The European Journal of International Law Vol. 32 no. 4

Sovereign Immunity as Liminal Space

David P. Stewart[*] and Ingrid B. Wuerth[**]

Abstract

Questions of foreign state immunity frequently involve the 'liminal space' between substance and procedure, between domestic and international law and between the domestic law of the forum states and domestic laws of other states. US courts typically (and rightly) rest their analysis not only upon relevant foreign law and international practice but also upon procedural norms that are not formally part of the Foreign Sovereign Immunities Act. Immunity frequently implicates both the reach and power of domestic courts and the authority, organization and expectations of foreign states. It is unsurprising, therefore, that the domestic procedures of the forum court and the internal laws of both the forum state and the foreign state play significant roles in immunity determinations, although the relative paucity of concrete evidence of state practice can make it very difficult to discern the content of customary international law. 'Restatements of domestic law' can play an important role in developing principles of immunity, perhaps especially in the liminal spaces between domestic and foreign, substance and procedure. Hopefully, institutes in other countries will produce works like the Restatement of the Law (Fourth): The Foreign Relations Law of the United States.

Roger O'Keefe has written a characteristically insightful analysis of the foreign sovereign immunity sections of the *Restatement of the Law (Fourth): The Foreign Relations Law of the United States*.[1] On the whole, he paints a very favourable picture of the *Restatement*, although he gently criticizes what he perceives as a failure to include more analysis of international law. He argues that, from the 'perspective of a non-US reader', the most valuable contribution of the relevant sections lies in the attention given in the Comments and Reporters' Notes to a range of preliminary issues of domestic law upon which immunity determinations turn, but which are regulated

[*] Professor from Practice, Georgetown University Law Center, Washington DC, USA. Email: stewartd@law.georgetown.edu.

[**] Associate Dean for Research & Helen Strong Curry Chair in International Law, Vanderbilt Law School, Nashville, TN, USA. Email: ingrid.wuerth@vanderbilt.edu.

[1] *Restatement of the Law (Fourth): The Foreign Relations Law of the United States* (2018).

neither by the US Foreign Sovereign Immunities Act (FSIA) nor by international law.[2] He writes that the attention to those issues invites – 'likely unwittingly' – reflection 'on the extent to which international law could and should inform the determination by domestic courts of these domestic legal questions on which the edifice of state immunity rests'.[3]

Not unwittingly, actually, and we are pleased that O'Keefe has focused on this aspect of the *Restatement* and of immunity law more generally. The sections that he addresses are in the main a restatement of the FSIA and the interpretation of that statute by US courts. Of course, the *Restatement*'s comments and reporters' notes – along with a bit of the black letter – do highlight some aspects of international law and practice. One stated purpose of the FSIA was in fact to codify customary international law governing immunity, so international law has been an important tool of interpretation since the enactment of the FSIA,[4] even if some of the statute's exceptions to immunity may arguably be inconsistent with, or even violate, international law. But as O'Keefe rightly observes, the *Restatement* may in places have the most value for those who seek to understand the domestic legal frameworks in which US – and other – courts make immunity determinations. Immunity is situated, after all, in a contested, liminal space between procedure and substance (in both international and domestic law), between the domestic law of the forum state and the internal law of the foreign state seeking immunity and between international and domestic law. These various sources of law are intertwined in complex ways that matter for the outcome of immunity decisions.

1 Procedure versus Substance

One might see the line between 'domestic legal questions' and the rules of sovereign immunity proper as a line that roughly approximates the divide between substance and procedure. To be sure, immunity is fundamentally about the question of jurisdiction. The International Court of Justice (ICJ) has described the rules of state immunity as 'procedural in character' because they do not bear on whether 'the conduct in respect of which the proceedings are brought was lawful or unlawful'.[5] Nevertheless, the procedural rules of immunity have both procedural and substantive elements and implications. Special rapporteurs of the International Law Commission have written extensively on what they call the procedural aspects of foreign official immunity from foreign criminal jurisdiction, including 'the timing of consideration of immunity by the courts of the forum State; the jurisdictional or other acts affected by immunity; the question of which organ must determine the applicability of immunity, and according

[2] O'Keefe, 'The Restatement of Foreign Sovereign Immunity: *Tutto il Mondo è Paese*', 32 *European Journal of International Law* (2021) 1483, at 1499. Foreign Sovereign Immunities Act (FSIA), Pub. L. 94-583 (Oct. 21, 1976), 90 Stat. 2891, codified as amended at 28 USC §§ 1330, 1391(f), 1441(d) and 1602-1611).

[3] O'Keefe, *supra* note 2, at 1485.

[4] *Federal Republic of Germany v. Philipp*, 141 S.Ct. 703, at 713–14 (3 February 2021).

[5] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, paras 58, 93.

to what procedure; invocation of immunity and the manner in which immunity can be invoked'.[6] Official and state immunity are obviously different, but some of the procedural issues relevant to foreign official immunity are also implicated in proceedings involving states.[7]

The timing of immunity determinations, for example, is not addressed in the 2004 United Nations (UN) Convention on the Jurisdictional Immunities of States and Their Property (UN Convention) or other treaties on immunity[8] but is instead regulated by domestic law.[9] Yet, given the purpose of immunity – not just to shield the foreign state from liability imposed by a domestic court but also to avoid the burdens of actual trial itself – it is easy to conclude that an immunity determination must be made early in the litigation as a matter of customary international law.[10] On the other hand, more precision than 'early' in the litigation is really impossible given the procedural variations in court systems around the world.

In US courts, the timing of immunity determinations is regulated by the FSIA. It characterizes immunity as depriving courts of both personal and subject matter jurisdiction, meaning that immunity is an issue that must be raised and resolved at the outset of litigation. More broadly, as the *Restatement* recognizes, many of the US Supreme Court's recent decisions involving foreign state immunity address 'procedural' questions, such as the burden of proof,[11] whether the FSIA is retroactive[12] and the proper methods of serving a foreign state.[13] Although resolved by the US Supreme Court entirely as matters of domestic law and to some extent answered by the FSIA itself, all of these issues arguably should be – or already are – considered to reflect aspects of customary international law.[14]

O'Keefe, however, does not seem to have these 'procedural' aspects of immunity in mind when he directs his attention to the domestic legal basis upon which immunity depends. Rather than distinguishing between 'procedure' and 'substance', he focuses instead on topics not specifically addressed by the FSIA (as opposed to those that are), including issues related to corporate form and structure.

6 International Law Commission, Sixth Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur (ILC Sixth Report), 70th Session, Doc. A/CN.4/722, 12 June 2018, paras 24, 35; see also Dodge and Keitner, 'A Roadmap for Foreign Official Immunity Cases in U.S. Courts', 90 *Fordham Law Review* (2021) 677.

7 *Cf.* Longobardo, 'State Immunity and Judicial Countermeasures', 32 *European Journal of International Law* (2021) 457 (discussing the implications of classifying state immunity as procedural rather than substantive).

8 ILC Sixth Report, *supra* note 6, para. 49.

9 United Nations Convention on Jurisdictional Immunities of States and Their Property (UN Convention), UN Doc. A/59/508, 2 December 2004.

10 ILC Sixth Report, *supra* note 6, para. 57.

11 *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S.Ct. 1312 (2017).

12 *Opati v. Republic of Sudan*, 140 S.Ct. 1601 (2020).

13 *Republic of Sudan v. Harrison*, 139 S.Ct. 1048 (2019).

14 See Wuerth, 'Immunity from Execution of Central Bank Assets', in T. Ruys, N. Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (2019) 266, at 275 (discussing procedural hurdles to the attachment of assets in Belgium and France).

2 Foreign versus Domestic

One such question is the distinction between an 'agency or instrumentality of a foreign state' and other entities that enjoy a domestic legal personality separate from that of the foreign state but nonetheless constitute for the purposes of the FSIA an integral part of the 'foreign state'.[15] Although the term 'agency and instrumentality' is defined by the FSIA, it is premised in part upon domestic law that is distinct from the FSIA itself. Indeed, in US practice, the line between a foreign agency and instrumentality and the foreign state is drawn based in part upon the content of foreign law. Courts must determine whether the foreign entity in question was created for a public purpose, whether its employees are civil servants as well as other issues related to the legal status of the entity under the domestic law of the foreign state.[16] The FSIA's definition is broader – more inclusive – than others. For instance, the UN Convention characterizes agencies and instrumentalities as a 'state' only to the extent that they are entitled to perform and are actually performing acts in 'the exercise sovereign authority of the State'.[17] The United Kingdom's State Immunity Act includes comparable language, which courts interpret with reference to both domestic English law and the internal law of the foreign state.[18]

The immunity of foreign states from claims brought by employees also depends in part, at least in the USA, upon the legal status of the employee under the law of the foreign state. The immunity of foreign states from employment-related claims is litigated under the commercial activity exception of the FSIA – foreign states are not immune if the employment relationship is deemed 'commercial'.[19] The line between sovereign and commercial employment relationships is based in part on the internal laws of the foreign state.[20]

3 Domestic versus International

Other 'preliminary issues' include when the forum court may ignore entirely the separate legal personality of an agency or instrumentality and treat it as the state itself for immunity purposes, what constitutes the property of a foreign state and what conduct is attributable to foreign states. These issues are quite alive and well in US jurisprudence. The extent to which these questions are (or should be) answered by domestic statutes or some other source of law, such as federal common law, state law or international law, is not always entirely clear in US or foreign jurisprudence.

15 O'Keefe, *supra* note 2, at 1489.

16 *Restatement (Fourth)*, *supra* note 1, § 452, Reporters' Note 4.

17 UN Convention, *supra* note 9, Art. 2(1)(b)(iii).

18 H. Fox and P. Webb, *The Law of State Immunity* (3rd edn, 2015), at 179; UK State Immunity Act, 1978.

19 *Restatement (Fourth)*, *supra* note 1, § 454, Reporters' Note 2; *cf. Merlini v. Canada*, 926 F.3d 21 (1st Cir. 2019), cert. denied, 140 S.Ct. 2804 (26 May 2020).

20 *Restatement (Fourth)*, *supra* note 1, § 454, Reporters' Note 2.

Disregard of corporate form so that the conduct (or assets and liabilities) of one legally distinct entity can be imputed to another is a frequently litigated issue in US courts, and it has great practical significance. Shortly after the FSIA was enacted, the US Supreme Court held in *First National City Bank v. Banco Para el Comercio Exterior de Cuba* (*Bancec*) that 'government instrumentalities' established as legal entities distinct 'from their sovereign should normally be treated as such'.[21] This presumption can be overcome by showing that a foreign 'corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created' or that separate treatment of the entities 'would work fraud or injustice'.[22]

The *Bancec* test was announced as a rule of substantive liability, governing when a separately incorporated government instrumentality would be liable for the debts of the state itself. Clearly, however, it has significant jurisdictional implications. Since the decision was rendered, courts have consistently expanded *Bancec* to apply to many issues of immunity. For example, a separately incorporated entity that was not an agency or instrumentality of Brazil was accorded the immunity to which a foreign state is entitled under the FSIA because it was the 'alter ego' of two instrumentalities that were entitled to immunity.[23]

In another case, arguments by plaintiffs that the commercial conduct of distinct corporate entities should be attributed to an instrumentality of the government of Ecuador (so that the instrumentality would not be immune from suit under the FSIA) were analysed under the difficult-to-satisfy *Bancec* test.[24] Courts have also applied *Bancec* to confer post-judgment enforcement jurisdiction over an agency based on jurisdiction over the foreign state itself under the arbitration exception.[25] *Bancec* is even used – unfortunately, in our view – as a constitutional test to determine whether a private corporation should be treated as a foreign state under the Due Process Clause of the Fifth Amendment.[26]

The *Bancec* test is fundamental to foreign state immunity analysis in the USA, yet it is textually not part of the FSIA, and its source and legal status within the US system is not exactly clear. O'Keefe describes it as purely domestic – that is, not derived from, or reflective of, any principle or practice recognized by international law.[27] Yet,

[21] *First National City Bank v. Banco Para el Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, at 626–27 (1983).

[22] *Ibid.*, at 629.

[23] *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 Civ. 6124 (JGK), 1999 WL 307666, at *11 (SDNY 17 May 1999), aff'd, 199 F.3d 94 (2d Cir. 1999) (as the alter ego of Petrobras with respect to the Bonds, Brasoil is also entitled to foreign sovereign immunity under the FSIA unless one of the statutory exceptions to immunity applies).

[24] *Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193, 196 (2d Cir. 2016); *Doe v. Holy See*, 557 F.3d 1066, 1079 (9th Cir. 2009).

[25] *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 138 (3d Cir. 2019), cert. denied 140 S.Ct. 2762 (2020).

[26] Wuerth, 'The Due Process and Other Constitutional Rights of Foreign Nations', 88 *Fordham Law Review* (*FLR*) (2019) 633, at 643; *cf.* Stewart, 'A Commentary on Ingrid Wuerth's *The Due Process and Other Constitutional Rights of Foreign Nations*', 88 *FLR* (2019) 102.

[27] O'Keefe, *supra* note 2, at 1489.

in developing the test, the US Supreme Court refused to apply US (state) corporate law as well as Cuban law. The latter was not controlling, the Court reasoned, because it did not want to permit foreign states to use their own corporate law to shield themselves from liability to third parties for violations of international law.[28] State corporate law was not appropriate either, since, as the Court observed, '[f]reely ignoring the separate status of government instrumentalities would result in substantial uncertainty' for sovereigns and creditors alike.[29] Instead, the Court developed a federal common law test – a somewhat controversial source of law in the US federal system.[30] The Court's test was based, at least in part, on public international law and general principles of corporate law and further recognized that the legal distinctions between entities drawn by another nation's laws accords '[d]ue respect for the actions taken by foreign sovereigns and for principles of comity between nations'.[31]

O'Keefe asks – implicitly at least – to what extent these foundational (but, in some sense, ancillary) questions are (or should be) regulated by international law? Disregard of corporate form and its relationship to international law is a central focus of Iran's currently pending case against the USA before the ICJ.[32] This case involves judgments against Iran issued by US courts in terrorism-related litigation – judgments that are worth US $56 billion.[33] The US Congress acted in various ways to facilitate the collection of the awards, including by making Iranian agencies and instrumentalities substantively liable for the judgments against Iran and by abrogating the immunity from execution to which the property of those agencies and instrumentalities might otherwise be entitled.[34] In other words, courts were directed by statute to disregard the separate juridical status of Iranian agencies and instrumentalities – in particular, Bank Markazi, the Central Bank of Iran – for the purposes of both liability and immunity. Iran claims that both actions violate customary international law and the US-Iran Treaty of Amity.[35]

The ICJ has held that it lacks jurisdiction over the immunity-related issues of that proceeding, but it has retained jurisdiction over Iran's claim about the disregard of corporate form as a matter of substantive liability.[36] The Treaty of Amity, which confers jurisdiction on the ICJ, protects 'companies'. The ICJ will accordingly have to determine which Iranian agencies and instrumentalities come within that language, so the case may be limited in terms of what it decides.[37] In any event, however, the

[28] Wuerth, 'The Future of the Federal Common Law of Foreign Relations', 106 *Georgetown Law Journal* (2018) 1825, 1834–3185.

[29] *Bancec*, *supra* note 21, at 626.

[30] See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[31] *Bancec*, *supra* note 21, at 626.

[32] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Application Instituting Proceedings, 14 June 2016.

[33] *Ibid.*, para. 7.

[34] See, e.g., 28 USC §§ 1610(g)(1), (g)(2).

[35] *Certain Iranian Assets*, *supra* note 32, para. 6; US-Iran Treaty of Amity, Economic Relations, and Consular Rights, US–Iran, 15 Aug., 1955, 8 UST 899.

[36] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, 13 February 2019, ICJ Reports (2019) 7, para. 80.

[37] *Ibid.*, para. 97.

proceeding illustrates the potential significance of corporate form to questions of state immunity and customary international law and the relationship between general corporate law and questions of immunity.

In one sense, we think it is clear, indeed, that the ancillary issues identified by O'Keefe are and should be governed by customary international law. It would be inconsistent with principles of foreign state immunity, for example, for a domestic statute or judicial decision to impute the commercial conduct of a random, unrelated corporate entity to the foreign state and thereby defeat that state of entitlement to immunity. Thus, whether US law is interpreted to permit those contacts to be imputed under the *Bancec* test also implicates international law. Similarly, it would be inconsistent with customary international law to declare that central banks are categorically incapable of having anything that qualifies as a 'property' interest so that they cannot be protected by immunity from execution.

Beyond these outer limits, however, it is often difficult today to identify the relevant norms of customary international law because – even today – there is so little concrete evidence of state practice in this particular area. Even where the content of international law is clear, uniformity can remain an elusive goal because states may always afford more immunity than customary international law requires. The intermingling of domestic and international law in immunity cases, along with the complexity of the domestic rules in question, does not so much call into question whether there are any international legal rules to be applied as it makes the baseline level of immunity extremely difficult to discern.

Here, the US Supreme Court's recent decision interpreting the FSIA's 'expropriation exception' is informative.[38] That exception allows suits for the recovery of damages arising from a foreign government's 'taking' of rights in property in violation of international law (subject to certain jurisdictional requirements).[39] International law is thus directly incorporated into, and determinative of, both the jurisdictional reach of the statute and the substantive standard to be applied to the merits. In this case, the plaintiffs (heirs of German art dealers) had sought compensation for valuable medieval relics (the 'Welfenschatz') confiscated by the Nazi government during the Holocaust, on the ground that their coerced sale constituted an 'act of genocide' and a 'taking' in violation of international law. The Court rejected their 'taking' claims because 'the phrase "rights in property taken in violation of international law," as used in the FSIA's expropriation exception, refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule'.[40]

[38] *Federal Republic of Germany v. Philipp*, 141 S.Ct. 703 (3 February 2021).

[39] 28 USC § 1605(a)(3) 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 … (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States'.

[40] *Philipp*, *supra* note 38, at 715.

By focusing on whether a government's alleged taking of property from its own nationals falls within the expropriation exception, the Court was taking an admittedly cautious approach. In fact, Chief Justice John Roberts's opinion acknowledged that the statutory exception, 'because it permits the exercise of jurisdiction over some public acts of expropriation, goes beyond even the restrictive view [of sovereign immunity]. In this way, the exception is unique; no other country has adopted a comparable limitation on sovereign immunity'.[41] One might read this (admittedly indirect) reference to the lack of relevant international practice as also cautioning, *sub silentio*, that any such expansion of US law is a matter for the legislature, not the courts.

Yet the opinion also rejected the claimants' argument that the sale of the consortium's property was an act of genocide 'because the expropriation exception is best read as referencing the international law of expropriation rather than of human rights'.[42] More to the point, the Chief Justice noted that the broader interpretation of the statute put forward by the heirs would arguably derogate from 'international law's preservation of sovereign immunity for violations of human rights law' (citing specifically the ICJ's decision in *Jurisdictional Immunities of the State* (*Germany v. Italy*)[43] and cautioned that their argument 'would overturn that rule whenever a violation of international human rights law is accompanied by a taking of property'.[44]

4 Conclusion

Just as immunity occupies liminal conceptual space between international and domestic law, it is also at the intersections of foreign and domestic law and of substance and procedure. More than any other body of international law, immunity is about the reach and power of domestic courts. It is accordingly designed to be applied by those courts, but it is also about the authority, organization and expectations of foreign states. It is unsurprising, therefore, that the domestic procedures of the forum court and the internal laws of both the forum state and the foreign state play outsized roles in the actual outcome of immunity cases. Restatements of domestic law have an especially important role to play, and we hope that authors and institutes in other countries produce similar works.

41 *Ibid.*, at 713, citing specifically *Restatement (Fourth)*, *supra* note 1, § 455, Reporters' Note 15, which noted, *inter alia*, that '[n]o provision comparable to § 1605(a)(3) has yet been adopted in the domestic immunity statutes of other countries. … Neither does any foreign state or international instrument provide for removal of immunity for alleged violations of international law or jus cogens'.

42 *Ibid.*, at 712 ('[w]e do not look to the law of genocide to determine if we have jurisdiction over the heirs' common law property claims. We look to the law of property').

43 *Ibid.*, at 713 ('[a]s the International Court of Justice recently ruled when considering claims brought by descendants of citizens of Nazi-occupied countries, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law'. *Jurisdictional Immunities*, *supra* note 5, at 139; see also Bradley and Goldsmith, 'Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation', 13 *Green Bag 2D* (2009) 9, at 21.

44 *Philipp*, *supra* note 38.