Immunity For Foreign Officials: Possibly Too Much and Confusing As Well

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recognized as jurisdictional defenses under the constitutive documents of the various international criminal tribunals and other international fora where claims of human rights abuses and charges of international criminal conduct can now be heard and decided. In this sense, there is no tension between immunities and accountability.

There is always pressure for change. One current pressure point concerns the effort to make states amenable to civil suit in foreign courts for torts committed against foreign nationals in their own territory or in an extraterritorial context. The first kind of suit might involve, for example, claims of mistreatment and abuse committed by domestic authorities against foreign nationals who return to their own countries to file claims for civil damages. In the context of U.S. law, one could think of *Saudi Arabia v. Nelson*, as well as suits brought under the expropriation or terrorism exceptions to the Foreign Sovereign Immunities Act. The second situation might arise where states are said to have human rights obligations, and therefore to be amenable to suit at home, in foreign courts, or in an international forum, for actions taken outside their territory. In my view, these are very problematic propositions, especially given that alternative mechanisms (for example, in bilateral channels or regional and international forums) frequently exist for resolving such issues.

Eli Lauerpacht famously wrote in 1954 that "exemption from legal process is not congenial to the climate of the modern State." While his appreciation of the balance between immunity and accountability, like that of Wilfred Jenks, seems to remain valid today, it is important not to lose sight of the functions and purposes served by immunities appropriately applied.

**IMMUNITY FOR FOREIGN OFFICIALS: POSSIBLY TOO MUCH AND CONFUSING AS WELL**

*by Barry E. Carter*

In his thoughtful presentation, David Stewart observes from his daily experience that the law of international immunities is a “rather complex body of rules.” In analyzing immunity issues, one needs to take into account treaties, laws, and/or cases that include, among others, the Foreign Sovereign Immunities Act, diplomatic and consular immunity, the case law regarding head of state immunity, and international organization law. In addition, there is pending the new UN Convention on Jurisdictional Immunities of States and their Property.

Mr. Stewart also posits a general conclusion that in recent decades the general trend has been to limit the scope of immunities granted to individuals. Although this might be true in many respects, it would seem that immunity for foreign government officials, other than diplomats, has expanded rather than contracted in recent years. The relevant law has also become more complex. I question whether this expansion and increased complexity are good developments, or instead ones that discourage appropriate accountability for these individuals.

It might be useful to start with two broad propositions.

First, the United States and some other countries have expanded considerably the prescriptive jurisdictional reach of their laws in the past fifteen to twenty years.

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8 28 U.S.C. §§ 1605(a)(3) and (7).

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For the United States, an important reaction to terrorist attacks and threats has been to enact and implement laws that create criminal and civil liability for attacks or other acts against U.S. citizens wherever they might be at the time of the event. In terms of international principles of jurisdiction, the United States has switched from its usual opposition to the passive personality principle that lasted through at least the 1970s to a position that embraces the principle in many situations. The principle provides that a state may apply its law "to an act committed outside its territory by a person not its national where the victim of the act was its national."¹

As an illustration, 18 U.S.C. § 2333 provides that any U.S. national injured by reason of an act of international terrorism may sue in a U.S. district court for treble damages and the costs of the suit. The law does not require that the act occur in the United States or that it have any effect here; rather, it requires only that a U.S. national is injured.²

In the immunity area, a prime example is the (a)(7) exception to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(7). This exception allows U.S. nationals to sue foreign states, designated as supporting terrorism, for money damages for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or providing material support to those who committed those acts. The claimant is not required to sue first in the foreign state’s court, but only needs to afford “the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted rules of international arbitration” when the act occurred within the foreign state’s territory. When the act occurred in a third state (e.g., Iranian-supported terrorism in Israel), the arbitration provision is inapplicable and the only forum provided for in the (a)(7) exception is the U.S. federal courts.

Second, while U.S. jurisdictional reach has been expanding geographically, immunity doctrines for foreign government officials have been heading in the opposite direction. It is now easier for foreign government officials to claim immunity, and the application and interpretation of the U.S. laws regarding them has become more confusing.

The primary reason for this is that the FSIA is more and more being interpreted to cover foreign officials acting within the scope of their official authority. This is so despite the fact that the law, as enacted in 1976, does not on its face appear to include natural persons. The law deals with suits against "foreign states," which the statute defines to include political subdivisions or an "agency or instrumentality." An agency or instrumentality is defined as "any entity ... which is a separate legal person, corporate or otherwise. ..."³

However, because some courts were concerned that plaintiffs might avoid the FSIA limitations by suing individual foreign officials rather than the states, and because of concerns about foreign policy implications, U.S. courts have increasingly held that the FSIA extends to suits against a foreign official operating within his or her official capacity. This was illustrated recently in Velasco v. Government of Indonesia,⁴ where the court held that the

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² See also, e.g., the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat 73 (reprinted at 28 U.S.C. § 1350 note) and 18 U.S.C. § 2313 (amended in 1984 to include the possession of automobiles abroad that had been stolen in the United States).
³ 28 U.S.C. § 1603(b) (emphasis added).
FSIA covered the acts within their official capacities of Indonesia's former ambassador to Syria and a former deputy of Indonesia's National Defense Security Council.5

It is time to ask whether this trend may have gone too far. For example, assume the Saudi equivalent of the U.S. deputy secretary of the treasury directs that large sums of Saudi government money and some of his own funds should be paid to a large charity that provides substantial support to a terrorist organization that conducts an attack against a U.S. airport or against a U.S. citizen in a third country. That second-level Saudi official would probably be immune from suit for his official acts under the FSIA today.6 In contrast, he might well not have been immune from a suit fifteen to twenty years ago when the FSIA was not ordinarily interpreted to cover foreign officials, assuming that personal jurisdiction could be obtained somehow.

Is this greater immunity good policy? Foreign government officials, like the Saudi one above, should not necessarily be immune for activities that might be within the scope of their responsibility, but are activities that are decidedly ones that the United States and other countries do not condone—e.g., supporting terrorism, torturing prisoners, and expropriating property.

Even if one supports some immunity for foreign officials, is the present dividing line between acts within and outside the scope of their authority a clear and satisfactory one? For example, in Velasco, after the U.S. Court of Appeals affirmed that the Indonesian officials were covered under the FSIA for acts taken in their official capacities, the court concluded that the alleged acts were outside the scope of their official capacities, but dismissed the lawsuit because the plaintiffs had failed to sue the particular defendants in their individual capacities.7

In any case, it is unfortunate that the scope of immunity today for government officials is also subject to overlapping and possibly conflicting rules. For example, even as the FSIA is now being read to include individual officials, the common law doctrine of head-of-state immunity continues to exist. In the United States today, head-of-state immunity would seem to be available to a foreign state's head, foreign minister, and possibly their families and maybe other high-ranking officials. U.S. courts generally follow an Executive Branch suggestion of immunity, but questions often arise when the Executive Branch is silent.8 In part because of its basis in case law, the doctrine is unclear regarding exactly who might be covered, the role of the Executive Branch, and the doctrine's relationship to the FSIA.

This uncertainty is compounded by the U.S. Supreme Court's recent support for statements of interest from the Executive Branch. The Court specifically noted last summer in Alvarez-Machain v. Sosa9 that in some cases, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."

5 See also, e.g., In re Terrorist Attacks on September 11, 2001, 349 F.Supp. 2d 765, 788 (S.D.N.Y. 2005) (finding that the FSIA covered the official acts of the Prince Sultan, the third-highest ranking member of the Saudi Arabian government, and Prince Turki, the Saudi ambassador to England, who had been the director of Saudi Arabia's Department of General Intelligence). Note that the author provided legal advice on some issues to plaintiffs' lawyers in one of these consolidated cases. For earlier FSIA cases, see, e.g., Chuidian v. Philippine National Bank, 976 F.2d 561 (9th Cir. 1992), and Jungquist v. Nahyan, 115 F.3d 1030 (D.C. Cir. 1997).

6 There are exceptions to immunity under the FSIA, but they are carefully circumscribed and probably would not be applicable to this hypothetical. One possible approach for the study and possible changes mentioned below would be to amend certain exceptions under the FSIA, such as the (a)(5) exceptions for torts. It is now limited in part to suits seeking damages for death or injury "occurring in the United States." 28 U.S.C. §1605(A)(5).

7 370 F.3d at 402.


9 124 S.Ct. 2739, 2766 n.21 (2004).
While this willingness of the court to listen to the State Department’s views has considerable merit, the somewhat haphazard process for issuing these statements of interest means that results in individual cases are uncertain.

As a closing example of how far changes have come in the past 20 years or so in the immunity area—i.e., more immunity and more confusion—consider the seminal Alien Tort Statute (ATS) case of Filartiga v. Pena-Irala.10 The defendant, Pena, was the inspector general of police in Asuncion, Paraguay, when he allegedly kidnapped and tortured Filartiga in Paraguay in 1976. In the successful ATS suit brought by Filartiga’s family against Pena, the Second Circuit did not discuss whether Pena, a government official at the time of the torture, was protected under the then-new FSIA.

Former police official Pena might be immune under the FSIA today, though there would be a question of whether the torturing and death were within the scope of his authority and whether the FSIA applies to former government officials. However, if the FSIA applies, then the holding in Argentine Republic v. Amerada Hess11 makes it clear that the FSIA would be the “sole basis” for obtaining jurisdiction over Pena, not the ATS.12

Given this complexity and lack of clarity, it might be useful to recall the immunity situation in the 1970s for foreign states. After the Tate letter of 1952, the U.S. State Department had been making decisions on immunity for foreign states, which the U.S. courts accepted. For various reasons, the practice was inconsistent, and the State Department was uncomfortable with its role. So, in 1976, with the State Department’s encouragement, Congress passed the FSIA, which was designed to provide objective standards to be interpreted by the courts on whether or not a foreign state should be granted immunity.

Now, thirty years later, questions arise about the scope of the FSIA regarding the immunity of foreign officials, and there is continuing uncertainty about the head-of-state doctrine. It would seem timely for the academic community, the Executive Branch, and Congress to analyze these questions further.

First, what should be the appropriate standards for immunity for foreign officials? Part of this analysis should include careful research into the laws and practices of other countries—research that has not been done. For consideration of reciprocity and diplomacy, it would seem wise to know what other countries are doing as the United States moves forward.

Second, on the basis of the analysis recommended above, there should be an effort to develop a reasonably clear set of statutory standards regarding immunity for foreign officials who are not diplomats, standards that could amend or supplement the FSIA and might well override the common law head-of-state doctrine.

ARBITRATING HUMAN RIGHTS

by Roger P. Alford*

Corporate liability is the current rage in human rights litigation. According to the Institute for Legal Reform, affiliated with the U.S. Chamber of Commerce, over forty cases are currently pending against corporations for alleged violations of the Alien Tort Statute or the

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10 630 F.2d 876 (2d Cir. 1980).
12 The U.S. Supreme Court cited Filartiga with apparent approval in Sosa, 124 S.Ct. at 2764, but that was regarding the scope of the law of nations, not the scope of foreign officials’ immunity.

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