No. 21-1450

IN THE

Supreme Court of the United States

TÜRKIYE HALK BANKASI A.Ş.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PROFESSOR ROGER O'KEEFE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT.....1

ARGUMENT 4

I. FOREIGN STATES HAVE ABSOLUTE IMMUNITY FROM CRIMINAL JURISDICTION 4

A. The International Law Of State Immunity Derives From The Sovereign Equality Of States 4

B. The International Law Of State Immunity Applies To Criminal Jurisdiction 6

II. FOREIGN STATE INSTRUMENTALITIES ARE IMMUNE FROM CRIMINAL JURISDICTION FOR ACTIONS TAKEN ON THEIR STATE'S BEHALF 11

A. The International Law Of State Immunity From Criminal Jurisdiction Extends To Foreign State Instrumentalities 11

B. Failure To Abide By These Principles Risks Retaliation Against U.S. Officials 16

III. ON THE FACTS ALLEGED, HALKBANK IS IMMUNE FROM CRIMINAL JURISDICTION. 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Adamov v. Federal Office of Justice,
Case No. 1A 288/2005 (Swi. Federal Supreme Court, Dec. 22, 2005) 8

Agent judiciare du Trésor v. Malta Maritime Authority and Carmel X, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 23, 2004, Bull. crim., No. 04-84.265 (Fr.) 11, 12, 14

Al-Adsani v. United Kingdom,
34 EHRR 11 (2001).....5

Almås and Almås v. Republic of Poland,
P.C.A. Case No. 2015-13,
(Perm. Ct. Arb. Jun. 27, 2016) 15

Austro-German Customs Union Case,
Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41 (Sep. 5) 5

Berizzi Bros. Co. v. The Pesaro,
271 U.S. 562 (1926).....2

Boos v. Barry,
485 U.S. 312 (1988).....15

Fed. Republic of Germany v. Philipp,
141 S. Ct. 703 (2021) 2, 10

Gustav F.W. Hamester GmbH. & Co. K.G. v. Republic of Ghana, ICSID Case No. ARB/07/24 (Jun. 18, 2010).....15

Hannes v. Kingdom of Roumania Monopolies Inst.,
260 A.D. 189 (N.Y. App. Div. 1940) 18

Heaney v. Gov't of Spain,
445 F.2d 501 (2d Cir. 1971) 13

Jam v. Int'l Fin. Corp.,
139 S. Ct. 759 (2019) 9

Jones v. Ministry of Interior of the Kingdom of Saudi Arabia [2006]
UKHL 26, [2007] 1 AC (HL) 270.....13, 14

Jurisdictional Immunities of the State (Ger. v. It: Greece Intervening),
2012 I.C.J. 99 (Feb. 3) 5, 13

Lozano (Mario Luiz) v. Italy,
Case No 31171/2008 (It. Ct. of Cass. sez. I pen. Jul. 24, 2008).....8

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[2016] ZASCA 17 (S. Afr. Supreme Court of Appeal Mar. 15, 2016) 8

Murray v. The Schooner Charming Betsy,
6 U.S. (2 Cranch) 64 (1804).....2

Permanent Mission of India to the United Nations v. City of New York,
551 U.S. 193 (2007).....2

Prosecutor v. Blaškić, Case No. IT-95-14,
Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 Jul. 1997
(Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997).....7

Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), [2000]
1 A.C. 147 (H.L. Mar. 24, 1999) 8

Republic of Argentina v. Weltover, Inc.,
504 U.S. 607 (1992).....2

Samantar v. Yousuf,
560 U.S. 305 (2010).....14

Saudi Arabia v. Nelson,
507 U.S. 349 (1993).....2

The Schooner Exchange v. McFaddon,
11 U.S. (7 Cranch) 116 (1812).....4

Yearsley v. W.A. Ross Const. Co.,
309 U.S. 18 (1940).....12

Constitutional Provisions

Turk. Const. arts. 165-67.....18

Statutory Authorities

18 U.S.C. § 3231.....3

22 U.S.C. § 8513a(d)(2).....17

Act on Civil Jurisdiction over Foreign States of 2009, Act No. 24 of 24 Apr. 2009, §§ 1-2 (Japan).....9

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11.....2

Foreign States Immunities Act of 1981, Act 87 of 1981, § 2(3) (South Africa).....9

Foreign States Immunities Act of 1985, No. 196, 1985, § 3(1) (Australia).....9

Foreign States Immunity Law, 5769-2008, §§ 2-3, 15(c) (Israel).....9

Immunities and Privileges Act of 1984,
Act No. 12 of 1984, § 18(2) (Malawi).....9

State Immunity Ordinance of 1985,
R.S.C. 1985, C. S-18, § 18 (Canada).....9

State Immunity Act of 1978,
c. 33 of 1978, § 16(4) (United Kingdom) 9

State Immunity Ordinance of 1981,
No. 6, § 17(2)(b) (Pakistan).....9

State Immunity Ordinance of 1985,
Cap. 313, § 19(2)(b) (Singapore).....9

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States for internationally wrongful acts
(Dec. 12, 2001) 14, 15

G.A. Res. 59/38, annex, United Nations
Convention on Jurisdictional Immunities
of States and Their Property
(Dec. 16, 2004) 5, 6, 9, 13

International Law Commission, Immunity of State
Officials from Foreign Criminal Jurisdiction:
Memorandum by the Secretariat,
U.N. Doc. A/CN.4/596 (Mar. 31, 2008).....7, 8

International Law Commission, Rep. of Work of Its
Sixty-Third Sess.,
U.N. Doc. A/C.6/66/SR.2 (2011).....14

International Law Commission, Rep. of Work of Its
Sixty-Third Sess.,
U.N. Doc. A/C.6/66/SR.27 (2011).....14

International Law Commission, Rep. of Work of Its Sixty-Third and Sixty-Fourth Sess., U.N. Doc. A/C.6/67/SR.20 (2012).....14

International Law Commission, Rep. of Work of Its Sixty-Third and Sixty-Fourth Sess., U.N. Doc. A/C.6/67/SR.21 (2012).....14

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Thomas Marois & Ali Riza Güngen, *Credibility & Class in the Evolution of Public Banks: The Case of Turkey,* 43 J. Peasant Studs. 1285 (2016).....16

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V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve*?, 109 Harv. L. Rev. 1477 (1996).....11

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6 Marjorie M. Whiteman*, Digest of International Law* (1968).....13

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Xiaodong Yang, *State Immunity in International Law* (2012).....8

INTEREST OF *AMICUS CURIAE*[1]

Roger O'Keefe is Professor of International Law at Bocconi University, Milan, and an honorary Professor of Laws at University College London. Professor O'Keefe's extensive publications in the field of international law include *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (2013), which he co-edited with Professor Christian J. Tams and to which he contributed thirteen chapters as author or co-author; and *International Criminal Law* (2015), a leading treatise that includes an extensive treatment of the international law of jurisdictional immunity from criminal proceedings. He has been consulted by governments and international organizations and has appeared as *amicus curiae* before the Appeals Chamber of the International Criminal Court on questions of jurisdictional immunity.

Professor O'Keefe has a particular interest in this case given his expertise in, and this case's implications for, the international law of jurisdictional immunity.

SUMMARY OF ARGUMENT

This brief addresses the customary international law governing whether an agency or instrumentality of one state ("foreign state") may be subjected to criminal proceedings in the courts of another state

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[1] No counsel for a party authored this brief in whole or in part. No one other than *amici curiae* and *amici*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

("forum state"). It assumes, based on the record before this Court, that Petitioner Türkiye Halk Bankasi A.S. ("Halkbank") is an instrumentality of Turkey and that Turkey has not consented to the exercise of jurisdiction over Halkbank.

The customary international law of state immunity is highly relevant to this case. This Court has often used the international law of state immunity (or, as it is known in the United States, "foreign sovereign immunity"[2]) as an aid to the construction of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 ("FSIA"). *See, e.g.*, *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703, 713 (2021) (referring to "the FSIA's express goal of codifying the restrictive theory of sovereign immunity"); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007) (discussing the "two well-recognized and related purposes of the FSIA: adoption of the restrictive view of sovereign immunity and codification of international law at the time of the FSIA's enactment"); *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60 (1993); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612-13 (1992). Likewise, this Court has long held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see, e.g.*, *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 576 (1926) (interpreting the admiralty

[2] While the labels are coterminous, this brief generally uses "state immunity" when referring to international law and "foreign sovereign immunity" when referring to U.S. foreign relations law.

jurisdiction statute "as not intended to include a libel in rem against a public ship"). That foundational rule of statutory interpretation governs the construction of the general criminal jurisdiction statute, 18 U.S.C. § 3231.

This brief makes three principal points.

First, state immunity stems from the sovereign equality of states and the international law rule that no state can exercise jurisdiction over another without its consent. Because states are unitary juridical entities under international law, state immunity protects not just foreign states, but also their instrumentalities and state officials. State immunity also applies in both the civil and criminal context. Criminal immunity differs from civil immunity only in terms of the exceptions to that immunity. There are, of course, well-established exceptions to civil immunity in commercial contexts, but not to acts of state. By contrast, criminal immunity is absolute, subject to no exceptions.

Second, all authorities to consider the issue agree that foreign instrumentalities have, at minimum, the same "conduct immunity" that foreign officials have. Both groups are immune from criminal jurisdiction for acts carried out on behalf of the state, including commercial conduct. This rule is logical and supported by (1) the United States' pre-FSIA understanding of state immunity, (2) the conclusion of the highest appellate court of the only other state to have addressed this issue, the Criminal Chamber of the French Court of Cassation, and (3) the leading authorities on state immunity and state responsibility.

There are substantial risks to allowing criminal prosecutions of foreign instrumentalities in violation of international law. Because international law does not distinguish between foreign instrumentalities and foreign officials, foreign states might retaliate by prosecuting not just U.S. agencies and instrumentalities, but also U.S. officials for their official conduct.

Third, on the alleged facts of this case, Halkbank benefits from the foreign sovereign immunity that the United States owes Turkey under international law. Halkbank is a state-owned entity that is accountable to the government of Turkey. The indictment alleges that high-ranking Turkish government officials, including the Prime Minister, knew of, and directed and controlled the alleged activities of Halkbank. The indictment also alleges that Halkbank undertook the scheme in part to benefit the Turkish government. There is thus no doubt that Halkbank's alleged actions were on behalf of Turkey, rendering it immune from criminal prosecution under international law.

ARGUMENT

I. FOREIGN STATES HAVE ABSOLUTE IMMUNITY FROM CRIMINAL JURISDICTION

A. The International Law Of State Immunity Derives From The Sovereign Equality Of States

The international law of sovereign immunity stems from the "equality and absolute independence of sovereigns." *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812); *see, e.g.*,

Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 I.C.J. 99, 123 (Feb. 3) ("*Jurisdictional Immunities*"). Under international law, each state is sovereign and equal, meaning that the state "has over it no other authority." *Austro-German Customs Union Case*, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41, at 57 (Sep. 5) (Anzilotti op.). A forum state's exercise of judicial power over a foreign state violates "the principle *par in parem non habet imperium*" (an equal has no authority over an equal), "by virtue of which one State shall not be subject to the jurisdiction of another State." *Al-Adsani v. United Kingdom*, 34 EHRR 11, ¶54 (2001).

International law thus prohibits a forum state from exercising judicial jurisdiction over a foreign state or its property, unless and to the extent that the foreign state has consented to jurisdiction or an accepted international law exception to state immunity applies. *See, e.g.*, Restatement (Fourth) of Foreign Relations Law § 451 (2018) ("Under international law and the law of the United States, a state is immune from the jurisdiction of the courts of another state, subject to certain exceptions."); *Jurisdictional Immunities*, 2012 I.C.J. at 123-24; G.A. Res. 59/38, annex, United Nations Convention on Jurisdictional Immunities of States and Their Property, at 3 (art. 5) (Dec. 16, 2004) ("United Nations Convention on State Immunity").

This immunity extends to all state instrumentalities and officials acting on the state's behalf. As a matter of international law, a state is a unitary entity with a single juridical personality. Although state agencies, instrumentalities, and officials may possess distinct juridical personalities

under domestic law, these state agencies, instrumentalities, and officials are, in certain circumstances, entitled to state immunity under international law. *See, e.g.,* United Nations Convention on State Immunity art. 2(1)(*b*) ("'State' means: (i) the State and its various organs of government; (ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity; (iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State; (iv) representatives of the State acting in that capacity . . . ."); Restatement (Fourth) of Foreign Relations Law § 451 cmt. e (2018) (same, but excluding foreign government officials).

International law thus prohibits a forum state from exercising jurisdiction over any person, whether legal or natural, entitled to invoke state immunity, unless an exception to immunity applies.

B. The International Law Of State Immunity Applies To Criminal Jurisdiction

A foreign state is immune, under international law, from both the civil and criminal jurisdiction of a forum state. There is overwhelming authority that current or former officials of a foreign state have "conduct immunity" (or immunity *ratione materiae*) from criminal jurisdiction.

As a matter of international law, current and former foreign officials are immune from criminal prosecution for their "acts performed in the discharge

of official functions." International Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat, U.N. Doc. A/CN.4/596 (Mar. 31, 2008), ¶91; *see Prosecutor v. Blaškić*, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 Jul. 1997, ¶41 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997) ("[E]ach State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions."); Rome Statute of the International Criminal Court art. 98(1), Jul. 17, 1998, 2187 U.N.T.S. 90, 148 (referring to "the State . . . immunity of a person . . . of a third State").

States, including the United States, widely share this view.[3] So do scholars.[4]

This state immunity from criminal prosecution differs from state immunity from civil jurisdiction in

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[3] *See, e.g.*, U.S. Statement of Interest, *Chuidian v. Philippine Nat'l Bank*, No. CV 86-2255 (C.D. Cal. Mar. 21, 1988) ("[A]n official should be shielded from personal liability for the performance of official functions."), *reprinted in* 2 Marian Nash, *Cumulative Digest of United States Practice in International Law, 1981-1988*, at 1581, 1582; *Minister of Justice and Constitutional Development v. Southern African Litigation Centre*, [2016] ZASCA 17, ¶66 (S. Afr. Supreme Court of Appeal Mar. 15, 2016); *Lozano (Mario Luiz) v. Italy*, Case No 31171/2008, ¶5 (It. Ct. of Cass. sez. I pen. Jul. 24, 2008); *Adamov v. Federal Office of Justice*, Case No. 1A 288/2005, ¶3.4.2 (Swi. Federal Supreme Court, Dec. 22, 2005); *Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147 (H.L. Mar. 24, 1999) (appeal taken from Eng.); U.N. Doc. A/C.6/72/SR.22 (Nov. 27, 2017), ¶97 (Australia); U.N. Doc. A/C.6/71/SR.27 (Dec. 5, 2016), ¶123 (Czech Republic); U.N. Doc. A/C.6/71/SR.29 (Dec. 2, 2016), ¶7 (Netherlands); U.N. Doc. A/C.6/68/SR.17 (Oct. 28, 2013), ¶34 (Norway, on behalf of the Nordic countries).

[4] *See, e.g.*, Joanne Foakes, *The Position of Heads of State and Senior Officials in International Law* 10 (2014); Xiaodong Yang, *State Immunity in International Law* 426-27 (2012); Bing Bing Jia, *The Immunity of State Officials for International Crimes Revisited*, 10 J. Int'l Crim. Just. 1303, 1304-07 (2012); Ingrid Wuerth, Pinochet*'s Legacy Reassessed*, 106 Am. J. Int. L. 731, 732 (2012); Zachary Douglas, *State Immunity for the Acts of State Officials*, 82 Brit. Y.B. Int. L. 281, 287 (2011); Campbell McLachlan, Pinochet *Revisited*, 51 Int. & Comp. L.Q. 959, 961-63 (2002); *see also* International Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction: Memorandum by the Secretariat, U.N. Doc. A/CN.4/596 (Mar. 31, 2008), ¶¶154-212; Roman Kolodkin (Special Rapporteur), Second Rep. on Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631 (Jun. 10, 2010), ¶34.

that it is unqualified and subject to no exceptions. In the civil jurisdiction context, of course, "foreign governments are entitled to immunity only with respect to their sovereign acts, not with respect to commercial acts" under the restrictive theory of state immunity. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 766 (2019). But the restrictive theory leaves "untouched" the rule of absolute immunity in criminal cases. Hazel Fox & Philippa Webb, *The Law of State Immunity* 91 (3d ed. 2015). Thus, the international community expressed its "general understanding" that the United Nations Convention on State Immunity, which enumerates those commercial exceptions, "does not cover criminal proceedings." G.A. Res. 59/38, ¶2 (Dec. 2, 2004). Likewise, the state immunity legislation of other states recognizes commercial exceptions in civil—but not criminal—proceedings.[5] Because criminal immunity remains undiminished by the restrictive theory, the state remains immune from criminal jurisdiction for all its acts, including commercial acts.

There is, to be sure, some debate over whether state immunity for criminal jurisdiction extends to

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[5] *See* State Immunity Act of 1978, c. 33 of 1978, § 16(4) (United Kingdom); Foreign States Immunities Act of 1981, Act 87 of 1981, § 2(3) (South Africa); State Immunity Ordinance of 1981, Ordinance No. 6 of 1981, § 17(2)(b) (Pakistan); Immunities and Privileges Act of 1984, Act No. 12 of 1984, § 18(2) (Malawi); Foreign States Immunities Act of 1985, No. 196, 1985, § 3(1), definition of "proceeding" (Australia); State Immunity Act of 1985, R.S.C. 1985, C. S-18, § 18 (Canada); State Immunity Act of 1985, Cap. 313, § 19(2)(b) (Singapore); Foreign States Immunity Law, 5769-2008, §§ 2-3, 15(c) (Israel); Act on Civil Jurisdiction over Foreign States of 2009, Act No. 24 of 24 Apr. 2009, §§ 1-2 (Japan).

grave, universally condemned international criminal offenses like genocide, crimes against humanity, and war crimes.[6] The better view is that customary international law recognizes no such exceptions. *See* Roger O'Keefe, *International Criminal Law* 437-53 (2015); Sean D. Murphy, *Immunity* Ratione Materiae *of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?*, 118 Am. J. Int'l L. Unbound 4, 8 (2018). But regardless, this debate only underscores that the restrictive theory's commercial activity exceptions do not apply in the criminal context, as there is no civil immunity exception for "acts of genocide" or other similar international crimes. *Philipp*, 141 S. Ct. at 714; *see id.* at 713 ("derogating international law's preservation of sovereign immunity for violations of human rights" would "violate international law").

[6] *See, e.g.*, Report of the International Law Commission on the Work of Its Sixty-Ninth Session, [2017] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/2017/Add.1 (Part 2), ¶¶71 n.371, 74. *But see id.* ¶¶91-115; International Law Commission, Rep. of the Work of Its Seventy-Third Sess., U.N. Doc. A/77/10, ¶¶230-36 (2022).

II. FOREIGN STATE INSTRUMENTALITIES ARE IMMUNE FROM CRIMINAL JURISDICTION FOR ACTIONS TAKEN ON THEIR STATE'S BEHALF

A. The International Law Of State Immunity From Criminal Jurisdiction Extends To Foreign State Instrumentalities

An agency or instrumentality of a foreign state is entitled to the same immunity from criminal jurisdiction as the foreign state itself. The authority discussed in the prior section, to be sure, arose in the context of criminal prosecutions of current or former foreign government officials, not states themselves or their instrumentalities. But this is for the simple, contingent reason that most states recognize the criminal responsibility of natural persons only, and do not allow for or otherwise substantially restrict criminal prosecutions of "legal persons" like corporations or instrumentalities. *See, e.g.*, V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477, 1491 (1996) ("[C]orporate criminal liability in Europe is generally more restrictive than in the United States."). Just as with natural persons, international law requires forum states that allow for prosecution of legal persons to respect the immunity of foreign state agencies and instrumentalities. The sole relevant question, for state immunity purposes, is whether that natural or legal person counts under international law as the foreign state.

The only other state to address this issue head-on in the criminal context has concluded that foreign

instrumentalities have absolute conduct immunity for acts they undertake on behalf of their governments. The Criminal Chamber of the French Court of Cassation held that the Malta Maritime Authority, an agency of the state of Malta, was immune from the jurisdiction of the French criminal courts. "[T]he rule of customary international law which bars proceedings against States before the criminal courts of a foreign State extends to organs and entities that constitute emanations of the State, as well as to their agents, by reason of acts which, as on the facts of the present case, relate to the sovereignty of the State concerned." *Agent judiciare du Trésor v. Malta Maritime Authority and Carmel X*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 23, 2004, Bull. crim., No. 04-84.265 (Fr.) ("*Malta Maritime Authority*").[7]

This rule makes sense, because it is effectively the same "conduct immunity" rule that applies to natural persons: "The action of the agent is the act of the government." *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 22 (1940) (citations and quotation marks omitted).

Agencies and instrumentalities, like natural persons, have absolute immunity from criminal prosecution for all conduct, including commercial activity, that they perform in their capacity as an

[7] The translation is Professor O'Keefe's. The original French text reads: "la coutume internationale qui s'oppose à la poursuite des Etats devant les juridictions pénales d'un Etat étranger s'étend aux organes et entités qui constituent l'émanation de l'Etat ainsi qu'à leurs agents en raison d'actes qui, comme en l'espèce, relèvent de la souveraineté de l'Etat concerné."

agency or instrumentality. Because all such immunity flows from the state, the rule is the same regardless of whether the person invoking it is a natural person (foreign official) or legal person (agency or instrumentality). An agency, instrumentality, or other entity is entitled to state immunity when it was empowered to act and did act for a national purpose, rather than in a purely private capacity.

The United States' pre-FSIA understanding of state immunity supported, at minimum, conduct immunity for foreign instrumentalities. The Restatement (Second) of Foreign Relations Law (1965) provided that "[t]he immunity of a foreign state . . . extends to (a) the state itself; . . . (f) any other public minister, official, or agent of the state with respect to acts performed in his official capacity . . .; [and] (g) a corporation created under its laws and exercising functions comparable to those of an agency of the state." *Id.* § 66. The U.S. Department of State endorsed this understanding. *See* 6 Marjorie M. Whiteman, *Digest of International Law* § 21, at 592 (1968) (reprinting this part of the Restatement). So did lower courts. *See, e.g.*, *Heaney v. Gov't of Spain*, 445 F.2d 501, 504 (2d Cir. 1971) (Friendly, J.) (endorsing this part of the Restatement).

In the civil context, the United Nations Convention on State Immunity suggests that foreign instrumentalities, like foreign officials, have immunity when they act in their official capacities. Article 2(1)(*b*) of the Convention defines "State" as "agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of

sovereign authority of the State." *Id.* art. 2(1)(*b*)(iii); *see, e.g.*, Report of the International Law Commission on the Work of Its Forty-Third Session, [1991] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1991/Add.1, (Part 2), at 17 (offering, as "[e]xamples," "the practice of certain commercial banks which are entrusted by a Government to deal also with import and export licensing which is exclusively within governmental powers").[8]

Moreover, the customary law of state responsibility for internationally wrongful acts suggests that a foreign instrumentality acting on behalf of the state is entitled to conduct-based immunity. An official or entity is entitled to state immunity whenever its conduct is attributable to the state under the international law of state responsibility. *See, e.g.*, *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC (HL) 270 [¶¶12, 74-79] (appeal taken from Eng.); International Law Commission, Rep. of the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 209, 211 (2022).[9] Thus, "some actions against an

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[8] This Convention, while not in force, is considered highly persuasive "on the content of customary international law." *Jurisdictional Immunities*, 2012 I.C.J. at 128; *see Jones v. Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007] 1 AC (HL) 270 [¶26] (appeal taken from Eng.).

[9] *See also* International Law Commission, Rep. of the Work of Its Sixty-Third Session, U.N. Doc. A/C.6/66/SR.26, ¶8 (2011) (Norway, on behalf of the Nordic countries); *Id.*, U.N. Doc. A/C.6/66/SR.27, ¶71 (2011) (Portugal); International Law Commission, Rep. of the Work of Its Sixty-Third and Sixty-Fourth Sessions, U.N. Doc. A/C.6/67/SR.20, ¶111 (2012) (Austria); *Id.*, U.N. Doc. A/C.6/67/SR.21, ¶¶29, 60, 83 (2012)

(footnote continued)

official in his official capacity should be treated as actions against the foreign state itself" and trigger sovereign immunity. *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010).

The law of state responsibility, notably, sets forth the same conduct immunity test as the *Malta Maritime Authority* case. "The conduct of a person or entity which is not an organ of the State . . . but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance." G.A. Res. 56/83, annex, Responsibility of States for internationally wrongful acts, at 3 (art. 5) (Dec. 12, 2001).[10] This rule applies "even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence." Report of the International Law Commission on the Work of Its Fifty-Third Session, [2001] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/2001, at 45. Such conduct is attributable to a foreign state "if the conduct complained of is systematic or recurrent, such that the

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(Belarus, Republic of the Congo, Portugal); *Id.*, U.N. Doc. A/C.6/67/SR.22, ¶82 (2012) (Italy).

[10] The Articles are the authoritative source on the international law of state responsibility. *See, e.g.*, *Gustav F.W. Hamester GmbH. & Co. K.G. v. Republic of Ghana*, ICSID Case No. ARB/07/24, ¶171 (Jun. 18, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0396.pdf; *Almås and Almås v. Republic of Poland*, P.C.A. Case No. 2015-13, ¶206 (Perm. Ct. Arb. Jun. 27, 2016), https://pcacases.com/web/sendAttach/1872.

[foreign] State knew or ought to have known of it and should have taken steps to prevent it." *Id.* at 46. "In short, the question is whether they were acting with apparent authority." *Id.*

B. Failure To Abide By These Principles Risks Retaliation Against U.S. Officials

As with all rules of international law, the United States has strong incentive to comply with the accepted international rules of the law of state immunity. "[T]he concept of reciprocity . . . governs much of international law . . . ." *Boos v. Barry*, 485 U.S. 312, 323 (1988). Failure to respect foreign instrumentalities' state immunity from criminal jurisdiction accordingly risks retaliation against the United States and weakening of the international law of state immunity.

Both possibilities would undermine longstanding U.S. interests because international law does not recognize any distinction between foreign instrumentalities and officials. It is not difficult to imagine, for example, that foreign governments might prosecute U.S. government officials for perceived international wrongs. This is no vague hypothetical: the United States' substantial and sustained international presence makes it an easy target abroad for such criminal actions. *See, e.g.*, Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 62 (2007) (The United States' "global responsibilities expose it to a disproportionate risk of ICC Prosecution."). And protecting U.S. officials from foreign criminal prosecutions has been a longstanding, bipartisan policy. *See, e.g.*, *President Barack Obama Certifies That U.S. Peacekeepers in*

Mali Are Immune from ICC Jurisdiction, 108 Am. J. Int'l L. 547, 548 (2014) (detailing many such efforts).

These very real risks caution restraint in deviating from international norms.

III. ON THE FACTS ALLEGED, HALKBANK IS IMMUNE FROM CRIMINAL JURISDICTION.

According to the record in this case, Halkbank is a sovereign instrumentality. Halkbank was created by the Republic of Turkey "to mobilize scarce domestic resources for capitalist transformation, while asserting Turkish sovereignty." Br. for Pet'r at 5 (quoting Thomas Marois & Ali Riza Güngen, *Credibility & Class in the Evolution of Public Banks: The Case of Turkey*, 43 J. Peasant Studs. 1285, 1292 (2016)). The bank, which is owned and controlled by the state, has a state mandate to make loans using public funds to support the Turkish economy and particular groups within it. Br. for Pet'r at 5-6. The Turkish state continues to operate Halkbank as a banking resource for the Turkish people. *Id.* As a result of these national purposes, Halkbank is a sovereign instrumentality for purposes of international law.

Accepting as true the facts alleged in the indictment, Halkbank is entitled to state immunity under international law. In brief, the indictment alleges that Halkbank "violate[d]," "evade[d]," and "avoid[ed]" certain components of the U.S. sanctions regime against Iran, including "prohibitions against Iran's access to the U.S. financial system, restrictions on the use of proceeds of Iranian oil and gas sales, and restrictions on the supply of gold to the Government of Iran and to Iranian entities and persons." J.A.1.

The remaining facts alleged in the indictment establish that Halkbank conducted this activity on behalf of Turkey.

As an exception to U.S. sanctions against Iran, the United States permitted certain countries, including Turkey, to continue purchasing Iranian oil and gas so long as Turkey (1) designated a Turkish bank to hold the proceeds owed to Iran and (2) limited Iran's use of those proceeds for certain purposes, including bilateral trade and humanitarian goods. J.A.2, 8, 22; *see also* 22 U.S.C. §§ 8513a(d)(2), (4)(D). To that end, Turkey designated Halkbank, a Turkish bank majority-owned by Turkey, to hold the proceeds of Iran's oil sales. J.A.1-2, 4. Halkbank is a state bank created under specific legislation with duties under Articles 166 and 167 of the Turkish Constitution to "take measures to ensure and promote the sound and orderly functioning of the markets for money, credit, capital, [and] goods and services," the management of which is determined by the Turkish government. Turk. Const. art. 167; *see also id.* arts. 165-66; Br. for Pet'r at 5.

As alleged in the indictment, Turkey delegated to Halkbank its responsibility for ensuring compliance with the sanctions that the United States imposed on Iran. J.A.13-17, 20-22; *see, e.g.*, *Hannes v. Kingdom of Roumania Monopolies Inst.*, 260 A.D. 189, 200 (N.Y. App. Div. 1940) (considering, at common law, whether "corporations are used as governmental agencies").

The indictment further alleges that the government of Turkey directed and controlled Halkbank's execution of the alleged activities. For example, in September 2013 and again in mid-2014, the Prime Minister of Turkey allegedly directed

Halkbank to take part in this scheme. J.A.20-21, 27. Other paragraphs allege that various "Turkish government officials both approved of and directed" aspects of Halkbank's alleged scheme. J.A.22. The indictment also alleges that Halkbank's alleged scheme was designed in part to benefit the government of Turkey by artificially inflating Turkey's export statistics. J.A.13-14. These allegations suggest that Halkbank's acts were performed under the control or on the instructions of Turkish state officials, in part to benefit the Turkish government. At minimum, they suggest that Turkish state officials were aware of Halkbank's acts, could have prevented them, and thus were responsible for them.

The fact that the functions relating to Iranian funds conferred on Halkbank involved some independent discretion or power to act does not deprive them of their character as an exercise of state authority. Nor does it matter whether Halkbank's activities between 2012 and 2016 relating to Iranian funds may have been beyond the lawful scope of the power granted to Halkbank. That is so because the acts alleged in the indictment were inseparable from the exercise of the functions that the Turkish government conferred on Halkbank. Those functions took the form of the very exercise of the governmental authority delegated to Halkbank, even if that exercise is alleged to have been unlawful.

As a result, in light of the principles outlined above, Halkbank was empowered to and performed acts in the exercise of the state authority of Turkey. Halkbank is therefore immune under international law from the criminal jurisdiction of U.S. courts.

CONCLUSION

Halkbank is entitled to immunity from criminal prosecution under the international law of state immunity. Failure to recognize this immunity would risk substantial international repercussions, including the criminal prosecution of U.S. officials and agencies in future cases. Accordingly, the court of appeals' judgment should be reversed.

Respectfully submitted,

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