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# No Sovereign Immunity Under FSIA for Human Rights Violations: a proposal to strengthen the system of Human Rights protection

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I. Current status: Six exceptions to sovereign state immunity under FSIA.

As a general principle, sovereign states are immune to actions brought in courts of foreign states. There are exceptions to this general rule, however, such as when a sovereign state is sued in a foreign court based on acts derived from commercial activities and thus not related to the *raison d'être* of the state.

In the United States, the Foreign Sovereign Immunities Act of 1976 (“FSIA”) (28 U.S.C. 97) provides:

*The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter. (Sec. 1602)*

The Act then provides as general rule:

*Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter. (Sec. 1604)*

It then provides for six exceptions:

*“General exceptions to the jurisdictional immunity of a foreign state:*

*(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -*

*(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;*

*(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;*

*(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;*

*(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;*

*(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to -*

*(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or*

*(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or*

*(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim,*

*save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.” (Sec. 1605)*

None of the exceptions relate to human rights violations.

## **II. The Shortcomings of the Current Statute – Failure to Provide Effective Enforcement Mechanisms for Recognized Human Rights Violations.**

As the United States recognized in leading the drafting of the Universal Declaration of Human Rights (“UDHR”), human rights are of utmost importance and must be respected worldwide. As stated in the UDHR, the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

Along with the UDHR, other international agreements, international bodies (*on human rights protection*), and domestic laws offer protection from violations and aim to repair the damages when violations of human rights occur.

Unfortunately, effective remedies for violations of human rights are not available worldwide.

When compared with the system of international protection of foreign investments, the system of international protection of human rights pales by its lack of strength. Under certain circumstances, foreign investors affected by the acts of a sovereign state can have access to a system of restitution and compensation that cannot be derailed by the defense of sovereign immunity. For example, a favorable arbitral award to a foreign investor may be enforced against assets of the defendant state allocated abroad; this is not available in the system of international protection of human rights. Moreover, the sovereign state cannot allege sovereign immunity if it has agreed to be part of the relevant treaties of investment protection. And in some cases and under certain conditions, as under the U.S. Sovereign Immunities Act, an investor can bring an action against a sovereign state for acts that affect the investment, such as an expropriation. This legal protection has deterred many states from undertaking actions for which they will not enjoy immunity. In other words, the strong system of international investment protection has directly contributed to preventing abuses against foreign investors.

The international human rights system provides no such prevention mechanism as the tools available to investors are not available to victims of human rights violations. Human rights are granted international protection yet the enforceability of judicial decisions aiming to protect human rights is insufficient. Most decisions of international bodies can be enforced only within the territory of the aggressor state, which means that if the state refuses to comply, the victim has no further recourse. In cases where a state is not subject to the jurisdiction of an international body, the victim may not have access to such a court

in the first place. Further, the international human right bodies can be extremely slow which may prolong the suffering of the victim. Moreover, victims are usually asked to exhaust the local remedies before initiating international actions for human rights violations. These problems could be alleviated if victims had the option of suing the aggressor state in foreign courts.

In the U.S. human right victims have the possibility of suing individuals and companies who have been violators or accomplices in violation of human rights under the Alien Tort Act. However, when the violator of human rights has been a state it is not possible so long as states are immune to damages for human rights violations. This shortcoming can be remedied by providing an express exception.

The current statute leaves U.S. courts impotent even in cases where an international human rights tribunal has found a state has violated the human rights of an individual. A cause of action could be provided under which a state that refuses to comply a decision of an international human rights tribunal would be deemed to have damaged the victim and hence be liable. Thus, the state will be exempted from immunity in actions brought by an individual in whose favor an international tribunal, commission or adjudicatory body has already ruled. Consequently assets of that state in the foreign country could be attached.

The exception should also reach cases where there has been a substantial and obvious violation of human rights and the victim is not entitled to protection of international human right tribunals or when attempts to seek protection elsewhere would be futile.

### **III. Possible solutions:**

Adding one additional exception to the FSIA would address the problems illustrated in the cases above. This exception would deter countries from violating human rights and provide for punitive damages against states that commit such violations. To ensure its effectiveness, the exception would establish that the assets of the aggressor state located in U.S. territory and used for commercial purposes could be attached.

### **IV. Impact:**

Ensuring that human rights violations can be addressed in our legal system strengthens the international protection of human rights as a whole. The United States can and should set a strong example to other countries who will, in turn, strengthen their own enforcement mechanisms of human rights and develop internal mechanisms to prevent violations.

### **V. Next Steps to Address this Issue:**

- Initiate discussion with human rights organizations and policymakers to develop an action plan;

## VI. Summary.

- Lack of due process seems to be a recurrent and generalized HHRR violation.
- Exhaustion of local remedies and / or, in the absence of judicial independence, becomes an artificial obstacle, particularly facing judicial corruption.
- Procedural inefficiency in many countries (for instance in Latin America) favors corruption and creates a generalized lack of confidence in the rule of law.

## VII. Proposed New Exception: Paragraph 7

*“General exceptions to the jurisdictional immunity of a foreign state:*

*(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -*

- (1) ... Waiver
- (2) ... Commercial activity
- (3) ... Property taken
- (4) ... Rights in property in the U.S.
- (5) ... Personal injury; death; damage / loss of property occurring in the US
- (6) ... Agreement to submit to arbitration.

### A. **Narrow view:**

(7) in which money damages are sought against a foreign state for human rights violations, as determined by an international organization, where:

- a) The legality of such international organization has been recognized\* by the U.S.;
- b) The decision relies on international legislation compatible\*\* with the U.S. legal system; and
- c) At the time of the violation, or at the time of enforcement, the victim is a U.S. national or resident\*\*\*.

The three requirements:

\*"*the legality of such organization has been recognized by the U.S.*" The test is "legality" of the organization, not that the U.S. be subject to its jurisdiction.

For instance? **Inter-American Court of Human Rights.** The Organization of American States established the Court in 1979 to enforce and interpret the provisions of the **American Convention on Human Rights.** The United States signed but never ratified the Convention. The U.S. recognizes the legality of this Court although it is not subject to its decision.

\*\* based on compatible legislation. This guarantees that the decision will not be objectionable from a U.S. point of view.

\*\*\* the victim is a U.S. national or resident. This requirement establishes a connecting factor that protects bona fide residents and nationals and prevents the U.S. court system from being flooded by cases that have no meaningful U.S. connection.

**B. Broad view:**

(7) in which ~~money damages are~~ redress is sought against a foreign state for human rights violations, as determined by an international organization, where:

- a) The legality of such international organization has been recognized\* by the U.S.; and
- b) The decision relies on international legislation compatible\*\* with the U.S. legal system; ~~and~~
- c) ~~At the time of the violation the victim was a U.S. national or resident\*\*\*.~~