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Southern District Weighs in on FSIA Immunity for Criminal Proceedings

In their column on International Criminal Law and Enforcement, Vera M. Kachnowski and Alexandra M.C. Douglas examine the case of a Turkish bank claiming immunity from prosecution under the Foreign Sovereign Immunities Act.

The prosecution of Turkish state-owned bank, Turkiye Halk Bankasi A.S. ("Halkbank"), in the Southern District of New York for sanctions-related offenses has garnered considerable attention, due both to its politicized nature and its procedural developments. *United States v. Turkiye Halk Bankasi A.S.,* 15 CR 867. Recently, Halkbank, which is organized under Turkish law and has no branches in the U.S., moved to dismiss the case based, inter alia, on its limited connection to the U.S. Among other things, Halkbank contended that the alleged conduct was too far removed from the U.S. to establish personal jurisdiction and that the indictment represented an impermissible extraterritorial application of U.S. law.

By **Vera M. Kachnowski**

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Foreign defendants faced with prosecution here often raise similar points. As a state-owned bank, however, Halkbank added a less common argument: that it is immune from prosecution under the Foreign Sovereign Immunities Act. But does the Foreign Sovereign Immunities Act, in fact, shield foreign state defendants from criminal proceedings here?

Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§1602-1611, was enacted "to address the potential sensitivity of actions against foreign states." *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000) (citations omitted). It is often repeated that the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Pablo Star Ltd. v. Welsh Gov't*, 961 F.3d 555, 559 (2d Cir. 2020). Under the FSIA, a foreign state and its agents and instrumentalities are "presumptively immune" from suit here unless a statutory exception applies. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Those exceptions include actions involving commercial activities, property rights, and certain tortious acts. 28 U.S.C. §§1605-1607.

Halkbank Indictment and Motion to Dismiss

On Oct. 15, 2019, Halkbank was charged in a six-count superseding indictment with fraud, money laundering, and sanctions offenses related to the bank's alleged participation in a multi-billion-dollar

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scheme to evade American sanctions on Iran. Specifically, the indictment alleged that Halkbank participated in transactions designed to secretly extract Iran's oil and gas proceeds and make international payments through the U.S. financial system, while hiding Iran's control. Halkbank was further accused of lying to U.S. Treasury Department officials about the scheme. The total alleged transfers amounted to approximately $20 billion of restricted Iranian funds, with at least $1 billion allegedly being laundered through the U.S.

The indictment followed on the heels of the trial and conviction, in January 2018, of Halkbank's Deputy General Manager of International Banking, Mehmet Hakan Atilla, in the same alleged scheme. Atilla's conviction and sentence were affirmed by the Second Circuit this July. *United States v. Atilla*, No. 18-1589 (2d Cir. 2020). In August, Halkbank moved to dismiss all charged counts, asserting various deficiencies in the indictment against it. It also posited three grounds for dismissal related to its status as a foreign defendant: first, that the bank was immune from prosecution under the FSIA; second, that the indictment was barred by the presumption against extraterritoriality; and third, that the court lacked personal jurisdiction.

Earlier this month, the court denied Halkbank's motion to dismiss in its entirety, with an analysis focusing on Halkbank's assertion of FSIA immunity. *United States v. Halkbank*, No. 15 Cr. 867 (RMB), 2020 U.S. Dist. LEXIS 182312 (S.D.N.Y. Oct. 1, 2020). Halkbank had argued that, as an entity majority owned by the Turkish government, it was an instrumentality of the Republic of Turkey and entitled to immunity under the FSIA or common law. Halkbank noted that the FSIA's text makes no distinction between civil and criminal cases in granting such immunity and argued that courts in other circuits and expert analyses have reached the same conclusion. It further argued that most of the FSIA's exceptions to immunity expressly apply only to civil cases, and that the other exceptions—including for commercial activities—should be deemed inapplicable to activities that only sovereigns (and not private citizens) can undertake. Halkbank contended that its role to "intermediate Iranian oil sales" was a sovereign function that, in any event, did not directly affect the U.S., as the exception requires. Mot. at 5.

In opposition, the government argued that the FSIA is aimed only at civil matters, not criminal cases. It pointed to the jurisdictional statute for actions against foreign states, 28 U.S.C. §1330, which provides U.S. courts with subject matter jurisdiction over "any nonjury civil action" for which no FSIA immunity applies. By contrast, the government argued, jurisdiction over criminal matters is set forth in 18 U.S.C. §3231, and affords U.S. courts subject matter jurisdiction over all offenses against U.S. laws, making no exception for foreign states. It further argued that the FSIA plainly is aimed at civil actions because it provides an opportunity for the Attorney General to intervene if such a suit threatened a criminal action. Moreover, even if the FSIA did apply to Halkbank, the government contended that the commercial activities exception would "strip away" any immunity. Opp'n at 9.

In denying the motion, the court quickly held that the "FSIA does not appear to grant immunity in criminal proceedings." *Halkbank,* 2020 U.S. Dist. LEXIS 182312, at *11. In drawing this conclusion, the court looked, inter alia, to *United States v. Hendron*, 813 F. Supp. 973, 975 (E.D.N.Y. 1993), which held that the FSIA "applies only to civil proceedings" and to an earlier Second Circuit decision, which observed that the FSIA's "basic purpose" was to provide jurisdiction to hear civil cases against foreign states. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 790 (2d Cir. 1980).

The court next analyzed the FSIA's commercial activity exception, which can be satisfied

in three ways. 28 U.S.C. §1605(a)(2). The court agreed with the government that even if FSIA immunity applied, Halkbank's various alleged interactions with the Treasury Department constituted both "commercial activity carried on in the United States" (the first option) and "act[s] performed in the United States in connection with a commercial activity elsewhere" (the second option). *Halkbank,* 2020 U.S. Dist. LEXIS 182312, at *14.

The third option requires an "act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere *and that act causes a direct effect in the United States.*" *Id.* at *12-13 (citation omitted) (emphasis added). Considering Halkbank's alleged interactions with the U.S. Treasury together with the allegations of money laundering through the U.S. financial system—characterized by the government as "a plan by [Halbank] and Iran … to victimize the United States and its financial institutions"—the court also found the third option satisfied. *Id.* at *14-15. It rejected Halkbank's common law immunity claim as well.

The court went on to hold the presumption against extraterritoriality inapplicable, finding a "sufficient domestic nexus between the allegations [] to avoid the question of extraterritorial application altogether." *Id.* at *17 (citation omitted). Specifically, the court deemed the alleged misrepresentations to U.S. officials and alleged laundering of $1 billion through U.S. correspondent accounts to constitute sufficiently domestic application of the charged statutes. The court also rejected Halkbank's personal jurisdiction argument, holding that the court's subject matter jurisdiction over the charged offenses also conferred personal jurisdiction over the defendants and deeming a "minimum contacts" test satisfied, though inapplicable in criminal cases.

Conclusion

The *Halkbank* decision makes for an interesting follow-on to a recent matter involving subpoena enforcement, also referenced by the parties in this case. In the subpoena enforcement action, a foreign state-owned corporation had moved to quash a grand jury subpoena on FSIA immunity grounds. The district court denied the motion and later held the corporation in contempt for failure to comply. On appeal, the D.C. Circuit declined to definitively answer whether FSIA immunity applies to civil and criminal proceedings alike but found that the corporation could not avoid compliance even if it did. *In re Grand Jury Subpoena*, 912 F.3d 623 (D.C. Cir. 2019) (per curiam), *cert denied*, 139 S. Ct. 914 (2019). Specifically, the D.C. Circuit held that the district court had subject matter jurisdiction over the criminal action under 18 U.S.C. §3231 (not 28 U.S.C. §1330). While the D.C. Circuit assumed FSIA immunity applied, it found that the commercial activity exception applied as well.

In its opinion, the D.C. Circuit noted a circuit split on the broader question of whether the FSIA immunizes foreign states from criminal prosecution. *Id.* at 627 (comparing *Southway v. Central Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999) (no); *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997) (no), with *Keller v. Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002) (yes). While the Supreme Court has not yet addressed this split, the *Halkbank* decision follows the courts in this and other circuits that have declined to find such immunity. That said, Halkbank has appealed the district court's order, so further insight from the Second Circuit on the FSIA's reach in criminal proceedings may be forthcoming.