ALERT MEMORANDUM

S.D.N.Y. District Court Rules Foreign Sovereigns Are Not Immune From Criminal Jurisdiction In U.S. Court.

October 9, 2020

On October 1, 2020, the U.S. District Court for the Southern District of New York ("SDNY") issued an important ruling in *U.S. v. Halkbank*, holding that foreign state-owned entities ("SOEs") can be subject to criminal jurisdiction in the United States.[1] The Court denied the defendant Turkish state-owned bank's motion to dismiss an indictment charging it with conspiracy, bank fraud, and money laundering in connection with allegedly processing $20 billion in Iranian oil and gas proceeds through the U.S. and international financial systems in violation of U.S. sanctions against Iran.

With this decision, the SDNY joins three Circuit courts that have addressed the unsettled issue by ruling that the Foreign Sovereign Immunities Act ("FSIA") does not preclude a U.S. court from exercising criminal jurisdiction over a foreign sovereign instrumentality. The *Halkbank* Court went a step further, rejecting Halkbank's defenses related to common-law sovereign immunity, constitutional due process, and extraterritoriality. In addition to expanding the scope of liability that foreign SOEs may face in U.S. court, the decision is also notable for its strengthening of prosecutorial discretion on questions of foreign sovereign immunity.

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[1] *United States v. Halkbank*, No. 15 CR 867 (RMB), 2020 WL 5849512 (S.D.N.Y. Oct. 1, 2020) ("*Halkbank*").

Background

In October 2019, the U.S. Attorney's Office for the Southern District of New York (the "USAO") indicted Halkbank, one of Turkey's largest state-owned banks, on six counts of conspiracy, bank fraud, and money laundering, alleging that Halkbank laundered over $1 billion of Iranian oil and gas proceeds through the U.S. financial system, and approximately $20 billion through the international financial system, in violation of U.S. and other sanctions.

Two of Halkbank's alleged co-conspirators, Turkish and Iranian citizen Reza Zarrab and Halkbank employee Mehmet Hakan Atilla, were indicted on similar charges. After unsuccessfully moving to dismiss their respective indictments, Zarrab pled guilty to designing the sanctions evasion scheme and Atilla was convicted by a jury and sentenced to a 32-month term of incarceration, which was affirmed by the Second Circuit in July 2020.[2]

Halkbank moved to dismiss the charges against it, claiming that (i) as a majority state-owned Turkish bank, it is immune from criminal prosecution under the FSIA and common law; (ii) the Court lacked personal jurisdiction over it; and (iii) the presumption against extraterritoriality barred the charges since the criminal statutes at issue do not apply extraterritorially.[3]

The FSIA provides that a "foreign state shall be immune from the jurisdiction of the courts of the United States" unless a specified exception to immunity applies and that U.S. district courts shall have jurisdiction in "any nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity."[4] One commonly invoked exception allows suits against a foreign sovereign entity based on commercial activity carried out within the United States.[5] In addition to foreign states themselves, foreign sovereign agencies, instrumentalities, and organs—including SOEs such as Halkbank—can qualify for immunity under the FSIA.

In civil cases, the U.S. Supreme Court has affirmed that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state."[6] But the Supreme Court has never ruled on whether or how the FSIA applies to criminal proceedings, and lower courts have reached varying conclusions.

The Decision

In *Halkbank*, U.S. District Judge Richard M. Berman of the SDNY rejected all of Halkbank's arguments:

First, with respect to sovereign immunity, the Court held that, although Halkbank would qualify for the FSIA's protections since it is majority-owned by the Turkish government, the FSIA does not apply in criminal cases. According to the Court, the FSIA's purpose is to create jurisdiction over certain civil claims, and nothing in its text or legislative history suggests that it applies to criminal proceedings. Even if the FSIA did apply to criminal proceedings—and in the Court's view it clearly did not—the Court held that the FSIA's exception to immunity for commercial activity in the United States

[2] *United States v. Zarrab*, 2016 WL 6820737 (S.D.N.Y. Oct. 17, 2016); *United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020).

[3] Halkbank also unsuccessfully argued that the charges failed on the merits and/or were duplicative.

[4] 28 U.S.C. § 1604; 28 U.S.C. § 1330(a).

[5] 28 U.S.C. § 1605(a)(2).

[6] *See, e.g.*, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

would deprive Halkbank of immunity here, based on Halkbank's interactions and communications with the U.S. Department of Treasury in and outside the United States in connection with its use of the U.S. financial system to carry out its scheme.

The Court also denied Halkbank's claim of common-law immunity, which the Court described as a "case-by-case prerogative of the Executive Branch."[7] The Court agreed with the USAO's argument that a decision by the USAO to prosecute manifests a "clear sentiment" of the Executive Branch that no such immunity should be recognized.[8]

Second, the Court held that because it had subject matter jurisdiction over the statutory offenses charged, it necessarily had personal jurisdiction over Halkbank for the charges.[9] The Court disagreed with Halkbank that personal jurisdiction separately required Halkbank to have relevant "minimum contacts" with the United States, but held that the minimum contacts test in any event would be satisfied in light of the relevant conduct's strong nexus to the United States.

Third, based on this U.S. nexus, the Court also ruled that the presumption against extraterritoriality, which seeks to limit the geographical reach of U.S. statutes where there is ambiguity, did not require dismissal. Halkbank emphasized that it was a foreign party engaged in foreign conduct that was legal under foreign law, and less than five percent of the allegedly illicit transfers passed through U.S. accounts. The Court nevertheless held that extraterritoriality was no bar to the prosecution since the gravamen of the conduct, and the alleged scheme's very purpose, was to launder funds through U.S. financial institutions, perpetrated by numerous misrepresentations to U.S. Department of Treasury officials.

Takeaways

As the *Halkbank* Court acknowledged in a footnote, "not all Circuits agree" on whether and under what circumstances U.S. courts can exercise criminal jurisdiction over foreign sovereign entities—and the Second Circuit may now have a chance to weigh in.[10] The Sixth Circuit has held that the FSIA "grants immunity to foreign sovereigns from criminal prosecution, absent an international agreement stating otherwise."[11] In contrast to the Sixth Circuit, but consistent with the SDNY in *Halkbank*, the Tenth, Eleventh, and D.C. Circuits have held that the FSIA *does not preclude* jurisdiction over foreign sovereign entities in criminal cases.[12] In the international context, South Africa, Canada, Pakistan, Singapore, and the United

[7] *Halkbank*, 2020 WL 5849512, at *5.
[8] *Id.*
[9] *See also* 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States").
[10] *Halkbank*, 2020 WL 5849512 at *4 n.5. *United States v. Biggs*, No. 06-3196 (CR), 2008 WL 1741625, at *1 (2d Cir. Apr. 14, 2008) involved related questions, but there the Second Circuit rejected FSIA immunity on multiple grounds, including that the defendant did not qualify as a "foreign state" under the FSIA.
[11] *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002) (reaching this holding in context of the RICO indictable act requirement).
[12] *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1215 (10th Cir. 1999) (holding in the RICO context that if Congress intended for sovereign entities to be "immune from criminal indictment under the FSIA," it "should amend the FSIA to expressly so state."); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (The "FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context[.]"); *In re Grand Jury Subpoena*, 912 F.3d 623, 634 (D.C. Cir. 2019) (affirming criminal contempt order against foreign state-owned entity for non-compliance with grand jury subpoena).

Kingdom have enacted legislation that specifically prohibits exercise of criminal jurisdiction over other sovereigns.

Even U.S. courts that agree that a foreign sovereign entity can be subject to criminal jurisdiction do not necessarily agree on the circumstances under which such jurisdiction may be exercised. The D.C. Circuit—which in a case related to the Mueller investigation became the first to affirm the actual exercise of criminal jurisdiction over a foreign sovereign entity (see our previous alerts here and here)—indicated that although the FSIA is not a source of jurisdiction or immunity in criminal matters, the FSIA's exceptions to immunity nevertheless apply in the criminal context. By contrast, the *Halkbank* Court considered the FSIA's exceptions only while assuming *arguendo* that the FSIA provides immunity in criminal matters.

The *Halkbank* decision also potentially broadens the scope of liability by eliminating certain defenses that have so far been left open by the Circuit courts. In particular, the *Halkbank* Court ruled that common law immunity can never be a defense in criminal proceedings against foreign sovereign entities, since the prosecutor's decision to bring charges itself manifests the position of the U.S. Executive Branch that no common law immunity should apply. This potentially vests increased power in prosecutors, by further committing questions of foreign sovereign criminal liability to prosecutorial discretion without requiring a formal statement from the government authorities with primacy over foreign relations. The *Halkbank* Court also rejected the argument that due process principles may provide a foreign SOE with defenses related to the "minimum contacts" personal jurisdiction test.[13] While this may be the norm in criminal prosecutions, it would be controversial under the FSIA.[14]

The U.S. government has only rarely sought to pursue criminal charges against foreign sovereign entities such as SOEs, and such cases are often resolved without expressly reaching the question of the sovereign entity's potential immunity from criminal liability. Criminal charges have never been brought against a foreign state itself. While *Halkbank* and other similar cases so far have all involved foreign SOEs rather than foreign states themselves, their reasoning could potentially be applied in either context.

The *Halkbank* decision adds to the U.S. government's arsenal. In addition to exerting diplomatic pressure or imposing sanctions, the U.S. government can now draw upon this decision, and the growing chorus it joins, to institute (or threaten) criminal process against SOEs and other foreign sovereign entities, which would have only a restricted set of defenses available to them under *Halkbank*'s reasoning if it prevails in the courts.

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[13] *Cf. In re Grand Jury Subpoena*, 912 F.3d at 635 (Williams, J. concurring) (describing unasserted jurisdictional defenses related to minimum contacts).

[14] The D.C. Circuit and Second Circuit have held that due process is not a constraint on the exercise of personal jurisdiction over foreign states, but that foreign state-owned entities might be entitled to such protections. *See GSS Group v. Liberian Port Authority*, 680 F.3d 805 (D.C. Cir. 2012); *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 301 (D.C. Cir. 2005); *Frontera Res. AzerCorp. v. State Oil Co. of Azer. Republic*, 582 F.3d 393 (2d Cir. 2009). The Second Circuit will consider exceptions to this rule when the foreign sovereign instrumentality is alleged to be the alter ego of the foreign state. *See Gater Assets Ltd. v. AO Moldovagaz*, No. 19-3550 (calendared for argument on October 20, 2020).