had acted under the authority of Pakistan intelligence authorities, which are charged with the protection of Pakistan and which enjoy sovereign immunity under the FSIA.\(^{205}\) The defendant argued that, according to the "public authority defense," he was derivatively protected by this sovereign immunity.\(^{206}\) The contours of a public authority defense are that a defendant who acts "in reliance" on official authority and "does not act knowingly" is not guilty.\(^{207}\) The defendant acts pursuant to public authority if the defendant is (1) told his behavior is lawful; (2) the individual so informing the defendant is an official of the United States; (3) the defendant relies on the official's statement; and (4) the defendant's reliance is reasonable.\(^{208}\) The defendant thus attempted to subpoena various documents from the Department of State to show that Pakistan had authorized his conduct.\(^{209}\)

The district court soundly rejected this defense: "Simply put, Defendant cannot rely on the authority of a foreign government agency or official to authorize his violations of United States federal law."\(^{210}\) The court also noted that the defendant cited no


\(^{204}\) Id. at *2.

\(^{205}\) Id. at *3-5.

\(^{206}\) Id. at *3-4.

\(^{207}\) Id. at *6.

\(^{208}\) Id. at *2.


\(^{210}\) Id. at *5-6; see United States v. Rector, 111 F.3d 503, 506-07 (7th Cir. 1997), overruled on other grounds, United States v. Wilson, 169 F.3d 418, 427 n.9 (7th Cir. 1999). The court did not discuss an analogous doctrine (the McLeod Rule), which was ultimately codified into the Habeas Corpus Statute, 28 U.S.C. § 2241 (1789), a law developed to shield officials acting under foreign sovereign orders from prosecution. See David J. Bederman, *Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 EMORY L.J. 515, 533-36 (1992) [hereinafter Bederman, *Cautionary Tale*] (describing how the statute providing for habeas relief to individuals acting under the orders of a superior had evolved to require a showing that
authority for the proposition that an individual or entity of a foreign government could authorize criminal conduct occurring within the United States.211 In addition, the court held, the defendant had not presented any evidence that a federal official had authorized his conduct.212

IV. New Perspectives on Old Ambiguities

Whatever the arguments presented for and against the FSIA’s criminal coverage, neither the statutory text nor the legislative history provide a clear answer to this important question. As the majority of courts have observed, the FSIA is essentially written as a civil statute.213 The most commonly relied upon provision in this respect is 28 U.S.C. § 1330(a), which grants district courts original jurisdiction over foreign states, as defined in the FSIA, expressly for “nonjury civil actions.”214 All of its other provisions, including the exceptions to immunity and the provisions on attachment of property, are worded to function in the civil context.215 In addition, a canvassing of the FSIA’s legislative history shows that the closest Congress came to a mention of criminal activity is in the antitrust context, but even there it is not clear whether it was referencing civil or criminal cases.216 Recognizing these facts and the ambiguities explored in the case

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212 Id.
213 See, e.g., Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983) (“[T]he Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.”).
214 Foreign Sovereign Immunities Act, 28 U.S.C. § 1330(a) (2006) (“The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.”).
215 United States v. Hendron, 813 F. Supp. 973, 974-75 (E.D.N.Y. 1993) (analyzing a number of provisions in the FSIA and concluding that the “[a]ct contains a panoply of provisions that are consistent only with an application to civil cases and not to criminal proceedings”).
216 DELLAPENNA, supra note 43, at 37-41.
law described above, this article argues that the Supreme Court’s approach to interpreting the FSIA in the recent case of Samantar provides a useful heuristic for rethinking the debate above and the need for some strong clarification concerning the FSIA’s criminal coverage. As may one day be the case regarding criminal coverage, Samantar resolved a fairly longstanding debate (of approximately 20 years) amongst the circuits regarding whether the FSIA covered foreign officials.

While the Supreme Court decisions interpreting the FSIA have not been devoid of intense textual analysis, Samantar does a particularly thorough job of analyzing the text and structure of the statute. The defendant in the original case was a former Somalian leader, Muhammad Samantar, who had been sued by victims and the families of victims of torture and other inhuman and illegal treatment under the Barre regime in which Samantar held a number of high ranking posts. Samantar v. Yousuf, 130 S. Ct. 2278, 2282-84 (2010). The district court had ruled that Samantar was entitled to FSIA immunity, because he could be considered part of a foreign state, but the Court of Appeals for the Fourth Circuit reversed. Id. at 2282-83. Ultimately, the Supreme Court framed the debate as whether, despite the absence of an express basis for coverage of foreign officials in the FSIA’s text, those individuals could nonetheless obtain immunity because they could be considered part of the “political subdivisions,” “agencies” or “instrumentalities” that comprise a “foreign state” as defined under the FSIA’s Section 1603.

The Court determined that all of the language used in 1603 pointed to an interpretation of “agency or instrumentality” as referring to entities only, and not to both entities and natural persons. Id. at 2287-88. Nothing in the legislative history contradicted this interpretation, and the Court concluded that where Congress had, indeed, wanted to refer to officials at other points in the statute, it had done so expressly. Id. at 2287-89. The history and purpose of the FSIA also did not lend support to the argument that officials were governed by the statute, because the Court found evidence that

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218 Id. at 2282-83.
219 Id. at 2285-86.
220 Id. at 2287-88.
221 Id. at 2287-89.
state immunity and official immunity were not necessarily co-extensive in every case.\textsuperscript{222} It also seemed implausible to the Court that Congress would codify immunity for official acts into the FSIA "without so much as a word spelling out how and when individuals are covered."\textsuperscript{223} Thus, while the argument that governmental personnel acting in their official capacity would have immunity made logical sense, it was a less than compelling argument that the FSIA codified that rule without saying so.\textsuperscript{224}

The main thrust of the Supreme Court’s conclusion against the inclusion of foreign government officials in the FSIA’s definition of a foreign state was that the FSIA is a "careful[ly] calibrat[ed]" statute in a number of respects and, while it did not “expressly foreclose” an alternate reading, its silence on natural persons should not be interpreted as a mandate for their coverage.\textsuperscript{225} Quite to the contrary, in the Court’s view, if the silence reflected anything it was that Congress did not consider the issue, because at the time of the FSIA’s enactment, official immunity for civil damages under statutes like the Alien Tort Statute was simply not a problem.\textsuperscript{226} As one commentator notes, many of the early Alien Tort cases against foreign officials seemed to simply ignore the possibility of the type of FSIA immunity that \textit{Samantar} ultimately claimed.\textsuperscript{227}

There is much that this approach has to lend to the issue of the FSIA’s criminal coverage as well. First, as with the issue of foreign officials, there is simply no express basis in the text (nor in the legislative history) to suggest that the FSIA is meant to cover

\textsuperscript{222} \textit{Id.} at 2288-91.
\textsuperscript{223} \textit{Samantar}, 130 S. Ct. at 2291.
\textsuperscript{224} See \textit{id.} at 2285, 2290-91.
\textsuperscript{225} \textit{Id.} at 2288-89.
\textsuperscript{226} \textit{Id.} at 2291-92 (2010). In Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), the Second Circuit is considered to have revived the Alien Tort Statute from historical obscurity. \textit{See} William S. Dodge, \textit{The Historical Origins of the Alien Tort Statute: A Response to the "Originalists."} 19 Hastings Int’l L. Rev. 221, 222-23 (1996) (discussing the Alien Tort Statute’s status as one of the “most widely discussed provisions in modern international law” since Filartiga’s emergence). But Filartiga is not concerned with former official immunity, and the issue does not appear to have played a significant role, even though it could have. \textit{See Filartiga}, 630 F.2d at 880.
\textsuperscript{227} \textit{Dellapenna}, supra note 43, at 326-38 (discussing Alien Tort Statute cases through Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989)).
criminal immunity at all. Key words such as “criminal,” “crimes” and “prosecution” are conspicuously absent. While Section 1604 does not foreclose a reading that criminal immunity is one type of immunity included, but not excepted, under other sections of the Statute, and, indeed, the provision could be read that broadly, several things point in favor of reading criminal immunity out of Section 1604 altogether. As with the coverage of officials, the structure of the statute makes it quite unbelievable that Congress would have meant for Section 1604 to grant immunity from all criminal prosecutions without making it clear that none of the other provisions in the statute, such as the exceptions to immunity, apply to criminal prosecutions. It is enticing to argue, as courts have done, that the implication of the language used in many of the provisions in the FSIA is that they were intended only for civil actions, but again it seems unsatisfying to say that Congress would want prosecutors and courts to determine such a key fact by implying it from the text. Even the provision that uses the word “civil” expressly, Section 1330(a), does not require a reading that excludes criminal jurisdiction, but rather can be read to confer federal jurisdiction where Congress felt it necessary to clarify how it would work with the diversity statute. As the Supreme Court has noted:

FSIA amended the diversity statute to delete references to suits in which a ‘foreign stat[e]’ is a party either as plaintiff or defendant, see 28 U.S.C. §§ 1332(a)(2) and (3) (1970 ed.), and added a new paragraph (4) that preserves diversity jurisdiction over suits in which foreign states are plaintiffs. As the legislative history explained, ‘[s]ince jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous.’ H. R. Rep., at 14; S. Rep., at 13.

Therefore, regarding Section 1330(a)’s wording, as with

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231 Id. at 438.
official immunity, it is perhaps most plausible to conclude that Congress was not thinking in terms of criminal jurisdiction at all. As the section below will discuss, like with official immunity, criminal prosecutions of one state in the courts of another were not a problem at the time of enactment. Indeed, the famous "Tate Letter" from the State Department's legal advisor, which outlined the change from a policy of granting absolute immunity to foreign states in U.S. courts to granting restrictive immunity and which has served as the cornerstone of U.S. policy in this area, speaks in terms of commercial activities and foreign trade, stating "the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their right determined in the courts." The implication of this language is that the State Department was only referring to civil actions because they were the primary concern at that time.

The doctrine of stare decisis does not apply to methods of statutory construction, and so the fact that the FSIA was construed in one way in Samantar does not mean that it must be construed similarly in other cases regarding its coverage. Samantar's logic regarding the FSIA's coverage, however, has powerful resonance in the debate over its criminal coverage. Samantar shows that the FSIA is not as exclusive as once thought and that it may be strictly construed by courts to exclude even the most logical interpretations. Also, Samantar can teach lessons about whether it is desirable for a court, as opposed to a legislature, to resolve such a key question, without leaving a comprehensive rule in its place. In the Samantar decision, the Supreme Court suggested alternatives that might provide foreign officials protection from suit, but none provided the coherence or clarity that the FSIA once did. Since the decision's issuance,

232 See infra Part V.B-C.
233 Letter from Jack B. Tate, Acting Legal Advisor, Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), in DEP'T ST. BULL. 984, 985.
236 Id. at 2291-92.
commentators have also set forth different views on whether the executive should resume control of official immunity interpretations, whether courts should develop a body of common law on their own, or whether courts should turn to other procedural devices to resolve the issue. Therefore, Samantar teaches not only a method for resolving ambiguities, but also offers a cautionary tale about doing so without proffering an alternative.

This lack of clarity or certainty as to the rule governing immunity may be more dangerous in the criminal context than in the civil, because in the criminal context issues of personal liberty or moral culpability may be at stake. Criminal law in the United States and around the world is, in many respects, designed to increase certainty as to what conduct will beget punishment.

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237 Peter B. Rutledge, Samantar, Official Immunity, and Federal Common Law, 15 LEWIS & CLARK L. REV. 589, 597 (2011) ("While Samantar deserves some nominal praise for resolving the immediate circuit split, the decision is deeply unsatisfying. The theoretical underpinnings of this exercise of federal common law power are woefully underdeveloped. Moreover, even assuming that the court properly exercised its common-law power in this setting, the decisions leaves unanswered a host of questions about the scope of individual immunity and its relationship between that immunity and the FSIA’s framework. Finally, the decision renews (but does not resolve) the old wars over the proper branch of government to control the immunity determination. In these respects, Samantar may have well have unleashed more doctrinal problems than it resolved.").

238 See Tom Baker et al., The Virtues of Uncertainty in Law: An Experimental Approach, 89 IOWA L. REV. 443, 468-70 (2003-2004) (discussing mechanisms for increasing certainty in areas of criminal law). The authors explained:

There are many rules in criminal law that are explicitly designed to address uncertainty with respect to the size of a sanction. These rules follow in part from the fundamental principle that an individual is entitled to know in advance the content of criminal prohibitions as well as the sanctions for violating them. The prohibition on retroactive changes in the criminal sanctions provides a paradigmatic example. International documents, such as Section 11(2) of the Universal Declaration of Human Rights and Section 7(1) of the European Convention of Human Rights, prohibit the imposition of retroactive sanctions for new offenses, or retroactively increasing the sanctions for existing offenses. Similar provisions can be found in numerous constitutions, including in Article I, Sections 9 and 10 of the United States Constitution, Article 103(2) of the German Constitution, and in Section 11(g) of the Canadian Charter of Rights and Freedoms. A related principle of criminal law—the principle of lenity—also increases the certainty of the criminal sanction. According to the principle of lenity, a criminal statute must be strictly construed and any doubt regarding the size of the sanction must be resolved in favor of the defendant. Finally, one
decision by a court that terminates any link between the FSIA and criminal immunity, offering nothing more than some vague guidance for future cases, would strike at the heart of this rule of certainty.

V. Resolving Ambiguities

A. The General Debate

The above analysis is not intended to be exhaustive, nor entirely conclusive on the issue of what type of amendment to adopt to clarify the FSIA’s treatment of criminal jurisdiction. Nevertheless, three issues should be apparent. First, there is no clear indication that the FSIA was meant to confer or deny immunity for crimes. Second, there is nothing in a criminal act per se that disqualifies it from being otherwise commercial for purposes of a civil suit under the FSIA and nothing that similarly disqualifies it from forming the basis for other tests under the FSIA, for example, by way of the expropriation or discretionary exemption under the tort provision. Third, the FSIA provides no guidance on how to separate criminal acts, as courts have done, as being of a certain nature (i.e., particularly heinous or destructive) such that they are disqualified under the FSIA from constituting, for example, commercial behavior, or a valid exercise of official discretion.

On some level, the FSIA’s exceptions were meant to permit litigation against a foreign state and its instrumentalities that any ordinary person could bring against another.239 To exclude behavior that is, in another dimension, criminal would ferociously undercut the scope of those provisions and the purpose of the FSIA, leaving private litigants with no civil recourse for a number of contractual violations and tortuous acts because they might also be criminal.240 An amendment to clarify this generally might be

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239 See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439-40 (1989) ("Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States . . . ").

240 See id.; see also Alder v. Federal Republic of Nigeria, 219 F.3d 869, 875 (2000)
prudent, but not altogether necessary, especially if FSIA is amended to clarify that it does not include criminal jurisdiction. If it becomes clear that the FSIA has no bearing on criminal actions, then it may become easier to conclude that the FSIA does not exclude civil actions based on illegal acts.

Nor is an amendment to the FSIA concerning the third dilemma, to clarify when criminal conduct is so destructive that it loses its commercial nature or is so heinous that it cannot be discretionary, entirely necessary. The FSIA already contains a definition of commercial conduct that courts have adapted to suit cases in which the criminality of otherwise commercial conduct is at issue, and these questions are best left to courts to determine on a more fact-specific basis by developing and refining their own tests. That approach avoids forcing Congress to make any unnecessarily awkward policy decisions regarding whether sex-trafficking can be commercial in nature or whether knowingly removing consular personnel before they can be criminally prosecuted for, e.g., child molestation, can be an exempt discretionary act by a high-ranking consular official.

With regard to the question of criminal jurisdiction itself, a clarifying amendment or a separate statute is needed. Coverage of criminal behavior is the primary issue affecting all of the debates described above. In drafting an amendment, Congress should consider several areas of background information.

**B. International Law**

The FSIA codified international law at the time of its enactment as to the immunity of states and their subdivisions from the civil jurisdiction of U.S. courts. Therefore, Congress must consider the state of international law regarding municipal or domestic criminal prosecutions of foreign sovereigns or immunity-derivative institutions associated with them; how that state of international law is, if at all, interpreted or reflected in our own

(“A contract for services is plainly commercial in nature. The fact that the contract was for an illegal purpose . . . does nothing to destroy its commercial nature.”).


present law; and how the state of international law is changing or evolving and the implications this should have on any amendment.

Criminal prosecutions of foreign states and associated entities in the courts of other countries typically have long been seen as contrary to international law. The United Nations Convention on the Jurisdictional Immunities of States and their Property, which tracks many of the exceptions to immunity that are contained in the FSIA, appears to be solely civil in nature, and the General Assembly understands it as such. Foreign sovereign immunity statutes of other nations with common law systems, including the United Kingdom, Canada, Australia, and

243 The absolute immunity of states, at least concerning prosecutions of heads of state and diplomatic ministers, was confirmed by the International Court of Justice (ICJ) in the Arrest Warrant of 11 April 2000, which involved a warrant for arrest of the Minister of Foreign Affairs of the Congo by Belgian authorities, pursuant to their universal jurisdiction statute for crimes against humanity. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 1, ¶ 51-61 (Feb. 14). The ICJ observed that “in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as Head of State, Head of Government and Minister of Foreign Affairs, enjoy immunities from jurisdiction in other States both civil and criminal.” Id. ¶ 51. In a 2009 Resolution on the Immunity from Jurisdiction of the State and of Persons who Act on Behalf of the State in Case of International Crimes by the Institute of International Law, those involved in the debate could not agree on the assimilation of an exception to the immunity rationae materiae (or conduct based immunity) for grave human rights violations by officials. See Annyssa Bellal, The 2009 Resolution of the Institute of International Law on Immunity and International Crimes: A Partial Codification of the Law, 9 J. INT’L CRIM. JUSTICE 227, 239-41 (2011) (describing the debate). In other words, if officials cannot obtain immunity for heinous acts, states should not be able to, either. Id. But, even as the debate is described, it concerns immunity from the civil jurisdiction of foreign courts for foreign states themselves. Id.; see also, Inst. of Int’l L., Third Commission, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes, arts. II-IV (2009) [hereinafter Resolution on Immunity], available at http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf; ELEANOR WYLLS ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS 15 (1933) (referring to exceptions from immunity as suits by private parties against state-associated entities but not noting any similar exception for criminal prosecutions).


245 State Immunity Act, 1978, c. 33, § 16(4) (noting that the part of the act applying to proceedings against a state in the United Kingdom does not apply to criminal proceedings).

246 State Immunity Act, R.S.C. 1985, c. S-18 (“This Act does not apply to criminal proceedings or proceedings in the nature of criminal proceedings.”).

247 Foreign State Immunities Act 1985 (Cth) pt.1, s.3 (Austl.) (explaining that
Singapore, also expressly indicate that their restrictive immunity provisions are meant to apply to civil cases.

One possible reason for the difference between civil and criminal jurisdiction is that a criminal indictment is a harsher commentary on an entity—it is, as noted commentator Hazel Fox states, a “moral” condemnation. It denigrates the equality and dignity of the foreign state within the international order by criminally prosecuting it in the courts of a co-equal sovereign. Avoiding insults to the “dignity” of the sovereign or quasi-sovereign states is a longtime rationale supporting the maintenance of sovereign immunity in the United States. Suits against the state are particularly distasteful to courts when litigants ask them, in some sense, to regulate or comment on the public governmental activity of a foreign state. The court in Mitsui noted, without specific citation, that foreign sovereigns do not normally sue each other in peacetime, presumably referring to suits concerning the actions of sovereigns acting in their public capacity. The Mitsui court did not acknowledge, however, that an agency of a foreign state could act just as any other private party in a corporate transaction and commit a crime in that context as well.

A second reason for this immunity might be international comity.

“Comity” in the legal sense is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. Rather, it is the recognition which one nation allows within its territory to the legislative, executive, or judicial proceeding “means a proceeding in a court but does not include a prosecution for an offence or an appeal or other proceeding in the nature of an appeal in relation to such a proceeding.”).


249 Fox, 2nd ed., supra note 41, at 87.

250 See Republic of the Philippines v. Pimentel, 553 U.S. 851, 866 (2008) (observing that “[t]here is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so. The dignity of a foreign state is not enhanced if other nations bypass its courts without right or good cause.”).

251 Id. at 865-66.


253 Id. at 843.
acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens, or of other person who are under the protection of its laws.  

Courts in one country may fear that the instrumentalities of their own nation could be retaliated against and indicted abroad if they permit similar suits—what Posner and Sunstein refer to in another context as part of the “entanglement” theory in foreign affairs.  If a nation, such as the United States, were to adopt a form of restrictive criminal immunity, there would be a concern that a foreign state might act purely out of retaliation and prosecute U.S. entities and officials unreasonably. Sunstein and Posner argue that these entanglement concerns must be weighed against the benefits of advancing certain U.S. interests—here, the enforcement of criminal law in an equal and just manner. Furthermore, guidance from the executive might alleviate some concern by showing courts that the State Department is not concerned and that diplomatic considerations would prevent a foreign state from acting purely out of retaliation. The next Section of this Article will explore the use of the executive in ameliorating comity-related concerns in additional detail.

Despite this near absolute criminal immunity, exceptions have emerged to the rule of absolute criminal immunity of foreign states through doctrines such as universal and international criminal

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255 Eric A. Posner & Cass Sunstein, *Chevronizing Foreign Relations Law*, 116 Yale L.J. 1170, 1184-85 (2007) [hereinafter Posner & Sunstein] (discussing the entanglement theory of international comity: “The entanglement theory suggests that international comity doctrines reduce the risk that courts will inadvertently cause foreign policy tensions or crises by offending other nations. . . . The common theme is that a court might inadvertently increase international tensions or, in the extreme case, even provoke an international crisis by offending or injuring a foreign nation. That nation might then retaliate against the United States, for example, by withdrawing its participation in a vital area of international cooperation or directing its own courts to commit similar offenses against the United States.”).

256 Id. at 1186 (“[C]ourts should consider at least three factors when resolving cases with foreign relations implications: (1) an empirical determination or conjecture (a) that the foreign state is likely to reciprocate or (b) that it would otherwise retaliate in some way if the court ignored its interests; (2) a judgment that the benefits of reciprocation or nonretaliation by foreign states exceed the costs of deference to the foreign interests; and (3) an additional judgment about whether deference has systemic or rule of law benefits or disadvantages for the United States.”).
International criminal jurisdiction is vested, on a multilateral level, in the International Criminal Court (ICC), which is the product of a treaty. Despite its rocky beginning, particularly with regard to problems of acceptance by the United States, the ICC has grown as an institution capable of handling important cases involving the violation of international law by high profile leaders. For example, in 2011, as a vote of confidence in the ICC, the U.N. Security Council charged it with handling the criminal investigation of atrocities committed in Libya. This marked the first time that the Security Council had voted unanimously to refer a case to the ICC, and for the United States, this was also the first vote of referral to the ICC. Current State Department Legal Advisor Harold Koh has recently described the once tenuous relationship between the United States and the ICC as changing from “hostility to positive engagement.”

Certainly the most famous example of a criminal proceeding before a domestic court is the extradition proceedings in Britain of Augusto Pinochet for torture and crimes against humanity. A Spanish court requested extradition for crimes against Spanish citizens and Chilean citizens allegedly authorized by Pinochet on Chilean soil. On appeal from the divisional court, in three highly-watched decisions, the British House of Lords ultimately concluded that Pinochet did not enjoy immunity for acts of torture committed after Chile and Britain had ratified the U.N. Torture Convention. While distinguishable on many grounds, and not necessarily embodying a generally applicable rule, the Pinochet decisions suggest that there may be some cracks in the armor of foreign state criminal immunity before domestic courts.

Nearly 150 years before Pinochet, New York courts rejected the immunity defense in a trial for murder and arson for the raid of

\[257\] See, e.g., Resolution on Immunity, supra note 270, arts. II-IV; Fox, 2nd ed., supra note 41 at 87-92; Bradley & Goldsmith, Pinochet, supra note 38, at 2159-60.

\[258\] Rome Statute, supra note 16, art. 2.


\[260\] Id. at 570.


\[262\] Bradley & Goldsmith, Pinochet, supra note 38, at 2146-48.

\[263\] Id.
the U.S. ship, the *Caroline*, by Alexander McLeod.264 McLeod argued that he was entitled to release because the British government had ratified his actions, but the court disagreed, concluding that Britain’s approbations did nothing to the criminality of the act.265 In the context of the *Samantar* decision, McLeod’s case has been cited by those scholars arguing for less immunity for former and current officials who are defendants in suits for human rights offenses,266 but McLeod also shows the deep roots of the prerogative of national tribunals to prosecute even those expressly disclaimed as acting under orders from foreign sovereigns.267

Hazel Fox notes that the pervasive use of the restrictive theory of immunity around the world might effect a change or shift away from the old absolute immunity from private criminal prosecution, and in the case of an entity, regardless of whether it is a civil or criminal case, the compensation and the penalty can often be the same: a monetary sum.268 A recent report on state immunity from the Organization for Economic Cooperation and Development recognizes Fox’s theory that criminal monetary sanctions against state entities may be acceptable under a theory of restrictive immunity, and distills factors that would counsel in favor of an exception from immunity for state-controlled enterprises in criminal proceedings, namely: “the limitation of remedies to compensatory type remedies; the commercial nature of the transaction; and a strong jurisdictional (territorial) connection of the events with the forum state.”269

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265 *Id.* at 581-604.
267 See also Horn v. Mitchell, 223 F. 549, 552 (D. Mass. 1915), aff’d, 232 F. 819, 822-24 (1st Cir. 1916) (finding no immunity for criminal prosecution of German soldier accused of tampering with explosives, as the United States was not yet part of World War I). *Cf.* Bederman, *Cautionary Tale*, supra note 210, at 527-28 (discussing the enactment of a portion of the habeas statute that deals with foreign sovereign compulsion, 28 U.S.C. § 2241(c)(4) and its limitations).
268 Fox, 2nd ed., *supra* note 41, at 87-97.
Despite these exceptions, domestic criminal prosecutions of foreign states and their entities remain relatively unheard of, and any changes have been mainly in the area of criminal prosecutions of natural persons, not states or their associated entities. In addition, of course, international law has recognized special immunities from criminal prosecution for diplomats and consular officers. Under the Vienna Convention on Diplomatic Relations, diplomatic agents and their family members are immune from the criminal jurisdiction of signatories' courts. Other staff associated with their mission may be immune from criminal prosecution for acts taken in the course of their duties. Under the Vienna Convention on Consular Relations, consular personnel are immune from arrest and detention pending trial, but they are only immune from the criminal jurisdiction of courts in cases wherein the prosecution is based on acts performed in the exercise of consular functions.

C. U.S. Interpretation of International Law

The United States has developed its own practices and interpretations of international law relevant to whether of restrictive criminal immunity might emerge. Three general principles, distilled from various sources, may be helpful in resolving the issue of whether one should ever grant criminal jurisdiction over a foreign sovereign. First is the rule reflected in the famous case of Schooner Exchange v. McFadden in which Justice Marshall described the absolute rights of sovereigns in

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270 See generally Stephens, supra note 266, at 2675 ("[M]ost claims of foreign official immunity in U.S. courts involve the specialized immunities granted to diplomats and consuls by international treaties or the common law immunity afforded to recognized heads of state. Cases against other foreign government officials were rare between the adoption of the Constitution and the late twentieth century, and... the scattered cases were not always consistent.").


272 Id.

273 Id. at 12-13.

274 See Harold Hongju Koh, Why Do Nations Obey International Law, 106 YALE L. J. 2599, 2645-47 (1997) (describing the transnational legal process, or the process by which international law is made—through a series of interactions between states both, internationally and domestically).

their own borders and explained that foreign sovereign immunity is a matter of comity and grace, but not of right.\textsuperscript{276} Gamal Badr notes, "[f]or Marshall . . . the starting point was the local state's exclusive territorial jurisdiction to which immunity was an exception emanating from the will of the local state itself. He did not envisage a blanket immunity for the foreign state as a general rule, to which exceptions would be made . . . ."\textsuperscript{277} Although it is in tension with the view under international law that foreign state immunity in certain contexts is tantamount to a matter of right,\textsuperscript{278} Supreme Court decisions, even regarding the FSIA, have repeatedly emphasized that foreign sovereign immunity is a matter of prerogative of the domestic sovereign.\textsuperscript{279} Following from that, under this rule, it is arguable that the United States has the prerogative to prosecute entities and individuals connected with foreign sovereigns for violations of our own criminal laws occurring within our territory, provided that no treaty, such as those on diplomatic or consular relations, restrains such an action.

Second, U.S. law reflects a preference for individual accountability for grave harms under international and domestic law over sovereign interests in a qualified set of circumstances. For example, the Alien Tort Statute and the Torture Victim Protection Act are both statutes that have generated a great deal of litigation in U.S. courts by permitting civil suits to go forward for the most severe violations of human rights, such as extra-judicial killings, genocide, and torture.\textsuperscript{280} They have been utilized not only against officials, but also now against companies, which, in conjunction with sovereigns, have violated international law in their conduct abroad.\textsuperscript{281} This is also reflected in jurisprudential

\textsuperscript{276} \textit{Id.} at 137.

\textsuperscript{277} \textsc{Gamal Moursi Badr}, \textsc{State Immunity: An Analytical And Prognostic View} 11(1984).

\textsuperscript{278} Jasper Finke, \textsc{Sovereign Immunity: Rule, Comity, or Something Else?}, 21 \textsc{Eur. J. Int’l L.} 853, 865-67 (2010) (discussing the tension between these two views of foreign sovereign immunity).

\textsuperscript{279} Republic of Austria v. Altmann, 541 U.S. 677, 689 (2004) (noting that foreign sovereign immunity is "a matter of grace and comity rather than a constitutional requirement").


\textsuperscript{281} See, \textit{e.g.}, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244,
carve-outs from immunity for *ultra vires* actions of foreign or U.S. officials, who act in violation of the law of their own country and then seek immunity for actions committed under the color of law.\textsuperscript{282}

For violations of "clearly established" domestic law by U.S. officials, courts have established a similar regime of qualified immunity.\textsuperscript{283} This is true when private litigants sue both federal and state officials in personal capacity civil actions for violations of civil rights.\textsuperscript{284} In an article by Seth Waxman and Professor Trevor W. Morrison, the authors argued that a similar type of qualified immunity should apply for federal agents in criminal prosecutions by state authorities.\textsuperscript{285} Waxman and Morrison argue that the two guideposts that should inform this inquiry are "the federal government's interest in ensuring that States do not interfere with federal policy and prerogatives by criminalizing the execution of federal law, and federal officers' due process right to fair warning before they are subjected to criminal sanction for conduct they reasonably believed to be within their authority."\textsuperscript{286} Qualified immunity from criminal prosecutions would therefore

\textsuperscript{259} (2d Cir. 2009) (adopting the position that under international law, aiding and abetting liability, the subject of civil suits under the Alien Tort Statute, requires intention or purpose).

\textsuperscript{282} Hilao v. Estate of Marcos, 25 F.3d 1467, 1472 (9th Cir. 1994); Trajano v. Marcos, 978 F.2d 493, 498 (9th Cir. 1992); Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990), *abrogated* by Samantar v. Yousuf, 130 S. Ct. 2278 (2010); United States v. Yakima Tribal Court, 806 F.2d 853, 859 (9th Cir. 1986); Doe v. Liu Qi, 349 F. Supp. 2d 1258, 1282 (N.D. Cal. 2004); Caribri v. Assasie-Gyimay, 921 F. Supp. 1189 (S.D.N.Y. 1996).


\textsuperscript{284} See Johnson v. Fankell, 520 U.S. 911, 914-15 (1997) ("We have recognized a qualified immunity defense for both federal officials sued under the implied cause of action asserted in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and state officials sued under 42 U.S.C. § 1983. In both situations, 'officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'") (citation omitted).


\textsuperscript{286} *Id.*
protect federal enforcement and federal official discretion, while permitting punishment where the federal official objectively exceeds his or her reasonable authority—i.e., in the worst cases. 287

The prosecution of Dominique Strauss-Kahn, former head of the IMF, for allegations of rape merits consideration here. Not much more need be said about the substance of the allegations save that Strauss-Kahn was indicted by a New York grand jury for forced sexual acts on a female member of a hotel’s housekeeping staff while he was staying in New York. 288 As commentators on the affair recognized, and ultimately the State Department agreed, 289 it was problematic for Strauss-Kahn to seek immunity under applicable treaties relating to the IMF or under U.S. law protecting diplomats, in part because Strauss-Kahn was not acting in any sort of official capacity when he allegedly committed the acts in question. 290 Moreover, he actually resigned from his position as IMF chief following the allegations, thereby removing

287 See id. at 2202.
288 See Howard Schneider & Brady Dennis, Strauss-Kahn Indicted in Sexual Assault, WASH. POST (May 19, 2011), http://www.washingtonpost.com/business/economy/strauss-kahn-indicted-in-sexual-assault/2011/05/19/AF34MP78_story.html (“A New York grand jury has indicted former International Monetary Fund managing director Dominique Strauss-Kahn on charges arising from the alleged sexual assault of a hotel maid last week, but a judge agreed Thursday that he could await trial in a New York apartment after posting $1 million in bail and agreeing to electronic monitoring.”).
290 See Duncan Hollis, What Kind of Immunity Does the IMF Managing Director Have?, OPINIO JURIS (May 15, 2012, 10:51 A.M.), http://opiniojuris.org/2011/05/15/what-kind-of-immunity-does-the-imf-managing-director-have/; Chimene Keimer, Why has DSK Not Yet Asserted Immunity? Because He Can’t, OPINIO JURIS (May 17, 2011, 1:35 P.M.), http://opiniojuris.org/2011/05/17/why-has-dsk-not-yet-asserted-immunity-because-he-can%E2%80%99t;/ see also Perez Jimenez v. Aristeguieta, 311 F.2d 547, 557-58 (5th Cir. 1962) (“Appellant’s acts constituting the financial crimes of embezzlement or malversation, fraud or breach of trust, and receiving money or valuable securities knowing them to have been unlawfully obtained as to which probable cause of guilt had been shown were not acts of Venezuela sovereignty. Judge Whitehurst found that each of these acts was ‘for the private financial benefit’ of the appellant. They constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape which appellant concedes would not be an ‘Act of State.’”).
any protection the status of his position might have provided. In the end, none of that mattered because weaknesses in the prosecution’s case, namely inconsistent statements by the victim, caused the district attorney to drop the case. Another claim of diplomatic immunity was also rejected in a subsequent civil case brought by Mr. Strauss-Kahn’s accuser.

The Strauss-Kahn case is an imperfect example in this context, because the defendant was not part of a foreign state in any real sense. He was not the French president, nor was he a French official. Either type of post would have likely entitled him to immunity not only for his official actions, but also probably for his personal actions, similar to the immunity that is accorded to diplomats. The case is, however, an important example because it shows how someone nearly as high-profile as a foreign president could be prosecuted fairly for the commission of a violent crime in the United States that is completely unrelated to his position or the execution of his official duties. Specifically, even though it was not the case for Mr. Strauss-Kahn, his circumstances show how procedural due process and prosecutorial discretion could intervene in another case to ensure that a retaliatory or politically motivated criminal prosecution would not ultimately succeed. In addition, the failure to prosecute Mr. Strauss-Kahn would have likely resulted in heavy public outcry over exceptionalism in the application of U.S. criminal law. For example, one could also see a similar outcry arising over a state-owned corporation’s exemption from our criminal law pertaining to environmental protection or food and drug production and distribution.

In the civil case against Mr. Strauss-Kahn, a New York State court has already denied him absolute immunity, which his attorneys argued exists under the U.N. Convention on Specialized Agencies and customary international law. The court sided with the plaintiff, noting that the U.S. International Organizations Immunity Act (IOIA) and other relevant international conventions provide immunity only for official acts. In a passage that illustrates the intersection between domestic interests in the fight against violent crime, international interests in reciprocity and foreign relations, and the crossover interest in avoiding situations in which immunity becomes impunity for no functional reason, the court stated:

Thus, the IOIA, with its official acts immunity, not customary international law, controls the nature of the immunity relative to Mr. Strauss-Kahn. The United States of America, through its political processes can make laws, ratify treaties or issue judicial pronouncements which require a non-citizen employee of a specialized agency, here on our soil as part of the fabric of international governance, to behave, in their private conduct in a lawful way failing which to be answerable in courts of law or other tribunals under the same standards as their next door American neighbors. At a time when issues concerning human rights significantly shape today’s international law, customary or otherwise, it is hardly an assault on long standing principles of comity among nations to require those working in this country to respect our laws as Americans working elsewhere must respect theirs.

The above passage also calls to light the other significance of the Strauss-Kahn case for purposes of this discussion: the way in which certain grave abuses of diplomatic immunity—a procedure meant to protect diplomats and their families from undue interference from the host state—could alternatively proceed if such blanket immunity did not exist. In cases involving rape, assault, or slavery by those protected by personal and official diplomatic immunity from criminal prosecution, commentators

297 Id. at *9-10.
298 Id.
have complained that the State Department has acted in a less than transparent manner to affect broad grants of diplomatic immunity from police investigation or prosecution for violent crime.\textsuperscript{299} As it stands right now, the State Department has less than satisfying options for seeking to apply criminal law to those acts perpetrated in abuse of diplomatic immunity. It has considered compensating the victims of diplomatic crimes, but noted that the problem of uncompensated victims of crimes by diplomatic agents was not significant enough to justify the burden of establishing that type of fund.\textsuperscript{300} At most, a diplomat suspected of a crime may be deported, which the Department views as an "extreme diplomatic tool."\textsuperscript{301} In some ways, this is worse for the innocently accused than is prosecution. In a fair trial, diplomats are permitted to clear their name in a country with standards of criminal due process and where all of the relevant evidence is located. Although a jury never formally acquitted Mr. Strauss-Kahn, his reputation arguably suffered less because the prosecution had to drop a weak case. It likely would have been even more damaging if U.S. authorities had permitted him to flee the country without answering the charges at all.

Third, even when grave harms to human rights are not involved, the United States has long maintained a commitment to the basic principle of restrictive immunity,\textsuperscript{302} which the FSIA and

\textsuperscript{299} Ross, supra note 294, at 174-75, 186-88 (discussing specific cases in which the State Department halted police investigations involving grants of diplomatic immunity). In a 2010 Second Circuit case, Swarna v. Al-Awadi, 622 F.3d 123 (2d. Cir. 2010), the Second Circuit affirmed a lower court ruling denying residual diplomatic immunity to former diplomats of the Kuwait mission to the United Nations in a civil suit for atrocious acts committed against an in-home domestic worker. \textit{Id.} at 128. The defendants were accused of committing acts of psychological abuse, physical battery, and multiple rapes. \textit{Id.} at 128-29. This was the second lawsuit in the matter; the first was dismissed by the Southern District in New York in 2002 because the then-current diplomat defendants had immunity. \textit{Id.} at 130. The plaintiff waited eight years for a U.S. appellate court to permit consideration of the merits of her case. \textit{Id.}


other domestic practices embody. In a line of cases predating the
more official commitment to restrictive immunity by the State
Department through the Tate Letter and ultimately by Congress
with the enactment of the FSIA, the restrictive principle was
developed.\textsuperscript{303} In that case, which involved foreign sovereign
immunity, the district court compared Justice Marshall’s language
in the \textit{Schooner} case, noting the difference between a prince’s
private property and a foreign nation’s public property, with
Marshall’s language in another case regarding the state of
Georgia’s private commercial interests in a corporation.\textsuperscript{304} This
comparison is useful in showing that Marshall was thinking in
terms of restrictive immunity, at that time, for suits against a
foreign state, even though \textit{Schooner} has come to be cited for the
principle of absolute immunity of foreign states.\textsuperscript{305} The language
from Justice Marshall was:

\begin{quote}
It is, we think, a sound principle that when a government
becomes a partner in any trading company, it divests itself,
so far as concerns the transactions of that company, of its
sovereign character, and takes that of a private citizen.
Instead of communicating to the company its privileges
and its prerogatives, it descends to a level with those with
whom it associates itself, and takes the character which
belongs to its associates, and to the business which is to be
transacted.\textsuperscript{306}
\end{quote}

This idea has been borne out with respect to certain entities
associated with our own federal government. As with many states
around the world,\textsuperscript{307} the creation of federally chartered
corporations, banks, and non-profits (e.g., Red Cross) has come in
waves.\textsuperscript{308} In some statutes, Congress has described these federally

\begin{quote}
\textsuperscript{303} See Morrisey, supra note 295, at 679-81.
2007).
\textsuperscript{305} Morrisey, supra note 295, at 680.
\textsuperscript{306} The Pesaro, 277 F. 473, 476 (S.D.N.Y. 1921) (quoting Bank of U.S. v. Planters’
Bank of Ga., 22 U.S. 904, 906-07 (1824)).
\textsuperscript{307} See, e.g., Pier Angelo Toninelli, \textit{The Rise and Fall of Public Enterprise: The
Framework, in The Rise and Fall of State Owned Enterprise in the Western
World} 3, 14-22 (Pier Angelo Toninelli ed. 2000).
\textsuperscript{308} See Paul E. Leud, \textit{Federal Chartered Corporations and Federal Jurisdiction}, 36
\end{quote}
chartered corporations as "private" or as lacking federal instrumentality status.\footnote{Id. at 324.} Jurisprudence on whether and when these entities are subject to state law and regulation has not been a model of clarity. "For the most part," Professor Lund notes, "federal business corporations are subject to the general laws—tort, contract, and otherwise—in the states in which they conduct business."\footnote{Id. at 325.} To put it more concretely, while the federal government is immune from suit absent the consent of Congress under most circumstances,\footnote{See Berger v. Pierce, 933 F.2d 393, 397 (6th Cir. 1991) (noting that the United States cannot be sued absent consent and thus concluding that "it is self-evident that a federal agency is not subject to state or federal criminal prosecution"). Cf. Margaret K. Minister, Federal Facilities and the Deterrence Failure of Environmental Laws: The Case for Criminal Prosecution of Federal Employees, 18 HARV. ENVTL. L. REV. 137, 157-163 (1994) (discussing difficulties holding federal facilities accountable in state criminal prosecutions despite arguable statutory authorization for such prosecutions).} certain federal instrumentalities may be sued and subject to state regulation so long as the action or prosecution (as a form of regulation) does not interfere with their federal function.\footnote{James v. Fed. Reserve Bank of N.Y., 471 F. Supp. 2d 226, 237-38 (E.D.N.Y. 2007) (concluding that a federal reserve bank would not have immunity from state fair employment laws because they do not interfere with the bank's federal function).} Therefore, roughly stated, government-owned entities performing a private, non-governmental function should theoretically receive no immunity.\footnote{See Lewis v. United States, 680 F.2d 1239, 1242 (9th Cir. 1982) ("The test for determining whether an entity is a federal instrumentality for purposes of protection from state or local action or taxation, however, is very broad: whether the entity performs an important governmental function."); see also Amtrak Tries to Stop Prosecution, EUGENE REGISTER GUARD, Sept. 22, 1989, at 3B (explaining that the Florida State Attorney argued that Amtrak could try to escape civil regulatory actions by states, but not criminal charges for violating state dumping laws regarding refuse on the tracks).} And, in the foreign sovereign immunity context, the Supreme Court has affirmed this idea:

When the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of . . . the accidents which it may cause . . . the law should not permit the foreign state to shift these everyday burdens of the marketplace to private parties.\footnote{Saudi Arabia v. Nelson, 507 U.S. 349, 366 n.2 (1993) (White, J., concurring in}
at the heart of restrictive immunity consistently animates U.S.
law and policy in the area of sovereign immunity.\textsuperscript{315}

The principal of restrictive immunity is also embodied in
federal common law governing foreign state liability in the form
of the \textit{Banc\'ec} presumption, which derives from the case of \textit{First
National City Bank v. Banco Para El Comercio Exterior de Cuba
(Banc\'ec)}.\textsuperscript{316} The primary issue in \textit{Banc\'ec} was whether a
counterclaim against entities of the Cuban government for
expropriation of foreign bank property should be dismissed in
pending commercial litigation originally between City Bank and a
dissolved bank of the Cuban government, \textit{i.e.}, \textit{Banc\'ec}.\textsuperscript{317} The case
then became about whether the court should consider the bank and
the government of Cuba juridically distinct for purposes of
liability, particularly given that it seemed clear that the Cuban
government had dissolved the bank to avoid commercial
obligations.\textsuperscript{318} On the basis of common principles of international
and federal common law, the Court held that unless a requisite
degree of control is established between a foreign state and its
instrumentality or unless considering them separate would create
an injustice, an instrumentality of a foreign state will be presumed
to be juridically distinct from the foreign state itself for purposes
of liability.\textsuperscript{319} The \textit{Banc\'ec} presumption reinforces the distinction

\textsuperscript{315} See, e.g., Nelson, 507 U.S. at 359-60 ("[A] state is immune from the jurisdiction
of foreign courts as to its sovereign or public acts (\textit{jure imperii}), but not as to those that
are private or commercial in character (\textit{jure gestionis}).").

\textsuperscript{316} First Nat\'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S.
No. 107-297, 105 Stat. 2322 (codified at 28 U.S.C.S. § 1610 (2012)), \textit{as recognized in
Weinstein v. Islamic Republic of Iran}, 609 F.3d 43 (2d Cir. 2010).

\textsuperscript{317} Id. at 613-15.

\textsuperscript{318} See \textit{id}. at 622-23.

\textsuperscript{319} Id. at 633-34. Subsequent court of appeals cases have digested the presumption
in this manner, and noted further implications. \textit{See} Alejandre v. Telefonica Larga
Distancia de P.R., Inc., 183 F.3d 1277, 1284-85 (11th Cir. 1999) ("[G]overnment
instrumentalities enjoy a presumption of separate juridical status vis-a-vis the foreign
government to which they are related. While Banc\'ee applied this presumption for
between the private and public activities of the state for purposes of liability by ensuring that the foreign state itself will not be liable for the private commercial activities of its instrumentalities absent exceptional circumstances.\textsuperscript{320}

\textbf{D. Future Considerations and Guiding Questions}

On the basis of the principles and rules set forth above, a number of considerations need to be addressed in determining what immunity from criminal prosecution should be available to foreign states and the entities associated with them. Each of these considerations or issues in itself could be the subject of an entire article, and the list below is by no means exhaustive. Before proceeding to briefly describe those considerations, one proposition seems apparent: it would be irregular to grant states, their instrumentalities, and their officials absolute and total immunity from U.S. criminal laws. The modern standard under international law and U.S. law is restrictive sovereign immunity.\textsuperscript{321} Some sort of restrictive immunity standard should therefore be applied in any amendment.

\textsuperscript{320} See First Nat'l Citi Bank, 462 U.S. at 624-28.

Judge Joan Donoghue of the International Court of Justice has noted that a satisfying and cohesive theory outlining the contours of restrictive immunity has not emerged. Commentators have suggested various approaches, such as assimilation of foreign sovereigns into the same position of the domestic sovereign; creation of a presumption of non-immunity; and creation of a new standard to balance certain interests, such as adherence to international law, plaintiffs' rights to relief in court absent immunity, and comity concerns regarding U.S.-related entities as defendants in foreign courts. In crafting the "considerations" below, this article leans more toward what Judge Donoghue calls this third "functional" approach, and it takes into account the analysis of the features of domestic and international law described above. The following considerations as to the contours of restrictive criminal immunity should be significant. This list is based, in part, on the commonly arising issues in foreign sovereign immunity that Peter Trooboff expressed in his excellent and comprehensive summation of the past and the future of law of foreign state immunity over twenty years ago.

I. Defining the "Foreign State"

Assuming that some type of restrictive immunity is indeed the standard, and that restrictive immunity means holding foreign sovereign-associated entities accountable when the nature of their activities is the same as that in which any other private party could be engaged, then one important question is how to define the foreign state for purposes of restrictive criminal foreign sovereign immunity. Would that include the state itself, its subdivisions, and its agencies and instrumentalities? Given the contours of restrictive immunity at present it may be prudent to cover only those entities that the state has established as essentially a private-

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323 See id.
324 Id. at 493-94.
functioning entity, such as a state-owned corporation or state-owned foundation; this is the type of restrictive immunity that seems to characterize treatment of instrumentalities of the U.S. federal government.  

There should be no insult to foreign sovereignty if a majority foreign-state owned corporation is prosecuted for environmental crimes in the United States. It would be natural then that the officers and directors of covered foreign state-owned companies should bear criminal responsibility just as the officers and directors of any other entity in the United States potentially would.

Whether foreign officials generally, who are not subject to diplomatic, consular, or some other type of immunity, should receive immunity for crimes presents a more difficult question. Considerations of consistency and fairness dictate that the answer should be "no immunity" for serious violations of U.S. criminal law, such as murder, rape, assault and drug trafficking. These are crimes for which officials would be prosecuted in their personal capacity because they are not, nor can they credibly be, classified under the law as official activities. The cases described above, granting or denying immunity on the basis of the FSIA's discretionary exemption in the tort context, provide a useful lens through which to view this issue: violent and purely destructive behavior that violates our criminal law is not official in nature and does not deserve immunity. Our strong interest in maintaining equal administration of the criminal law should tip the scales in favor of avoiding any unproductive extensions of immunity to cover other officials wherever possible, balanced with foreign relations and comity considerations.

When the crime is transnational in nature or the criminal conduct is an "international crime" within the meaning of the Rome Statute for example, the issue is more complex and controversial. Some prosecutions of this type will no doubt be possible because Congress has expressly authorized them by statute and/or pursuant to an international agreement. In those

327 See Lewis v. United States, 680 F.2d 1239, 1240-41 (9th Cir. 1982).
329 See id.
instances, immunity could be expressly removed by statute. In other instances, comity concerns and the prevalence of civil litigation under the Alien Tort Statute as a substitute may (to the extent that it remains one) at times tip the scales in favor of only covering crimes committed within the territorial borders of the United States. The consequences of making a distinction of this type, including the harm to various international and foreign policy interests, balanced seriously against the interest of our own citizens in the deterrent effects of violent and destructive crime both domestically and internationally, will deserve serious consideration in any policy choice.

2. **Coverage of Particular Crimes**

For which crimes, federal or state, will covered entities be subject to punishment? It seems less possible to restrict criminal prosecutions by placing them into broad categories, as the FSIA does with civil claims. Instead, perhaps the rule of thumb should be that the criminal prosecution, regardless of the crime, should go forward provided that it does not interfere with any public function of the foreign state-owned entity, excepting circumstances in which a multilateral or bilateral instrument to which the United States is a party states otherwise, or rather provided that covered entities should only bear responsibility when their conduct is entirely private in nature. Although these standards are not the model of clarity, any statutory enactment could draw upon the wealth of jurisprudence in the civil context for analogies and, more importantly, lessons learned.

3. **The Role of the Executive**

Given the close connection between the imposition of criminal liability and concerns about damage to foreign relations or international comity concerns, Congress should be clear about the role and powers ascribed to the Executive in whatever instrument it adopts. Separation of powers debates may not lend themselves to generally applicable abstractions on this point.

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332 See Posner & Sunstein, supra note 255, at 1184-85.
333 See Paul Gewirtz, Realism in Separation of Powers Thinking, 30 WM. & MARY
and are beyond the scope of this brief discussion. However, in a more practical sense, it seems clear that given the history of foreign sovereign immunity determinations in the United States, and the sensitivity of criminal prosecutions under international law, if the United States were to adopt a restrictive standard embodied in a piece of legislation, the Executive Branch should have some degree of input, even if only in a discrete class of cases. In the aftermath of Samantar, the State Department made a determination of no immunity to which the district court ultimately deferred. There have been various proposals about what degree of deference to accord to executive determinations regarding immunity, some questioning its lawmaking authority and others calling for a type of Chevron style administrative deference. Although the State Department may be exempt from certain portions of the Administrative Procedure Act (APA) itself, if it is to engage in a conclusive determination regarding the criminal immunity of a party to a prosecution in court, that procedure should embody the spirit of our administrative law, i.e., the Department’s determination must be (1) reviewable in some way and (2) subject to some sort of basic requirements of transparency and regularity which are innate values in nearly all aspects of our legal system.

4. Establishing Appropriate Punishments

The punishments to which covered entities may be subjected must be carefully considered. Restriction of the liberty of officers associated with these entities will be controversial, as will criminal

L. REV. 343, 343-44 (1989) (arguing that a "rigid" separation of the functions of the branches ignores the realities of government).

334 Prior to the adoption of the FSIA, these determinations were made by the State Department and were for all intents and purposes considered binding by the courts. See Ex parte Republic of Peru, 318 U.S. 578, 589–90 (1943), superseded by statute, Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11(2006), as recognized in Chuidian v. Philippine Nat. Bank, 912 F.2d 1095, 1100 (9th Cir. 1990).


and civil forfeiture or seizure of the foreign state's assets. Several characteristics of the FSIA will be relevant considerations for policymakers. First, the FSIA itself provides a broader immunity from the execution of judgments against a foreign state than it does for jurisdiction of those suits.\textsuperscript{339} Thus courts have noted that it forces them into the awkward compromise of providing for a right without a remedy under some conditions.\textsuperscript{340} This is also, if not more so, an undesirable incongruence for the criminal sphere. All crimes should have a punishment. Second, the FSIA provides for broader immunity from execution against the assets of a foreign state than it does for the assets of an agency or instrumentality.\textsuperscript{341} The latter's assets may be attached to satisfy a judgment even though they are not specifically involved in the transaction over which the court has jurisdiction.\textsuperscript{342} The property of central banks and military property is specially protected.\textsuperscript{343} The availability for attachment of the assets of associated entities is broader when an action is brought under the FSIA provisions remedying state-sponsored terrorism.\textsuperscript{344} Finally, although the FSIA is silent on the issue of injunctive relief, courts have still issued injunctions without concern for violating the Act.\textsuperscript{345} Once again, with these restrictions, it is evident that Congress walked a fine line between protecting property more commonly associated with the public functions of the state (perhaps more likely to be in the hands of the foreign state itself or its central bank)\textsuperscript{346} and property commonly associated with the private commercial activities of the foreign state.\textsuperscript{347}

All of these considerations will have to be reformulated and
considered in light of the civil and criminal forfeiture regimes. Civil forfeiture is an *in rem* proceeding against an actual piece of property involved in criminal activity, which takes place regardless of the innocence or guilt of the property owner.\textsuperscript{348} Criminal forfeiture occurs as a punishment once there has been a conviction on the basis of criminal charges in court.\textsuperscript{349} It does not treat the property as the defendant, although third party claims to the property may still be considered and prevail in certain circumstances.\textsuperscript{350} The core concern in thinking through these issues will be whether the financial interests and property of the foreign state are tangentially implicated in a transaction in which it has not taken part as a private party; that is, the concern that animates the FSIA’s restriction on execution against the commercial transaction property of the foreign state that is not the basis for the claim at issue. This concern about suits that implicate the interests of otherwise immune sovereigns was at the center of the Supreme Court’s decision in *Republic of the Philippines v. Pimentel*,\textsuperscript{351} in which the Court concluded that if a sovereign is a necessary party to a dispute then that case is subject to dismissal if the party is not joinable because of its immunity.\textsuperscript{352} Avoidance of entanglement with otherwise immune sovereign property interests and the creation of presumptions of separateness between foreign sovereigns and private-operating instrumentalities should be significant considerations in the development of policy on criminal punishments in this area.

Taking these four considerations and boiling them down into questions, policymakers should be asking: (1) what are the foreign sovereign owned- or controlled-entities that should incur criminal liability for crimes in the United States; (2) what is a truly private venture and/or activity, the prosecution of which will have minimal effects on the public affairs of other states; (3) how can foreign affairs considerations play into immunity determinations in a way that is sufficiently regularized and accountable to the

\textsuperscript{348} CHARLES DOYLE, Crime and Forfeiture 5, in CONG. RESEARCH SERV., 97-193 (2009).
\textsuperscript{349} See id. at 14-18.
\textsuperscript{350} See id. at 18-19.
\textsuperscript{351} 553 U.S. 851 (2008).
\textsuperscript{352} Id. at 855.
interests of the public; and (4) how can the entanglement of immune interests be avoided, while still implementing effective penalties against non-immune entities in an equitable manner? As with sovereign immunity cases, the answers to these questions will require, at times, uncomfortable compromises between notions of equality and justice and the preservation of the dignity—or the authority—of sovereign entities. Despite any awkwardness that may exist with this rationale for continued immunity, jurisprudence and public policy still place significant weight on it, and so it must be preserved in the form that is the least intrusive on other constitutional values pertaining to criminal due process, at present.

VI. Conclusion

In sum, although the FSIA is often referred to as an all-encompassing statute for suits against foreign states and their associated entities,353 Samantar teaches that courts should strictly construe the express language of that statute and realize that new problems related to restrictive immunity are increasingly coming to light,354 problems which Congress was not aware of when the FSIA was enacted and which, therefore, do not find a basis in the FSIA’s text. Thus, individual officials are left in a gray area right at a time when their accountability under international law is becoming a frequently litigated issue in U.S. courts.355 Policymakers should avoid any similar confusion with respect to the FSIA’s criminal jurisdiction. Whatever action is taken to clarify this coverage, Congress should remember that the restrictive immunity standard has become thoroughly ingrained in public policy.356

Cases like those above will continue to arise and, as was the case previously, the government may continue to argue that the FSIA does not apply to criminal cases when it wishes to prosecute

354 See Rutledge, supra note 237, at 597.
an individual, agency, state-owned corporation, ship or other entity that does not enjoy otherwise impenetrable diplomatic immunity. Defendants will continue to argue that they enjoy absolute criminal immunity under the FSIA or under customary international law. A lack of clarity in this area only results in spotty administration of domestic criminal law, and potential resentment of unnecessary exceptionalism afforded to foreign-state-associated entities able to capitalize on these ambiguities in some cases. For those reasons, there should be some concrete action taken to clarify the application of restrictive immunity principles to the criminal law jurisdiction of the U.S. courts.

Perhaps others will look at the smattering of cases described above and note that criminal foreign sovereign immunity is not enough of a problem yet, and that the status quo, however ambiguous, is preferable to making difficult choices that threaten to alienate other nations to some extent. That argument has force, and perhaps any clarifying amendment or additional statute will have to wait until a specific event shocks the political system into action. The timing aside, as with other types of immunity, the push away from state impunity and towards more accountability, whether by officials or by entities associated with the state, should and will likely continue, because, although there have been steps backwards in terms of domestic and foreign sovereign immunity, nearly each decade has seen some case or event that further opens the state and its branches to suit (e.g., the FSIA, Pinochet, the ICC, and Samantar). Provided that individuals and non-governmental organizations continue to press for state accountability, and that accountability becomes further ingrained in our legal and civil culture, foreign sovereign immunity will have to become more restrictive and less absolute. It seems unlikely that criminal foreign sovereign immunity will be an exception.

357 See, e.g., In re Deltuva, 752 F. Supp. 2d 173, 180 (D.P.R. 2010).
358 See supra Parts IV and V.