CHAPTER 12

Immunity from Jurisdiction

Quick Reference Rules of Law

The Schooner Exchange v. McFaddon

Government (D) v. Claimants (P)

11 U.S. (7 Cranch) 116 (1812).

NATURE OF CASE: Appeal from reversal of dismissal of claim of ownership.

FACT SUMMARY: Two Americans (P) claimed that they owned and were entitled to possession of the schooner Exchange.

RULE OF LAW

National ships of war entering the port of a friendly power are to be considered as exempted by the consent of that power from its jurisdiction.

FACTS: Two Americans (P) claimed they had seized the schooner Exchange on the high seas and that they now owned it and were entitled to possession of the ship. The United States Attorney (D) claimed that the United States and France were at peace and that a public ship of the Emperor of France had been compelled by bad weather to enter the port of Philadelphia and was prevented by leaving by process of the court. The district court granted the United States' (D) request to dismiss the claims of ownership and ordered that the ship be released. The circuit court reversed, and the United States (D) appealed to the U.S. Supreme Court.

ISSUE: Are national ships of war entering the port of a friendly power to be considered as exempted by the consent of that power from its jurisdiction?

HOLDING AND DECISION: (Marshall, C.J.) Yes. National ships of war entering the port of a friendly power are to be considered as exempted by the consent of that power from its jurisdiction. The jurisdiction of the nation within its own territory is exclusive and absolute. The Exchange, a public armed ship, in the service of a foreign sovereign, with whom the United States is at peace, and having entered an American port open for her reception, must be considered to have come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country. Reversed.

Quicknotes

JURISDICTION The authority of a court to hear and declare judgment in respect to a particular matter.

SOVEREIGN IMMUNITY Immunity of government from suit without its consent.

ANALYSIS

This case implicated the absolute form of sovereign immunity from judicial jurisdiction. The Court highlighted three principles: the exemption of the person of the sovereign from arrest or detention within a foreign country; the immunity that all civilized nations allow to foreign ministers; that a sovereign is understood to cede a portion of his territorial jurisdiction when he allows troops of a foreign prince to pass through his dominions.

Argentine Republic v. Amerada Hess Shipping Corp.

Country at war (D) v. Foreign corporations (P)

488 U.S. 428 (1989).

NATURE OF CASE: Review of reversal of dismissal of action seeking damages for property destruction.

FACT SUMMARY: A pair of Liberian corporations (P) sought to sue the Argentine Republic (D) in U.S. courts under the Alien Tort Statute.

RULE OF LAW

The Alien Tort Statute does not confer jurisdiction over foreign states.

FACTS: United Carriers, Inc. (P), a Liberian corporation, chartered a vessel called the Hercules to Amerada Hess Shipping Corporation (P), another Liberian corporation. The ship was to be used to transport fuel. While off the South American coast during the 1983 Falkland Islands War, it was irreparably damaged and had to be scuttled. United (P) and Amerada (P) sued Argentina (D) in U.S. district court. The court dismissed, holding jurisdiction to be absent. The Second Circuit reversed, holding that jurisdiction existed under the Alien Tort Statute of 1789. The U.S. Supreme Court granted review.

ISSUE: Does the Alien Tort Statute confer jurisdiction over foreign states?

HOLDING AND DECISION: (Rehnquist, C.J.) No. The Alien Tort Statute does not confer jurisdiction over foreign states. The statute confers jurisdiction in district courts over suits brought by aliens in tort for violations of international law or U.S. treaties. The law, as an initial matter, is silent as to whether it applies to suits against foreign states. More importantly, in 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA), which dealt in a comprehensive manner with the issue of jurisdiction over foreign states. The law provides that, except as provided in the Act, foreign states shall be immune from U.S. courts' jurisdiction. While the FSIA does not explicitly repeal the Alien Tort Statute to the extent that it may confer jurisdiction over a foreign state, it is clear that this was an intent behind the FSIA. This being so, the FSIA can be the only source of jurisdiction over a foreign state. Reversed.

Quicknotes

DAMAGES Monetary compensation that may be awarded by the court to a party who has sustained injury or loss to his person, property or rights due to another party's unlawful act, omission, or negligence.

JURISDICTION The authority of a court to hear and declare judgment in respect to a particular matter.

TORT A legal wrong resulting in a breach of duty by the wrongdoer, causing damages as a result of the breach.

ANALYSIS

The main focus of the FSIA appears to be commercial. There are a variety of commercial activities that occur outside the United States that can lead to a foreign state's being sued in a U.S. court. The same is not true in the tort arena.

Austria v. Altmann

Sovereign (D) v. Art heiress (P)

541 U.S. 677 (2004).

NATURE OF CASE: Appeal from affirmance of denial of motion to dismiss action to determine rightful ownership of art.

FACT SUMMARY: Austria (D) contended that the United States federal courts did not have jurisdiction to hear an action brought by Altmann (P) claiming that valuable art displayed in an Austrian museum was obtained through wrongful conduct by the Nazis during and after World War II and rightfully belonged to her.

RULE OF LAW

The Foreign Sovereign Immunities Act of 1976 (FSIA) applies to claims that are based on conduct that occurred before the FSIA's enactment and before the United States adopted a "restrictive theory" of sovereign immunity in 1952.

FACTS: Upon learning of evidence that certain of her uncle's valuable art works had either been seized by the Nazis or expropriated by Austria (D) after World War II, Altmann (P) filed an action in federal district court to recover six paintings by Gustav Klimt from Austria (D) and its instrumentality, the Austrian Gallery (Gallery) (D). Altmann (P) claimed that her uncle had bequeathed the paintings to her in his will after he fled Austria (D). Austria (D) and the Gallery (D) moved to dismiss, claiming sovereign immunity. Altmann (P) claimed that the FSIA applied to deny sovereign immunity through an exception for cases in which rights in property have been taken in violation of international law. The district court denied Austria's (D) motion and the court of appeals affirmed. The U.S. Supreme Court granted certiorari.

ISSUE: Does the FSIA apply to claims that are based on conduct that occurred before the FSIA's enactment and before the United States adopted a "restrictive theory" of sovereign immunity in 1952?

HOLDING AND DECISION: (Stevens, J.) Yes. The FSIA applies to claims that are based on conduct that occurred before the FSIA's enactment and before the United States adopted a "restrictive theory" of sovereign immunity in 1952. Foreign sovereign immunity is a matter of grace and comity, rather than a constitutional requirement. Accordingly, the Court has long deferred to Executive Branch sovereign immunity decisions, and until 1952, Executive policy was to request immunity in all actions against friendly sovereigns. In that year, the State Department began to apply the "restrictive theory" of sovereign immunity. Although this change had little impact on federal courts, which continued to abide by the Department's immunity suggestions, the change threw immunity decisions into some disarray. Foreign nations' diplomatic pressure sometimes prompted the Department to file suggestions of immunity in cases in which immunity would not have been available under the restrictive theory, and when foreign nations failed to ask the Department for immunity, the courts had to determine whether immunity existed, so responsibility for such determinations lay with two different branches. To remedy these problems, Congress enacted the FSIA to codify the restrictive principle and transferred primary responsibility for immunity determinations to the Judicial Branch. The FSIA grants federal courts jurisdiction over civil actions against foreign states and carves out the expropriation and other exceptions to its general grant of immunity. In any such action, the district court's subject matter jurisdiction depends on the applicability of one of those exceptions. Evidence that Congress intended the FSIA to apply to pre-enactment conduct lies in its preamble's statement that foreign states' immunity "[c]laims . . . should henceforth be decided by [United States] courts . . . in conformity with the principles set forth in this chapter," § 1602. This language is unambiguous and means that immunity "claims"—not actions protected by immunity, but assertions of immunity to suits arising from those actions—are the relevant conduct regulated by the FSIA and are "henceforth" to be decided by the courts. Thus, Congress intended courts to resolve all such claims in conformity with the FSIA's principles regardless of when the underlying conduct occurred. The FSIA's overall structure strongly supports this conclusion, since many of its provisions unquestionably apply to cases arising out of conduct that occurred before 1976, and its procedural provisions undoubtedly apply to all pending cases. In this context, it would be anomalous to presume that an isolated provision (such as the expropriation exception on which respondent relies) is of purely prospective application absent any statutory language to that effect. Finally, applying the FSIA to all pending cases regardless of when the underlying conduct occurred is most consistent with two of the FSIA's principal purposes: clarifying the rules judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims. This holding does not prevent the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity. Nor does the holding express an opinion on whether deference should be granted such filings in cases covered by the FSIA. Instead, the issue resolved by the holding here concerns only the interpretation of the FSIA's reach—a "pure question of statutory construction . . . well within the province of the Judiciary." Affirmed.

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ANALYSIS

Under the "restrictive theory," immunity is recognized with regard to a foreign state's sovereign or public acts (*jure imperii*), but not its private acts (*jure gestionis*). This theory "restricts" the classical or absolute theory of sovereign immunity, under which a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign.

Quicknotes

CERTIORARI A discretionary writ issued by a superior court to an inferior court in order to review the lower court's decisions; the Supreme Court's writ ordering such review.

COMITY A rule pursuant to which courts in one state give deference to the statutes and judicial decisions of the court of another state.

INTERNATIONAL LAW The body of law applicable to dealings between nations.

SOVEREIGN IMMUNITY Immunity of government from suit without its consent.

Siderman de Blake v. Republic of Argentina

Property owner and torture victim (P) v. Sovereign (D)

965 F.2d 699 (9th Cir. 1992).

NATURE OF CASE: Appeal from a judgment dismissing torture claims lodged against the government of another country.

FACT SUMMARY: After the military regime governing Argentina (D) tortured Jose Siderman (P) and threatened his family with death, the Sidermans (P) fled to the United States, later filing this complaint for damages due to the torture and for the expropriation of their property.

RULE OF LAW

The right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law.

FACTS: After the Argentine (D) military regime subjected Jose Siderman (P) to seven days of torture, during which they shouted anti-Semitic epithets at him, they left him in an isolated area, threatening his family with death unless they left Argentina (D) immediately. Forced to sell an interest in 127,000 acres of land at a steep discount in order to finance their flight, the Sidermans (P) came to the United States. Argentine (D) military officials diverted to themselves the profits and revenues from the Sidermans' (P) corporation, INOSA. The Sidermans (P) filed this complaint, alleging torture and expropriation of their property. When Argentina (D) did not appear, the court entered a default judgment for the Sidermans (P) on the torture claim but dismissed the expropriation claims. The district court later vacated the default judgment, dismissing the action on the grounds of Argentina's (D) immunity under the Foreign Sovereign Immunity Act (FSIA). The Sidermans (P) appealed.

ISSUE: Is the right to be free from official torture fundamental and universal, a right deserving of the highest status under international law?

HOLDING AND DECISION: [Judge not stated in casebook excerpt.] Yes. The right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law. The record reveals no ground for shielding Argentina (D) from the Sidermans' (P) claims that their family business was stolen from them by the military junta. It further suggests that Argentina (D) has implicitly waived its sovereign immunity with respect to the Sidermans' (P) claims for torture. Thus, the district court erred in dismissing the Sidermans' (P) torture claims. Reversed and remanded.

ANALYSIS

While not all customary international law carries with it the force of a *jus cogens* norm, which is derived from values taken to be fundamental by the international community, the prohibition against official torture has attained that status. Thus, under international law, any state that engages in official torture violates a *jus cogens* norm. The court concluded, however, that if violations of a *jus cogens* norm committed outside the United States were to be exceptions to immunity, Congress must make them so. The fact that there had been a violation of a *jus cogens* norm did not confer jurisdiction under the FSIA.

Quicknotes

JUS COGENS NORM Universally understood principles of international law that cannot be set aside because they are based on fundamental human values.

SOVEREIGN IMMUNITY Immunity of government from suit without its consent.

Republic of Argentina v. Weltover, Inc

Bond issuer (D) v. Bond holders (P)

504 U.S. 607 (1992).

NATURE OF CASE: Review of denial of dismissal of action for breach of contract.

FACT SUMMARY: Argentina (D) contended that it could not be sued in a U.S. court for defaulting on bonds it had issued.

RULE OF LAW

A foreign government may be amenable to suit in a U.S. court for defaulting on its bonds.

FACTS: Due to currency instability, Argentine businesses often had trouble participating in foreign transactions. The Argentine government (D), to ameliorate this problem, instituted a program wherein it agreed to sell to domestic borrowers U.S. dollars in exchange for Argentine currency. The dollars could be used to pay foreign creditors of Argentine businesses. Argentina (D) issued bonds, called "Bonods," to reflect its obligations. In 1986, Argentina (D), facing a shortage of reserves of U.S. dollars, defaulted on bond payments. Several bond holders (P), who collectively owned $1.3 million worth of bonds payable in New York, sued for breach of contract in federal court in New York. Argentina (D) moved to dismiss, asserting sovereign immunity. The district court denied the motion, and the Second Circuit affirmed. The U.S. Supreme Court granted review.

ISSUE: May a foreign government be amenable to suit in a U.S. court for defaulting on its bonds?

HOLDING AND DECISION: (Scalia, J.) Yes. A foreign government may be amenable to suit in a U.S. court for defaulting on its bonds. The Foreign Sovereign Immunities Act of 1976 creates an exception to foreign sovereign immunity "commercial" activities. For purposes of the FSIA, an activity falls within the exception if (1) it occurs outside the United States, (2) is in connection with commerce, and (3) causes a direct effect in the United States. Here, the first element without question has been satisfied. Whether a government's activity is "commercial" must be determined with reference to the nature of the act. The issuing of a bond is a commercial rather than a sovereign act—private concerns can and often do issue bonds; it is not an activity given only to sovereigns. Finally, an effect is "direct" if an effect is the natural and immediate consequence of the activity in question. Here, the effect in the United States was direct because the bonds were payable in New York, so the breach occurred there. In sum, the activities of Argentina (D) with respect to the bonds were commercial in nature, so the commercial activity exception to the FSIA applies. Affirmed.

ANALYSIS

The key to determining if the commercial activity exception applies in any given case is whether the government has entered the marketplace. If it has, it is to be treated, under the FSIA, as a private player. If it undertakes an activity peculiar to a sovereign, the exception does not apply.

Quicknotes

BOND A debt instrument issued by the issuing entity evidencing a promise to repay the loan with a specified amount of interest on a particular date.

BREACH OF CONTRACT Unlawful failure by a party to perform its obligations pursuant to contract.

SOVEREIGN IMMUNITY Immunity of government from suit without its consent.

Saudi Arabia v. Nelson

Host country (D) v. Foreign citizen (P)

507 U.S. 349 (1993).

NATURE OF CASE: Appeal from a judgment for the plaintiff in a personal injury action against a sovereign government.

FACT SUMMARY: Saudi Arabia (D) claimed foreign sovereign immunity from the subject-matter jurisdiction of the federal courts after Nelson (P) filed suit against it, alleging wrongful arrest, imprisonment, and torture.

RULE OF LAW

Foreign states are entitled to immunity from the jurisdiction of courts in the United States, unless the action is based upon a commercial activity in the manner of a private player within the market.

FACTS: Nelson (P) was recruited in the United States for employment as a monitoring systems engineer at a hospital in Riyadh, Saudi Arabia (D). When Nelson (P) discovered safety defects in the hospital's oxygen and nitrous oxide lines, he repeatedly advised hospital officials of the defects and reported them to a Saudi government (D) commission as well. Hospital officials instructed Nelson (P) to ignore the problems. Several months later, he was called in to the hospital's security office, arrested, and transported to a jail cell, where he was shackled, tortured, beaten, and kept without food for four days. After thirty-nine days, the Saudi government (D) released Nelson (P), allowing him to leave the country. Nelson (P) and his wife (P) filed this action in the United States, seeking damages for personal injury. They also claimed a basis for recovery in Saudi Arabia's (D) failure to warn Nelson (P) of the hidden dangers associated with his employment. The Saudi government (D) appealed the judgment of the court of appeals.

ISSUE: Are foreign states entitled to immunity from the jurisdiction of courts in the United States, unless the action is based upon a commercial activity in the manner of a private player within the market?

HOLDING AND DECISION: (Souter, J.) Yes. Foreign states are entitled to immunity from the jurisdiction of courts in the United States, unless the action is based upon a commercial activity in the manner of a private player within the market. Saudi Arabia's (D) tortious conduct in this case fails to qualify as "commercial activity" within the meaning of the Foreign Sovereign Immunities Act of 1976. Its conduct boils down to abuse of the power of its police by the Saudi government (D). A foreign state's exercise of the power of its police is peculiarly sovereign in nature and is not the sort of activity engaged in by private parties. Furthermore, Nelson's (P) failure to warn claim must also fail; sovereign nations have no duty to warn of their propensity for tortious conduct. The Nelsons' (P) action is not based upon a commercial activity within the meaning of the Act and therefore is outside the subject-matter jurisdiction of the federal courts. Motion to dismiss is granted. Reversed.

CONCURRENCE: (White, J.) Neither the hospital's employment practices nor its disciplinary procedures have any apparent connection to this country. Absent a nexus to the United States, the Act does not grant the Nelsons (P) access to our courts.

DISSENT: (Stevens, J.) If the same activities had been performed by a private business, jurisdiction would be upheld.

ANALYSIS

Under the "restrictive," as opposed to the "absolute," theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts but not as to those that are private or commercial in character. A state engages in commercial activity under the restrictive theory where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns. Whether a state acts in the manner of a private party is a question of behavior, not motivation. While it is difficult to distinguish the purpose of conduct from its nature, the Court recognized that the Act unmistakably commands it to observe the distinction.

Quicknotes

FAILURE TO WARN The failure of an owner or occupier of land to inform persons present on the property of defects or active operations that may cause injury.

JURISDICTION The authority of a court to hear and declare judgment in respect to a particular matter.

SOVEREIGN IMMUNITY Immunity of government from suit without its consent.

Permanent Mission of India to the United Nations v. City of New York

Sovereign's permanent mission (D) v. Municipality (P)

551 U.S. 193 (2007).

NATURE OF CASE: Appeal from affirmance of decision denying immunity from declaratory judgment action to establish the validity of tax liens.

FACT SUMMARY: India (D) and Mongolia (D) contended that they were immune under the Foreign Sovereign Immunities Act from New York City's (City) (P) action seeking declaratory judgments that tax liens the City (P) had on buildings owned by India (D) and Mongolia (D) were valid to the extent the buildings were used to house diplomatic employees.

RULE OF LAW

The Foreign Sovereign Immunities Act of 1976 (FSIA) does not immunize a foreign government from a lawsuit to declare the validity of tax liens on property held by the sovereign for the purpose of housing its employees.

FACTS: India (D) and Mongolia (D) owned buildings in New York City (City) (P) that in part were used to house lower-level diplomatic employees. Under New York law, real property owned by a foreign government is exempt from taxation when used exclusively for diplomatic offices or quarters for ambassadors or ministers plenipotentiary to the United Nations. For years, the City (P) levied property taxes against India (D) and Mongolia (D) for that portion of their diplomatic office buildings used to house lower-level employees and their families, but the governments (D) refused to pay the taxes. By operation of state law, the unpaid taxes converted into tax liens held by the City (P) against the properties. The City (P) filed a state-court suit seeking declaratory judgments to establish the liens' validity, but the governments (D) removed the cases to federal court, where they argued that they were immune under the FSIA, which is "the sole basis for obtaining jurisdiction over a foreign state in federal court." The district court disagreed, relying on a FSIA exception withdrawing a foreign state's immunity from jurisdiction where "rights in immovable property situated in the United States are in issue." The court of appeals affirmed, holding that the "immovable property" exception applied, and thus the district court had jurisdiction over the City's (P) suits. The U.S. Supreme Court granted certiorari.

ISSUE: Does the FSIA immunize a foreign government from a lawsuit to declare the validity of tax liens on property held by the sovereign for the purpose of housing its employees?

HOLDING AND DECISION: (Thomas, J.) No. The FSIA does not immunize a foreign government from a lawsuit to declare the validity of tax liens on property held by the sovereign for the purpose of housing its employees. Under the FSIA, a foreign state is presumptively immune from suit unless a specific exception applies. In determining the immovable property exception's scope, the Court begins, as always, with the statute's text. Section 1605(a)(4) of the FSIA does not expressly limit itself to cases in which the specific right at issue is title, ownership, or possession, nor does it specifically exclude cases in which a lien's validity is at issue. Rather, it focuses more broadly on "rights in" property. At the time of the FSIA's adoption, "lien" was defined as a "charge or security or incumbrance upon property," and "incumbrance" was defined as "[a]ny right to, or interest in, land which may subsist in another to the diminution of its value." New York law defines "tax lien" in accordance with these general definitions. A lien's practical effects bear out the definitions of liens as interests in property. Because a lien on real property runs with the land and is enforceable against subsequent purchasers, a tax lien inhibits a quintessential property ownership right—the right to convey. It is thus plain that a suit to establish a tax lien's validity implicates "rights in immovable property." Such an interpretation is supported by two of the FSIA's purposes: adoption of the restrictive view of sovereign immunity and codification of international law at the time of the FSIA's enactment. First, property ownership is not an inherently sovereign function. Moreover, the FSIA was intended to codify the preexisting real property exception to sovereign immunity recognized by international practice. That practice supports the City's (P) view that India (D) and Mongolia (D) are not immune, as does the contemporaneous restatement of foreign relations law. That restatement stated that a foreign sovereign's immunity does not extend to "an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction." Restatement (Second) of Foreign Relations Law of the United States § 68(b), p. 205 (1965). Because an action seeking the declaration of the validity of a tax lien on property is a suit to establish an interest in such property, such an action would be allowed under this rule. Affirmed and remanded.

DISSENT: (Stevens, J.) The true dispute in this case is over a foreign sovereign's tax liability—not about the

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validity of the City's (P) lien. Had Congress intended to waive sovereign immunity in tax litigation, it would have said as much.

ANALYSIS

Even if the tax liens in this case are declared valid, India (D) and Mongolia (D) would be immune from foreclosure proceedings. Nevertheless, the benefit to the City (P) of having the liens validated is that once a court has declared property tax liens valid, foreign sovereigns traditionally concede and pay. Even if the foreign sovereign fails to pay in the face of a valid court judgment, that country's foreign aid may be reduced by the United States by 110 percent of the outstanding debt. Finally, the liens would be enforceable against subsequent purchasers.

Quicknotes

CERTIORARI A discretionary writ issued by a superior court to an inferior court in order to review the lower court's decisions; the Supreme Court's writ ordering such review.

LIEN A claim against the property of another in order to secure the payment of a debt.

SOVEREIGN IMMUNITY Immunity of government from suit without its consent.

Argentine Republic v. Amerada Hess Shipping Corp.

Country at war (D) v. Foreign corporations (P)

488 U.S. 428 (1989).

NATURE OF CASE: Review of reversal of dismissal of action seeking damages for property destruction.

FACT SUMMARY: A pair of Liberian corporations (P) sought to sue the Argentine Republic (D) in U.S. courts under the Alien Tort Statute.

RULE OF LAW

The Foreign Sovereign Immunities Act's (FSIA) exception for noncommercial torts does not apply to acts occurring on the high seas.

FACTS: United Carriers, Inc. (P), a Liberian corporation, chartered a vessel called the Hercules to Amerada Hess Shipping Corporation (P), another Liberian corporation. The ship was to be used to transport fuel. While off the South American coast during the 1983 Falkland Islands War, it was irreparably damaged and had to be scuttled. United (P) and Amerada (P) sued Argentina (D) in U.S. district court. The court dismissed, holding jurisdiction to be absent. The Second Circuit reversed, holding that jurisdiction existed under the Alien Tort Statute of 1789. The U.S. Supreme Court granted review.

ISSUE: Does the FSIA's exception for noncommercial torts apply to acts occurring on the high seas?

HOLDING AND DECISION: (Rehnquist, C.J.) No. The FSIA's exception for noncommercial torts does not apply to acts occurring on the high seas. The FSIA is the only source of jurisdiction over a foreign state. The only exception to immunity found in the statute that even arguably applies here is that involving noncommercial torts. However, this exception only applies to torts occurring in the United States. As the tort here occurred on the high seas, the exception does not apply. Since no section of the FSIA applies here, jurisdiction over Argentina (D) does not exist. Reversed.

ANALYSIS

The main focus of the FSIA appears to be commercial. There are a variety of commercial activities that occur outside the United States that can lead to a foreign state's being sued in a U.S. court. The same is not true in the tort arena.

Quicknotes

JURISDICTION The authority of a court to hear and declare judgment in respect to a particular matter.

TORT A legal wrong resulting in a breach of duty by the wrongdoer, causing damages as a result of the breach.

Gates v. Syrian Arab Republic

Beheading victim's mother (P) v. Sovereign (D)

580 F. Supp. 2d 53 (D.D.C. 2008).

NATURE OF CASE: Claims brought under state law and the Foreign Sovereign Immunities Act (FSIA) against a sovereign and its principals for money damages for terrorist acts committed by an organization supported by the sovereign.

FACT SUMMARY: Families (P) of U.S. civilian contractors, Armstrong and Hensley, who were beheaded by al-Qaeda in Iraq, claimed that the Syrian Arab Republic (Syria) (D), its president (D), and its intelligence minister (D) were liable under the FSIA for money damages for the beheadings because Syria (D) actively and knowingly supported al-Qaeda in Iraq.

RULE OF LAW

(1) State-law claims must be dismissed where plaintiffs assert that they are victims of state-sponsored terrorism.

(2) A sovereign may be held liable under the FSIA's state-sponsored terrorism exception where it is shown that terrorist acts against U.S. citizens were committed by terrorists knowingly supported by the sovereign to advance the sovereign's policy objectives.

(3) Money damages for economic damages, solatium, pain and suffering, and punitive damages may be awarded under the FSIA against a state sponsor of terrorism for outrageous acts of terrorism against U.S. citizens committed by terrorists supported by the state sponsor.

FACTS: Al-Tawhid wal-Jihad ("al-Qaeda in Iraq") beheaded U.S. civilian contractors Armstrong and Hensley, and their families (P) brought suit against the Syrian Arab Republic (Syria) (D), its president (D), and its intelligence minister (D), seeking damages under the FSIA and asserting state-law claims for battery, assault, false imprisonment, intentional infliction of emotional distress, wrongful death, survival damages, conspiracy, and aiding and abetting. The plaintiffs alleged that Syria (D), acting through the principals named as defendants, provided material support and resources to al-Qaeda in Iraq and its leader, Zarqawi. Because none of the defendants filed an answer or otherwise appeared, the court proceeded to a default setting, which under the FSIA requires the entry of a default judgment against a non-responding foreign state where the claimant proves its case to the court's satisfaction. The court, after reviewing the evidence presented, concluded that support for Zarqawi and his al-Qaeda network from Syrian territory or Syrian government actors could not have been accomplished without the authorization of the Syrian government and its military intelligence. The court then addressed the issue of whether Syria (D) could be held liable for money damages under the FSIA for the beheadings of Armstrong and Hensley.

ISSUE:

(1) Must state-law claims be dismissed where plaintiffs assert that they are victims of state-sponsored terrorism?

(2) May a sovereign be held liable under the FSIA's state-sponsored terrorism exception where it is shown that terrorist acts against U.S. citizens were committed by terrorists knowingly supported by the sovereign to advance the sovereign's policy objectives?

(3) May money damages for economic damages, solatium, pain and suffering, and punitive damages be awarded under the FSIA against a state sponsor of terrorism for outrageous acts of terrorism against U.S. citizens committed by terrorists supported by the state sponsor?

HOLDING AND DECISION: [Judge not stated in casebook excerpt.]

(1) Yes. State-law claims must be dismissed where plaintiffs assert that they are victims of state-sponsored terrorism. Under FSIA § 1605A(c), U.S. citizens who are victims of state-sponsored terrorism can sue a responsible foreign state directly. Thus, Congress has provided the "specific source of law" for recovery and has thereby eliminated the inconsistencies arising under state law in such cases. Here, the families (P) effectively brought suit only against Syria (D) because they claimed that all the named defendants should be treated as the foreign state itself. The only cause of action permissible against Syria (D) is a federal cause of action under the FSIA, and the state-law claims must be dismissed.

(2) Yes. A sovereign may be held liable under the FSIA's state-sponsored terrorism exception where it is shown that terrorist acts against U.S. citizens were committed by terrorists knowingly supported by the sovereign to advance the sovereign's policy objectives. Here, it has been shown to the court's satisfaction that it was Syria's (D) foreign policy to support al-Qaeda in Iraq in order to topple the nascent Iraqi democratic government and thwart the U.S. invasion of Iraq. Syria's (D) aid to Zarqawi for at least three years was not unknowing, and, given prior acts of terrorism against civilians by al-Qaeda in Iraq, it was foreseeable that Zarqawi and his terrorist organization would again engage in such acts. Thus, the murders of Armstrong and Hensley were a foreseeable consequence of Syria's (D) aid and support to Zarqawi

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and al-Qaeda in Iraq, and there is jurisdiction over Syria (D) to support damages under the FSIA.

(3) Yes. Money damages for economic damages, solatium, pain and suffering, and punitive damages may be awarded under the FSIA against a state sponsor of terrorism for outrageous acts of terrorism against U.S. citizens committed by terrorists supported by the state sponsor. Damages for a private action for proven acts of terrorism by foreign states under the FSIA § 1605A(c) may include economic damages, solatium, pain and suffering, and punitive damages. The amount of punitive damages awarded for personal injury or death resulting from an act of state-sponsored terrorism depends on the nature of the injury, the character of the terrorist act, the need for deterrence, and the wealth of the state sponsor. As with other punitive damages, the goal is to punish those who engage in outrageous conduct and to deter others from engaging in similar conduct. Additionally, if several large punitive damages awards issue against a foreign state sponsor of terrorism, the state's financial capacity to provide funding will be curtailed. Therefore, default judgment is entered against Syria (D) in the following amounts: For the Armstrong family: economic damages of $1,051,377; pain and suffering of $50,000,000; punitive damages of $150,000,000; and solatium of $4,500,000. For the Hensley family: economic damages of $1,358,210; pain and suffering of $50,000,000; punitive damages of $150,000,000; and solatium of $6,000,000.

ANALYSIS

The damages provision used by the court to award various money damages in this case, § 1605A(c), was enacted in 2008 in an effort by Congress to assist victims in satisfying their judgments against state sponsors of terrorism as well as to clarify that the cause of action provided in the terrorist-state exception applies not only to agents, employees, or officials of the state sponsor, but also applies to the state itself.

Quicknotes

PUNITIVE DAMAGES Damages exceeding the actual injury suffered for the purposes of punishment of the defendant, deterrence of the wrongful behavior or comfort to the plaintiff.

SOLATIUM Damages awarded in order to provide solace to the victim or to otherwise compensate for emotional injury.

Dole Food Company v. Patrickson

Corporation (D) v. Food worker (P)

538 U.S. 468 (2003).

NATURE OF CASE: Appeal from judgment denying removal to federal district court to foreign corporations impleaded in a state-court tort action.

FACT SUMMARY: Dead Sea Bromine Co. and Bromine Compounds, Ltd. (collectively, the Dead Sea Companies (D)), which were impleaded by Dole Food Company and others (Dole petitioners) (D) in a state-court tort action, contended that as subsidiaries of an instrumentality of Israel they were entitled to remove the case to federal district court under the Foreign Sovereign Immunities Act of 1976 (FSIA).

RULE OF LAW

(1) Under the FSIA, a state must own a majority of the shares of a corporation if the corporation is to be deemed an instrumentality of the state.

(2) Instrumentality status under the FSIA is determined at the time the complaint is filed.

FACTS: Farm workers (P) filed a state-court action against Dole Food Company and others (Dole petitioners) (D), alleging injury from chemical exposure. The Dole petitioners (D) impleaded Dead Sea Bromine Co. and Bromine Compounds, Ltd. (collectively, the Dead Sea Companies (D)). As to the Dead Sea Companies (D), the court of appeals rejected their claim that they were instrumentalities of a foreign state (Israel) as defined by the FSIA, and that they were therefore entitled to removal to federal district court. The court instead ruled that a subsidiary of an instrumentality is not itself entitled to instrumentality status. The U.S. Supreme Court granted certiorari.

ISSUE:

(1) Under the FSIA, must a state own a majority of the shares of a corporation if the corporation is to be deemed an instrumentality of the state?

(2) Is instrumentality status under the FSIA determined at the time the complaint is filed?

HOLDING AND DECISION: (Kennedy, J.)

(1) Yes. Under the FSIA, a state must own a majority of the shares of a corporation if the corporation is to be deemed an instrumentality of the state. Removal of actions against foreign states is governed by 28 U.S.C. § 1441(d). Section 1603(a) of the FSIA defines "foreign state" to include its "instrumentality," which in turn is defined, in part, as any entity "which is a . . . corporat[ion]" whose shares are majority-owned by the foreign state, and that is not a U.S. citizen or created under the laws of a third country. Thus, the issue is whether the Dead Sea Companies (D) were an instrumentality of Israel. Israel did not have any direct ownership of shares in these companies, which were separated from Israel by one or more intermediate corporate tiers. Therefore, the Dead Sea Companies (D) were only indirect subsidiaries of Israel. They do not satisfy the FSIA requirement that the state own a "majority" of the shares of the corporation to qualify for instrumentality status. Only direct ownership satisfies the statutory requirement. In issues of corporate law structure often matters. The statutory reference to ownership of "shares" shows that Congress intended coverage to turn on formal corporate ownership. As a corporation and its shareholders are distinct entities, a corporate parent that owns a subsidiary's shares does not, for that reason alone, own or have legal title to the subsidiary's assets; and, it follows with even greater force, the parent does not own or have legal title to the subsidiary's subsidiaries. The veil separating corporations and their shareholders may be pierced in certain exceptional circumstances, but the Dead Sea Companies (D) refer to no authority for extending the doctrine so far that, as a categorical matter, all subsidiaries are deemed to be the same as the parent corporation. Affirmed as to this issue.

(2) Yes. Instrumentality status under the FSIA is determined at the time the complaint is filed. The plain language of FSIA § 1603(b)(2), which requires that a corporation show that it is an entity "a majority of whose shares . . . is owned by a foreign state," and is expressed in the present tense, requires that instrumentality status be determined at the time the action is filed. Here, any relationship recognized under the FSIA between the Dead Sea Companies (D) and Israel had been severed before suit was commenced, so the companies would not be entitled to instrumentality status even if their theory that such status could be conferred on a subsidiary were accepted. Affirmed as to this issue. Affirmed.

ANALYSIS

Under corporate law principles, which the Court looked to in this case, the fact that Israel might have exercised considerable control over the Dead Sea Companies (D) would not have changed the outcome of the Court's decision, since control and ownership are distinct concepts, and it is majority ownership by a foreign state, not control, that is the benchmark of instrumentality status.

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Quicknotes

CERTIORARI A discretionary writ issued by a superior court to an inferior court in order to review the lower court's decisions; the Supreme Court's writ ordering such review.

IMPLEADER Procedure by which a third party, who may be liable for all or part of liability, is joined to an action so that all issues may be resolved in a single suit.

First National City Bank v. Banco Para El Comercio Exterior de Cuba

American bank (D) v. Cuban state bank (P)

462 U.S. 611 (1983).

NATURE OF CASE: Review of suit to collect on a letter of credit and counterclaim for a setoff.

FACT SUMMARY: First National City Bank (now Citibank) (D) claimed that it could set off the value of its seized assets in Cuba against a claim by Banco Para El Comercio Exterior de Cuba (Bancec) (P) for payment on a letter of credit issued before the Cuban government nationalized all assets.

RULE OF LAW

The Foreign Sovereign Immunities Act of 1976 (FSIA) does not affect the attribution of liability among instrumentalities of a foreign state.

FACTS: The Cuban government established Bancec (P) in 1960 and later sued Citibank (D) on a letter of credit. Cuba then seized all of Citibank's (D) assets in Cuba. The Cuban government was later substituted as plaintiff when Bancec (P) was declared dissolved. Citibank (D) counterclaimed, asserting a right to set off the value of its seized Cuban assets. Bancec (P) claimed it was immune from suit as an instrumentality owned by a foreign government under the FSIA. The U.S. Supreme Court granted certiorari.

ISSUE: Does the FSIA affect the attribution of liability among instrumentalities of a foreign state?

HOLDING AND DECISION: (O'Connor, J.) No. The FSIA does not affect the attribution of liability among instrumentalities of a foreign state. The FSIA is not intended to affect the substantive law of liability. When a foreign sovereign asserts a claim in a United States court the consideration of fair dealing bars the state from asserting a defense of sovereign immunity to defeat a setoff or counterclaim. Citibank (D) may set off the value of its assets seized by the Cuban government against the amount sought by Bancec (P).

ANALYSIS

The court here first dismissed the notion that the Cuban bank could claim sovereign immunity. Then it applied principle of both international and federal common law. Under the Cuban Assets Control Regulations, any judgment entered in favor of an instrumentality of the Cuban government would be frozen pending settlement of claims between the U.S. and Cuba.

Quicknotes

CERTIORARI A discretionary writ issued by a superior court to an inferior court in order to review the lower court's decisions; the Supreme Court's writ ordering such review.

LETTER OF CREDIT An agreement by a bank or other party that it will honor a customer's demand for payment upon the satisfaction of specified conditions.

NATIONALIZATION Government acquisition of a private enterprise.

SETOFF A claim made pursuant to a counterclaim, arising from a cause of action unrelated to the underlying suit, in which the defendant seeks to have the plaintiff's claim of damages reduced.

Chuidian v. Philippine National Bank

Client (P) v. Bank (D)

912 F.2d 1095 (9th Cir. 1990).

NATURE OF CASE: Action to determine sovereign immunity.

FACT SUMMARY: Chuidian (P) sued Daza (D), an official of the Philippine government, after Daza (D) instructed a Philippine bank not to honor a letter of credit issued by the Republic of the Philippines to Chuidian (P).

RULE OF LAW

Foreign officials acting in an official capacity can claim sovereign immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA).

FACTS: Daza (D) was a member of an executive agency created by the Philippine government after the overthrow of former President Marcos. When Daza (D) instructed the Bank not to make payment on a letter of credit issued to Chuidian (P) during Marcos's regime, Chuidian (P) sued. Daza (D) claimed sovereign immunity under the FSIA.

ISSUE: Can foreign officials acting in an official capacity claim sovereign immunity under the Foreign Sovereign Immunities Act of 1976?

HOLDING AND DECISION: [Judge not stated in casebook excerpt.] Yes. Foreign officials acting in an official capacity can claim sovereign immunity under the FSIA. No authority supports the continued validity of the pre-1976 common law in light of the FSIA. It is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly.

ANALYSIS

Most courts have agreed with this decision. Some courts have denied immunity under the Alien Tort Act if human rights abuses are involved. Before the FSIA was enacted, the State Department decided such issues.

Quicknotes

LETTER OF CREDIT An agreement by a bank or other party that it will honor a customer's demand for payment upon the satisfaction of specified conditions.

SOVEREIGN IMMUNITY Immunity of government from suit without its consent.

Yousuf v. Samantar

Somali native (P) v. Somali official (D)

552 F.3d 371 (4th Cir. 2009).

NATURE OF CASE: Appeal from dismissal of action for damages for acts of torture and human rights violations under the Torture Victim Protection Act of 1991.

FACT SUMMARY: Natives of Somalia (P) brought suit under the Torture Victim Protection Act of 1991 against Samantar (D), claiming that they were victims of acts of torture and human rights violations committed against them by Somali government agents commanded by Samantar (D), who claimed immunity under the Foreign Sovereign Immunities Act (FSIA).

RULE OF LAW

The FSIA does not apply to individual officials of a foreign state.

FACTS: Natives of Somalia (P) brought suit under the Torture Victim Protection Act of 1991 against Samantar (D), claiming that they were victims of acts of torture and human rights violations committed against them by Somali government agents commanded by Samantar (D), who claimed immunity under the Foreign Sovereign Immunities Act (FSIA). The district court, following the majority view that individuals acting within the scope of their official duties qualifies them as an "agency or instrumentality of a foreign state" under the FSIA, and finding that Samantar (D) had acted in his official capacity, held that Samantar (D) had immunity from suit, and dismissed the case. The court of appeals granted review.

ISSUE: Does the FSIA apply to individual officials of a foreign state?

HOLDING AND DECISION: (Traxler, J.) No. The FSIA does not apply to individual officials of a foreign state. A majority of the courts considering the scope of the meaning of "agency or instrumentality" under the FSIA have concluded that an individual foreign official acting within the scope of his official duties qualifies as an "agency or instrumentality of a foreign state." However, the language and overall structure and purpose of the statute must also be considered. The FSIA defines an "agency or instrumentality" as an "entity" that is a "separate legal person . . . ." The phrase "separate legal person" seems to be drawn from corporate law, which holds that a corporation and its shareholders are distinct entities. If Congress had intended to cover individuals, it could have said so, without using a corporate concept. Thus, the FSIA's use of the phrase suggests that natural persons are not covered thereby. Moreover, in ensuring that an "agency or instrumentality" seeking the benefits of sovereign immunity is actually connected to a "foreign state," the FSIA requires that the "entity" be "neither a citizen of a State of the United States as defined in § 1332(c) and (e) . . . nor created under the laws of any third country." Sections 1332(c) and (e) govern the citizenship of corporations and legal representatives of estates, and are inapplicable to individuals. Also, it is nonsensical to speak of an individual, rather than a corporate entity, being "created" under the laws of a country. Therefore, these references support the interpretation that natural persons are not covered by the FSIA. Such an interpretation is also consistent with the FSIA's overall statutory scheme. For example, the rules for service of process under the FSIA are strikingly similar to the general procedural rules for service on a corporation or other business entity, and do not contain the rules for service of process on an individual. Finally, the legislative history also supports the interpretation that "an agency or instrumentality of foreign state" cannot be an individual. The House Committee Report on the FSIA explained that "separate legal person" was "intended to include a corporation, association, foundation, or any other entity that, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name." Because the FSIA does not apply to individual foreign government agents like Samantar (D), the district court erred that he had immunity. Reversed.

ANALYSIS

One criticism of the approach taken by the court in this case is that since there is little practical difference between a suit against a state and a suit against an individual acting in his official capacity, plaintiffs will be able to circumvent state immunity by suing government officials in their individual capacities, thus undermining one of the FSIA's primary goals.

Quicknotes

SOVEREIGN IMMUNITY Immunity of government from suit without its consent.

Regina v. Bartle and Commissioner of Police, Ex parte Pinochet

Government (P) v. Former head of state (D)

U.K. House of Lords, 2 W.L.R. 827, 38 I.L.M. 581 (1999).

NATURE OF CASE: Appeal from extradition proceedings.

FACT SUMMARY: Pinochet (D) claimed that he was immune from prosecution as a former head of state.

RULE OF LAW

The notion of continued immunity for former heads of state is inconsistent with the provisions of the Torture Convention.

FACTS: The House of Lords (P) considered charges that Pinochet (D), the former head of state of Chile, had violated the Torture Convention. Chile, Spain, and the United Kingdom were all parties to the Torture Convention, which became law on December 8, 1988. Pinochet (D) claimed he was immune as a former head of state under principle of international law.

ISSUE: Is the notion of continued immunity for former heads of state inconsistent with the provisions of the Torture Convention?

HOLDING AND DECISION: (Lord Browne-Wilkinson) Yes. The notion of continued immunity for former heads of state is inconsistent with the provisions of the Torture Convention. If, as alleged, Pinochet (D) organized and authorized torture after December 8, 1988, he was not acting in any capacity that gives rise to immunity because such conduct was contrary to international law. The torture proceedings should proceed on the allegation that torture in pursuance of a conspiracy to commit torture was being committed by Pinochet (D) after December 1988 when he lost his immunity.

ANALYSIS

The court discussed the common law as well. Under common law, a former head of state enjoys immunity for official acts done while in office. The purpose of the Torture Convention was to provide that there is no safe haven for torturers.

Quicknotes

EXTRADITION The surrender by one state or nation to another of an individual allegedly guilty of committing a crime in that area.

SOVEREIGN IMMUNITY Immunity of government from suit without its consent.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)

Sovereign state (P) v. Sovereign state (D)

I.C.J., 2002 I.C.J. 3.

NATURE OF CASE: Application claiming violations of international law and seeking order of provisional measures of protection relating to an arrest warrant for a sovereign's foreign minister.

FACT SUMMARY: The Democratic Republic of the Congo (D.R.C.) (P) contended that an international arrest warrant for its foreign minister, issued by Belgium (D), violated international law by purporting to exercise jurisdiction over another state's foreign minister, and the D.R.C. (P) sought an order of provisional measures of protection on the ground that the warrant effectively prevented the foreign minister from leaving the D.R.C. (P).

RULE OF LAW

A state's foreign minister enjoys full immunity from criminal jurisdiction in another state's courts, even where the minister is suspected of humanitarian violations.

FACTS: Under Belgian law, which provided for universal jurisdiction in the case of grave breaches of the Geneva Conventions, crimes against humanity, and other serious offenses, a Belgian judge issued an international arrest warrant for the foreign minister of the D.R.C. (P), seeking his extradition on allegations of grave violations of humanitarian law. Belgian law also provided that any immunity conferred by an individual's official capacity did not prevent application of universal jurisdiction. The Belgian warrant was transmitted to the International Criminal Police Organization (Interpol) and was circulated internationally. The D.R.C. (P) brought an application against Belgium (D) in the International Court of Justice (I.C.J.), asserting that the warrant violated international law by purporting to exercise jurisdiction over another state's foreign minister, and that the minister should enjoy immunity equivalent to that enjoyed by diplomats and heads of state. The D.R.C. (P) also sought an order of provisional measures of protection on the ground that the warrant effectively prevented the foreign minister from leaving the D.R.C. (P). The I.C.J. issued its judgment.

ISSUE: Does a state's foreign minister enjoy full immunity from criminal jurisdiction in another state's courts, even where the minister is suspected of humanitarian violations?

HOLDING AND DECISION: [Judge not identified in casebook excerpt.] Yes. A state's foreign minister enjoys full immunity from criminal jurisdiction in another state's courts, even where the minister is suspected of war crimes or crimes against humanity. A foreign minister's duties involve overseeing the state's diplomatic activities, acting as the state's representative in international negotiations and meetings, and traveling internationally. The minister may bind the state, and must be able to be in constant communication with the state and its diplomatic missions around the world, as well as with representatives of other states. Such a minister is recognized under international law as a representative of the state solely by virtue of his or her office. Based on these functions, an acting Minister of Foreign Affairs enjoys full immunity from criminal jurisdiction and inviolability so that he or she may not be hindered in the performance of his or her duties. Such immunity inheres regardless of whether the alleged criminal acts were performed in the minister's "official" capacity or "private" capacity, and regardless of when the conduct occurred. Otherwise, even the mere risk that by traveling to or transiting another state the minister might be exposed to legal proceedings could deter the minister from traveling internationally and fulfilling his or her official functions. Belgium's (D) argument that immunities cannot protect foreign ministers when they are accused of having committed war crimes or crimes against humanity is rejected. Belgium (D) points to instruments creating international criminal tribunals and decisions of national courts that state expressly that an individual's official capacity is not a bar to the exercise by such tribunals or courts of their jurisdiction. As support, it points to a judge's statement that "[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity that is coextensive with the obligation it seeks to impose." It also points to another judge's statement that "no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime." The D.C.R. (P), by contrast, points to statements by judges in the cases cited by Belgium (D) that support its assertion that, under international law as it currently stands, there is no exception to absolute immunity from criminal prosecution of an incumbent foreign minister accused of crimes under international law. The D.C.R. (P) also would limit the instruments creating war crimes tribunals to those tribunals and not extend them to other proceedings before national courts. Based on current practice and court decisions of some nations, there is no exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent foreign ministers suspected of having

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committed war crimes or crimes against humanity. Also, the rules regarding immunity for officials in the instruments creating war crimes tribunals are limited to those tribunals and do not create an exception to customary international law in regard to national courts. Decisions issued by those tribunals have not addressed the issue at bar and therefore do not affect this conclusion. Another consideration is that even if a national court has jurisdiction to prosecute an individual who is acting in an official capacity, such jurisdiction does not negate the individual's immunity under customary international law. Nevertheless, it must be emphasized that immunity from jurisdiction enjoyed by an incumbent foreign minister does not mean that he or she enjoys impunity for crimes he or she may have committed. Jurisdictional immunity is procedural, whereas criminal responsibility is a matter of substantive law, so that jurisdictional immunity does not operate to exonerate the minister, who may, under certain circumstances, be prosecuted for his or her crimes. The minister may be tried in the domestic courts of his or her state, and may cease to enjoy immunity if the state that the minister represents waives it. After the minister ceases to hold office, the minister will no longer enjoy all the immunities he or she previously enjoyed, and may be prosecuted for acts committed prior to or subsequent to the time the minister was in office, as well as in respect of acts committed during that period of office in a private capacity. Finally, the minister may be tried by international criminal courts where they have jurisdiction.

ANALYSIS

This case did not decide the tenability of the claim of universal jurisdiction by domestic courts. However, some of the Court's judges, in a separate opinion, expressed the belief that universal jurisdiction is permitted in the case of those crimes considered the most heinous by the international community, so that the warrant for the arrest of the D.R.C.'s foreign minister did not as such violate international law. It thus appears that the judges of the I.C.J. are split on the issue of universal jurisdiction as exercised by local or domestic courts. In any event, a domestic court's exercise of universal jurisdiction is not without precedent: in 1961, Israel claimed universal jurisdiction when it kidnapped the former Nazi Adolf Eichmann from Argentina, tried him in an Israeli court and executed him.

Quicknotes

INTERNATIONAL LAW The body of law applicable to dealings between nations.

JURISDICTION The authority of a court to hear and declare judgment in respect to a particular matter.

JUS COGENS NORM Universally understood principles of international law that cannot be set aside because they are based on fundamental human values.