

## IMMUNITY OF STATE-OWNED ENTERPRISES: STRIKING A NEW BALANCE

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### I. INTRODUCTION

Respect for sovereign immunity has been a bedrock of international law for decades. In recent years, however, various factors have complicated what was once a straightforward principle: Globalization has increased contact between citizens and corporations of different states; complex ownership structures have made it difficult to determine who or what is controlling a given juridical entity; and an increasing interest in protecting the rights of ordinary people has led to push-back on previously-impenetrable immunity doctrines throughout the inter-

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national legal regime. These trends collide in the questions and issues surrounding state-owned enterprises (SOEs).

SOEs exist in a lacuna between the legally regulated responsibilities and immunities of state actors, and the unregulated immunity bestowed on corporations. The existing legal structure in the United States fails to adequately address the level of immunity to which SOEs should be entitled, and for what acts. Part of this is attributable to competing interests: the diplomatic interests of maintaining the status quo, the justice interests of human rights advocates who want accountability, the economic interests of ensuring equal economic opportunity between businesses, the national security concerns of host countries regarding the presence and activities of foreign entities, and the judicial interest in ensuring that parties before a court receive fair resolutions and remedies in every case. All of these interests are entitled to thoughtful consideration, and a place in the discussion of appropriate standards for foreign sovereign immunity; however, the current statutory regime fails to balance the needs of victims and corporate competitors. Due to the convoluted rules of foreign sovereign immunity and their application to SOEs, an accountability-liability gap often emerges, where the party held legally responsible is not necessarily the one truly responsible for the wrong.

This note will examine the existing state of affairs with respect to SOEs under U.S. law, and will attempt to provide a solution that strikes the proper balance between the aforementioned competing interests. Part I will look at the Foreign Sovereign Immunities Act (FSIA or the Act) and the status quo regarding immunity of SOEs in the United States. Part II will then look at two areas where the application of law to SOEs is currently in flux, first where human rights violations arising from crimes under international law are at issue, and second where commercial activities involving complex corporate structures are concerned. Part III will look at different approaches to the problem of SOE immunity, both in the United States and in other countries. Part IV will conclude with a proposal to reform U.S. law in a manner that adequately considers and balances all competing factors at issue, by developing a new exception to the FSIA and changing the legal test for allocating responsibility between separate juridical entities.

## II. THE FOREIGN SOVEREIGN IMMUNITIES ACT

In 1976, the U.S. Congress passed the FSIA, which was intended to clarify the circumstances under which U.S. citizens could bring suit against a foreign state, or state-owned business, in U.S. courts.<sup>1</sup> Before the FSIA, the executive branch, specifically the State Department, made the decision to grant a party sovereign immunity.<sup>2</sup> The FSIA was a deliberate effort to put that determination into the hands of the judiciary, while also giving plaintiffs a clear framework for how the law of immunity would be applied.<sup>3</sup> Congress also intended to align U.S. sovereign immunity law with the application of such law elsewhere in the world.<sup>4</sup>

Consistent with international practice, the FSIA begins with the premise that foreign states receive a presumption of immunity in U.S. courts.<sup>5</sup> The Act then goes on to carve out several exceptions to this rule, including implicit or explicit waiver; actions based on commercial activity; an expropriation exception, for when rights in property taken in violation of international law; damages for a tortious act or omission;<sup>6</sup> and a terrorism exception.<sup>7</sup> Rejecting a pure adoption of the sovereign immunity principle, which would prohibit a foreign state from ever being sued in U.S. courts, Congress codified a “restrictive” view of sovereign immunity, wherein acts taken by a state that are not related to its public character are not shielded from immunity.<sup>8</sup> This allows for the listed exceptions, which are for the most part related to commercial matters.

The FSIA is applicable to SOEs through the definition of “foreign state” provided by the Act, which defines a foreign

1. H.R. REP. NO. 94-1487, at 6 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6604.

2. *Id.* at 7.

3. *Id.*

4. *Id.* at 9.

5. Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1604 (2012) (“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.”).

6. 28 U.S.C. § 1605(a). Other exceptions include enforcement of arbitral decisions, enforcement of a maritime lien, or actions to foreclose a mortgage.

7. 28 U.S.C. § 1605A.

8. H.R. REP. NO. 94-1487, at 7.

state as including agencies and instrumentalities of the state.<sup>9</sup> Agencies and instrumentalities are separate legal persons that are either an organ of or majority-owned by a foreign state.<sup>10</sup> At the time of the FSIA's drafting, U.S. legislators and their international counterparts understood the distinction between *jure imperii*—state acts taken in conjunction with sovereign authority—and *jure gestionis*—acts taken for purely commercial reasons.<sup>11</sup> Whereas the Act accords immunity to agencies and instrumentalities, there are differences between their treatment and that of foreign states. Significantly, the nexus of commercial activity between the agency or instrumentality and the United States required for the expropriation exception is less than is the nexus required for states.<sup>12</sup>

Since the FSIA was enacted in 1976, the Supreme Court has ruled on a number of related issues that shape the application and implications of the FSIA. In 2003, the Court in *Dole Food* found that immunity under the FSIA only extended to companies that were directly majority-owned by a foreign state, thus opening subsidiaries to litigation.<sup>13</sup> Generally, agencies and instrumentalities created by a foreign state are subject to a presumption of separateness to act as independent economic enterprises.<sup>14</sup> A corporate veil is presumed to exist between the SOE and its parent state. Regardless, in *Bancec*, the Court indicated that agencies and instrumentalities that were acting as an “alter ego” of a foreign state could be liable for actions

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9. 28 U.S.C. § 1603(a).

10. 28 U.S.C. § 1603(b). This note uses the terms “state-owned enterprise” and “agency and instrumentality” interchangeably, with the latter used in connection to the discussion of U.S. law, and the former used more generally throughout.

11. See Fredric Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE J. INT'L L. 1, 18, 27 (1976) (discussing the emerging international consensus around the restrictive theory of immunity in both the United States and Europe).

12. 28 U.S.C. § 1605(a)(3).

13. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003).

14. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 626–27 (1983) (“government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such”). The Court goes on to discuss the evidence in the legislative history of the FSIA that supports the incorporation of this presumption into the sovereign immunity regime.

taken by the state, even if the corporation as a separate, juridical entity had no connection to the state action in question.<sup>15</sup>

Thus, the basic structure of SOE immunity in the United States under the current regime is as follows: The immunity can only apply to companies that a foreign state directly owns, and those that are outright organs of the state; the companies are presumed to be separate from the foreign government, unless evidence shows that they are, for all intents and purposes, alter egos of the foreign state; and the companies are subject to the same grant of immunity as well as the same exceptions as a foreign state, though with a few differences, such as those relating to nexus and liability, as reviewed above.

### III. CASE STUDIES

Even with the existing FSIA regime and its accompanying case law, there are parts of the law where the lines of immunity begin to blur. Two particular areas stand out. The first is a series of cases wherein sovereign immunity limits the full realization of human rights interests, as the different standards established in the FSIA lead to a bifurcation of state accountability and SOE liability. Here, states that perpetuate criminal acts are dismissed from U.S. courts due to their immunity, while SOEs bear the brunt of liability even when they were acting at the behest of their states. The second area is liability for commercial activity, and increased scrutiny of how SOEs can use the immunity regime to avoid U.S. courts. Some, such as Senator Chuck Grassley of Iowa, have recently attempted to level the playing field between SOEs and ordinary corporations, particularly when it comes to tort and contractual liability.<sup>16</sup> Both of these areas demonstrate the accountability-liability gap, and how the current immunity scheme foregoes proper attribution of responsibility, preferring a rigid immunity framework which often fails to attribute liability appropriately. Regarding the human rights cases, the jurisprudence reveals that state actors who led the commission of atrocities escape

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15. *Id.* at 618, 629 (discussing the circumstances under which a separate juridical entity can be considered the same as its ownership).

16. Press Release, Chuck Grassley, U.S. Senator for Iowa, Grassley Looks to Keep State-Owned Enterprises from Skirting U.S. Courts (Sept. 15, 2016), <https://www.grassley.senate.gov/news/news-releases/grassley-looks-keep-state-owned-enterprises-skirting-us-courts>.

liability, while their SOEs assume whatever liability remains. The commercial activity cases indicate that corporations that have committed wrongs are able to hide behind the shield of sovereign immunity in order to evade liability for their actions. Both areas thus demonstrate the clear justification and need for broad reform.

#### A. *State-Owned Enterprise Immunity and Human Rights*

Foreign sovereign immunity and human rights are often in conflict. Regarding the actions of states, the law is relatively clear. The International Court of Justice has found that sovereign immunity is never abrogated, even when the crimes at issue are grave violations of international norms and human rights.<sup>17</sup> As for the United States, there is no FSIA exception for human rights violations, though some crimes that would likely fall within that ambit are specifically named in conjunction with the state-sponsored terrorism exception.<sup>18</sup>

The situation with respect to SOEs that engage in—or are complicit in—human rights abuses is less clear. Although the distinction is thin, SOEs are entitled to a slightly lesser immunity than foreign states, due to the structure of certain exceptions to the FSIA.<sup>19</sup> Nevertheless, the possibility that a plaintiff could obtain a judgment against a SOE acting at the behest of its government and not the foreign state itself creates an accountability-liability gap: The foreign government escapes accountability, while the SOE that was following orders bears all

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17. See generally Jurisdictional Immunities of State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. Rep. 99 (Feb. 3).

18. Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1605A(a)(1) (2012) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.”).

19. 28 U.S.C. § 1605(a)(3) (creating the takings of property exception and establishing two standards for the exception to apply: one for states, which requires a clear connection between the property at issue and the United States, and another for SOEs, wherein any connection between the company and the United States suffices).

of the costs. This effectively creates impunity for bad state actors, as a state can commit atrocities and cordon off their own liability simply by essentially laundering those bad acts through an SOE. The deterrence effect is also misplaced; SOEs often act at the behest of their sovereign, and thus the likelihood of legal jeopardy is not sufficient to deter them from obeying orders. Meanwhile, states experience no deterrence effect. This is all to the detriment of vindicating victim's rights against their aggressors, strengthening international efforts to prevent states from committing crimes, and upholding traditional notions of justice and punishment. Importantly, however, an opposing critique emerges from the perspective of those concerned with protecting international comity and norms of sovereign immunity. Due to the distinction between liability of sovereigns and liability of SOEs, SOEs can be subject to legal action as a run-around of sovereign immunity, thereby undermining the foreign relations concerns that traditionally exist there.

A series of cases involving the looting of art during the Holocaust illustrates this problem well. There have been many cases related to the taking of property during the Holocaust; so many, in fact, that in 2016, Congress specifically passed the Holocaust Expropriated Art Recovery Act to address these cases.<sup>20</sup> This note, however, will focus on a series of recent cases in which the D.C. Circuit Court has ruled on the application of the FSIA to human rights violations involving the participation of SOEs.

The facts of the first case, *Simon*,<sup>21</sup> relate to the participation of the Republic of Hungary (Hungary) in the extermination of its Jewish population at the end of the Second World War.<sup>22</sup> The suit named three parties: Hungary; the state-owned Hungarian railway Magyar Államvastuak Zrt. (MÁV); and Rail Cargo Hungaria Zrt. (RCH), an Austrian successor-in-interest to MÁV's wartime freight operation.<sup>23</sup> The plaintiffs brought a variety of claims against the defendants, all of which appeared to be related to the expropriation of Jewish property as part of

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20. Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016).

21. *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016).

22. *Id.* at 133–34.

23. *Id.* at 134.

the effort to extinguish the Hungarian Jewish population.<sup>24</sup> The plaintiffs argued that their claims fell within the expropriation exception of the FSIA, since “rights in property taken in violation of international law” were at issue in the case.<sup>25</sup> The court identified three requirements that the plaintiffs had to satisfy in order to fit within the FSIA’s expropriation exception: (1) property rights were at issue; (2) the property at issue was “taken in violation of international law”; and (3) the commercial-activity nexus was satisfied.<sup>26</sup> Because the expropriation exception is limited to rights in property, the court found that there was no room to “bring claims for personal injury or death.”<sup>27</sup>

The FSIA’s expropriation exception was intended to apply largely to cases involving the taking of property without just compensation. The facts of the *Simon* case clearly fulfilled the first requirement, as the case involved the taking of Jewish property in the Holocaust.<sup>28</sup> The second prong of the expropriation exception, that a violation of international law has occurred, is satisfied in such circumstances where no compensation was provided in exchange for the taking. In *Simon*, however, this type of expropriation was not at issue. Rather, the plaintiffs argued that the taking was “in violation of international law” based on the facts and events of the Holocaust.

It is here that *Simon* makes an intriguing leap. The D.C. Circuit Court did not just find that genocide is, in of itself, a violation of international law; that would not have been enough to satisfy the expropriation exception. Rather, the court found that the *taking of the property* itself amounted to the commission of genocide, and therefore the property had been “taken in violation of international law.”<sup>29</sup> In the words of Judge Srinivasan,

The question then becomes whether the takings of property described in the complaint bear a sufficient connection to genocide that they amount to takings

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24. *Id.*

25. *Id.* at 135 (quoting Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1605(a)(3) (2012)).

26. *Id.* at 140.

27. *Id.* at 141 (quoting *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 697 (7th Cir. 2012)).

28. *Id.* at 142.

29. *Id.* (quoting 28 U.S.C. § 1605(a)(3)).

“in violation of international law.” We hold that they do. In our view, the alleged takings did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriations *as themselves genocide*.<sup>30</sup>

The decision proceeds to examine the definition of genocide in order to further support the proposition that taking property can constitute a genocidal act.<sup>31</sup> Finally, the court concluded that because the plaintiffs showed the “requisite genocidal acts and intent,” the claim fell within the ambit of the expropriation exception.<sup>32</sup> Because genocide against a state’s own citizens is at odds with international law, the court found that the intrastate nature of the events in question was irrelevant.<sup>33</sup> Thus, the Court found that the plaintiffs satisfied the first two prongs of the expropriation exception to the FSIA.

The third requirement, that there be a commercial activity nexus, is where the respective analyses for a state defendant and a SOE defendant diverge. For foreign states, the question is whether the property at issue is (1) in the United States, and (2) connected with some commercial activity carried out by the foreign state in the United States.<sup>34</sup> For SOEs, the standard is whether (1) the property itself, or anything exchanged for that property, is “owned or operated” by the SOE, and (2) the SOE is engaged in commercial activity in the United States.<sup>35</sup> The standard is thus lower for the SOE: The property itself is less at issue, and the analysis turns more on the SOE’s activities within the United States. For the foreign state to be subject to the jurisdiction of U.S. courts, however, the property must be in the United States *and* connected to a commercial activity carried on by the foreign state itself.

This distinction became dispositive in the outcome of the jurisdictional question in *Simon*. The charges brought against Hungary were dismissed, as the plaintiffs did not present any facts demonstrating that Hungary carried out commercial ac-

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30. *Id.* (citations omitted).

31. *Id.* at 143.

32. *Id.* at 144.

33. *Id.* at 146.

34. *Id.*

35. *Id.*

tivity in the United States.<sup>36</sup> On the other hand, the court found it had jurisdiction over MÁV, the state-owned railway company, because it engaged in some commercial activity in the United States—namely, selling train tickets.<sup>37</sup> The court made no distinction between the two parties' culpability; the grounds for dismissing one and not the other turned entirely on the jurisdictional question, and the current structure of the FSIA.<sup>38</sup>

The second of the D.C. Circuit Court cases to address this issue is *De Csepel*.<sup>39</sup> *De Csepel* shares many facts in common with *Simon*: Both cases concerned the events of the Holocaust in Hungary, and the taking of property from the Hungarian Jewish population.<sup>40</sup> In *De Csepel*, the defendants were also Hungary and a series of SOEs: three Hungarian art museums and the Budapest University of Technology and Economics.<sup>41</sup> While the D.C. Circuit Court had initially decided that the lower court should decide the cases under the commercial activities exception, the District Court found on remand that expropriation was the proper FSIA exception under which to assess the case.<sup>42</sup> On appeal, the D.C. Circuit Court examined the FSIA's expropriation exception as applied to the Hungarian SOEs. Relying on *Simon*, the court held that the taking of Jewish property constituted genocide, and therefore "rights in property taken in violation of international law" were at issue, fulfilling the first and second requirements.<sup>43</sup> As for *Simon*'s third prong, the commercial activity nexus requirement, all parties agreed that the circumstance met the standard for agencies and instrumentalities under this exception.<sup>44</sup>

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36. *Id.* at 148.

37. *Id.* at 147–48.

38. *Id.* ("Because defendants make no attempt to argue that the rail company fails to 'engage[ ] in a commercial activity in the United States,' the nexus requirement is satisfied as to MÁV. . . . [A]s it stands, the complaint's allegations about Hungary's commercial activity fail to demonstrate satisfaction of §1605(a)(3)'s nexus requirement.") (citation omitted).

39. *De Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017).

40. *Id.* at 1097–98.

41. *Id.* at 1098.

42. *Id.* at 1099.

43. *Id.* at 1101–03.

44. *Id.* at 1104 ("The district court concluded that the second clause is met here, and neither the Republic of Hungary nor its various agencies and

In light of this stipulation, Hungary asked the court to dismiss the charges against the state based on the plaintiff's failure to allege facts fulfilling the commercial activity nexus requirement for a foreign state.<sup>45</sup> The plaintiffs relied on *Chabad*<sup>46</sup> to argue that the charges against Hungary should not be dismissed.<sup>47</sup> In *Chabad*, the D.C. Circuit Court denied the Russian Federation (Russia) motion to dismiss, finding that the SOE commercial activity was sufficient to satisfy the nexus requirement, and that Russia did not have immunity as a defendant.<sup>48</sup> Though *Chabad* focused more on the SOEs' satisfaction of the FSIA requirements than the specific argument as to why Russia should not be dismissed as a defendant, the D.C. Circuit Court implied that when the commercial activity nexus was satisfied for the agencies and instrumentalities of a state, the foreign state lost its immunity as well.<sup>49</sup> The question before the *De Csepel* court then became whether it should follow the precedent set in *Simon*, wherein the court dismissed the state actor as a defendant, or that in *Chabad*.

While the general rule would be to adhere to *Chabad*'s earlier ruling, the D.C. Circuit Court sidestepped the precedent by claiming that the state immunity question was not directly held in the *Chabad* case, and that therefore *Simon* was controlling.<sup>50</sup> The court went on to note that even without the precedent from *Simon*, the suit against Hungary would have been dismissed given the clear distinctions that the FSIA draws between states and their agencies and instrumentalities.<sup>51</sup> This marked a return to the presumption of separateness, that the state and agency are independent from one another and can therefore be independently liable. The court noted that without the presumed distinction between foreign state and

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instrumentalities, *i.e.*, the three museums and the university, dispute that conclusion.") (citation omitted).

45. *Id.*

46. Agudas Chasidei Chabad of U.S. v. Russian Federation, 528 F.3d 934 (D.C. Cir. 2008).

47. *De Csepel*, 859 F.3d at 1105.

48. *Id.* (discussing *Chabad*).

49. See generally *Chabad*, 528 F.3d at 939–950 (discussing interpretation of FSIA immunity requirements).

50. *De Csepel*, 859 F.3d at 1105 (stating that because the *Chabad* court did not explicitly address its reasons for retaining Russia as a defendant in the case, it was not strong enough precedent to overcome the holding in *Simon*).

51. *Id.* at 1107.

agency or instrumentality, the FSIA would create a way around sovereign immunity, simply by allowing suit against any SOE that satisfied the lower commercial activity nexus requirement in the United States.<sup>52</sup> In the end, as in *Simon*, the D.C. Circuit Court dismissed the suit against Hungary, but allowed it to stand against the SOEs. The D.C. Circuit Court upheld this line of reasoning once more in a 2018 case involving land seized from a plaintiff in Germany at the beginning of the Cold War.<sup>53</sup>

These decisions all lead to the accountability-liability gap alluded to at the beginning of this section. It is clear that the Hungarian institutions in question were not acting on their own.<sup>54</sup> One can reasonably assume that the railway company in *Simon* participated in the acts precisely because they were a state institution that the state could order to commit crimes.<sup>55</sup> The art museums sued in *De Csepel* may not have obtained the looted property without the state's actions.<sup>56</sup> And yet, although these SOEs were acting as the state when the crimes that satisfied the expropriation exception occurred, the suits against the state were dismissed and liability fell solely upon the SOEs.

This disjunction between the state as perpetrator and the SOE as the party held accountable is problematic for many

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52. *Id.* at 1108 (“In other words—and counterintuitively—a plaintiff (1) could more easily obtain jurisdiction over a foreign state if the expropriated property is possessed not by it, but by one of its agencies or instrumentalities, and (2) could sue any and all agencies and instrumentalities of a foreign state however unconnected to the United States, as long as the foreign state itself possesses the property in connection with a commercial activity carried on in the United States.”).

53. Schubart v. Federal Republic of Germany, 891 F.3d 392, 401 (D.C. Cir. 2018).

54. Cf. Randolph L. Braham, *The Holocaust in Hungary: A Retrospective Analysis*, in THE NAZIS’ LAST VICTIMS: THE HOLOCAUST IN HUNGARY 39–40 (Randolph L. Braham & Scott Miller eds., paperback ed. 2002) (indicating that the architects of the Final Solution used Hungary’s “puppet” government and state resources to support efforts to “dejewify” the country).

55. See *Simon v. Republic of Hungary*, 812 F.3d 127, 134 (D.C. Cir. 2016) (confirming that the railway company was state-owned); *id.* (supporting the plausibility that Hungary would have ordered the *Simon* company to commit crimes at this point in time).

56. See *De Csepel*, 859 F.3d at 1105 (illustrating Hungary’s involvement in confiscating art from Jewish citizens and subsequently turning over the art to domestic museums).

reasons. The first is that states are incentivized to launder their violation of international law through SOEs, with limited likelihood under the FSIA that any of the responsibility for those bad acts will fall back upon the country that is truly perpetuating the offense. The second is a temporal one: Although an SOE might have been acting as an alter ego of the state when the crime occurred, the principle of separateness is applied fully should the SOE become relatively more independent at any time between when the offense was committed and when suit is brought in court. The third, and perhaps most important, problem is that true victims who have suffered at the hands of the state do not receive proper redress.

The court in *Simon* acknowledged some of the lacunae resulting from the structure of the FSIA that contribute to this issue of unredressed victims:

We recognize one seeming anomaly, also noted by the Seventh Circuit in addressing parallel claims arising from the Hungarian Holocaust: that the FSIA scheme, as we construe it, enables the plaintiffs to “seek compensation for taken property but not for taken lives.” But that is a byproduct of the particular way in which Congress fashioned each of the various FSIA exceptions.<sup>57</sup>

Although the FSIA includes an exception that does address personal injury or death that would give rise to jurisdiction over a foreign sovereign, that exception is limited only to those injuries that happen within U.S. territory.<sup>58</sup>

Rules governing jurisdiction are, primarily, rules of procedure that help determine the scope of the judicial branch’s power. But jurisdictional rules can also exclude parties from the courts that have substantive claims that should be redressible in the U.S. courts. It is difficult to read *Simon* without the impression that something has gone wrong. Genocide and other high crimes in violation of domestic and international law present an area where an adjustment to the immunity regime is in order. The standards that currently exist, and the manner in which they are applied to shield states but not

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57. *Simon*, 812 F.3d at 146 (quoting *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d, 677 (7th Cir. 2012)) (citation omitted).

58. Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1605(a)(5) (2012).

their SOEs, manage simultaneously to undermine sovereign immunity—by leaving an avenue of state liability open through suit against their SOEs—and to provide little in the way of concrete remedies for victims.

### B. *State-Owned Enterprise Immunity and Commercial Liability*

Commercial litigation and liability constitute another area where the application of the FSIA can lead to incongruous results, based only on differing degrees of state ownership. In general, these cases concern the commercial activities exception to FSIA immunity, and present challenges in the attribution of a subsidiary's actions to a parent company that a state directly and wholly controls. These cases are the corporate equivalent of the human rights cases of the previous section: Courts dismiss actions against parent companies that are sufficiently close to a foreign state owner, while their subsidiaries bear the brunt of litigation and settlement. Under the current FSIA system, this paradigm results even if evidence establishes that the subsidiary company acted at the behest of its parent.

The commercial activity exception distinguishes between public acts of the state—*jure imperii*—and private acts of the state—*jure gestionis*—within a commercial market. The distinction is generally based on whether the state could have carried out the same act without relying on its state power.<sup>59</sup> If it could have, then the act is considered an ordinary commercial activity and is therefore not entitled to immunity.<sup>60</sup> Simply proving some form of commercial activity is thus not enough to trigger the exception; the basis of the cause of action must arise from the immunity-claiming party's demonstrated commercial activity.<sup>61</sup> This framework applies to states, agencies, and instru-

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59. Glob. Tech., Inc. v. Yubei (Xinxiang) Power Steering Sys. Co., 807 F.3d 806, 812 (6th Cir. 2015).

60. *Id.* (“The rule is that ‘when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are “commercial” within the meaning of the FSIA.’ These actions are assessed in terms of the types of actions by which private actors participate in the marketplace. The motive or purpose of the state-owned actor—that is, whether it was acting pursuant to a private corporate motive (e.g., profit-seeking) as opposed to a governmental motive (e.g., regulating the economy)—is not determinative.” (quoting Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992))) (citation omitted).

61. *Id.*

mentalities alike. Because parent-company SOEs often do not directly engage in the activities giving rise to the cause of action, the commercial activity then turns on whether the acts of the subsidiary can be attributed to the parent because the subsidiary constitutes an alter ego of the parent company. Importantly, the alter ego standard is quite high, and is therefore difficult to meet. Because of this standard, charges against the parent SOE are often dismissed.

Recently, Senator Chuck Grassley has questioned the special treatment that SOEs receive due to the FSIA. In a September 2016 statement, Senator Grassley asked how, as the involvement of SOEs in international commerce grows, we can “ensure that foreign state-owned companies are held to the same standards and requirements as their non-state-owned counterparts.”<sup>62</sup> As an example, Senator Grassley pointed to a class action lawsuit arising from the use of a bad drywall product used in some construction projects, particularly those circumstances that arose due to the destruction that Hurricanes Katrina and Rita wrought.<sup>63</sup>

The drywall lawsuits brought charges against a series of entities and subsidiaries of the companies that produced and sold the drywall. These manufacturers fell into two groups: those that were subsidiaries of the German corporation Knauf Gips, and those that were subsidiaries of the Chinese CNBM Group, chiefly represented in this case by the company Taishan.<sup>64</sup> Knauf and its subsidiary corporations were served, went to trial, and eventually settled.<sup>65</sup> Taishan and its parent corporations proved harder to hale into court.

The sued “Taishan entities” consisted of Taishan itself, Beijing New Building Materials (BNBM), China New Building Materials (CNBM), and China New Building Materials Group (CNBM Group).<sup>66</sup> Since 2006, BNBm has held a 65% equity interest in Taishan, adding to its controlling interest in the drywall manufacturer.<sup>67</sup> CNBM Group and CNBM both have ownership stakes in BNBm; CNBM as the controlling share-

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62. Press Release, Chuck Grassley, *supra* note 16.

63. *Id.*

64. *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 168 F. Supp. 3d 918, 922–923 (E.D. La. 2016).

65. *Id.* at 923.

66. *Id.* at 924.

67. *Id.* at 930.

holder, and CNBM Group as the actual controller.<sup>68</sup> CNBM itself, although it went public in 2005, is still 60% owned by CNBM Group, making CNBM Group the controlling shareholder.<sup>69</sup> Neither CNBM nor CNBM Group themselves engage in any work related to the construction business, though BNBM does manufacture construction materials in China.<sup>70</sup> While there is an extensive procedural history involving failures to appear in court, default judgments, and last-minute appeals,<sup>71</sup> most pertinent to this note and Senator Grassley's concerns is the fate of the claim brought against the corporate entity at the top of the Taishan ladder: the CNBM Group.

The CNBM Group claimed, because it is wholly-owned by the Chinese state, that it was entitled to immunity as an "agency or instrumentality" of a foreign state,<sup>72</sup> and filed a motion to dismiss for lack of subject matter jurisdiction on that basis.<sup>73</sup> The court's first analytical step was determining whether CNBM Group qualified as an "agency or instrumentality" under the FSIA.<sup>74</sup> Section 1603(b)(2) of the FSIA states that agencies or instrumentalities can be either organs of the state, or owned by the state.<sup>75</sup> Because CNBM Group, at the time of filing, was "directly and wholly" owned by the Chinese state, it met the statutory definition of an agency or instrumentality.<sup>76</sup> This accorded CNBM Group a presumption of immunity, which could only be overcome if the plaintiff showed that the facts of the case satisfied one of the FSIA exceptions.<sup>77</sup>

The plaintiffs argued two exceptions. The court quickly rejected the first, the "tortious activity exception," for failure to satisfy the element of the tortious act having occurred on U.S. soil.<sup>78</sup> The second claim was that the commercial activity exception applied to the CNBM Group's activities in this matter, thus overcoming the presumption of immunity. The court

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68. *Id.* at 927–28.

69. *Id.* at 927.

70. *Id.* at 927, 929.

71. *Id.* at 924–25.

72. *Id.* at 922.

73. *Id.* at 921.

74. *Id.* at 934.

75. *Id.* at 933.

76. *Id.* at 934.

77. *Id.*

78. *Id.*

found, however, that the claims were not based on any action taken specifically by CNBM Group, only those taken by its subsidiaries.<sup>79</sup> In fact, the Court noted, “CNBM Group [had] never manufactured, inspected, sold, supplied, distributed, marketed, exported, or delivered drywall.”<sup>80</sup> None of CNBM Group’s interactions with its subsidiaries, or even Taishan’s drywall marketing, brought it close enough to the alleged liability to be considered part of the basis for the claims.<sup>81</sup> As a result, the commercial activities exception was found not to apply to CNBM Group, allowing its presumption of immunity to stand.<sup>82</sup>

The plaintiffs’ final recourse was to argue that Taishan and the other subsidiaries constituted alter egos of CNBM Group, under the theory outlined in the *Bancec* case. The *Bancec* standard looks at the control that the parent company exercised over the subsidiary, as the presumption of separate status “can only be overcome ‘where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created.’”<sup>83</sup>

The close-knit relationship between CNBM Group and some of its subsidiaries lent some credence to this argument. With respect to BNBM, CNBM Group dictated strategies relating to resource management and corporate culture, and controlled funding allocation.<sup>84</sup> CNBM, BNBM, and Taishan leadership all received employee training from CNBM Group, with the Chairman of the CNBM Group leading at least one seminar personally.<sup>85</sup> For some amount of time, CNBM Group, BNBM Group, and CNBM all were registered to the same address and shared the same office space and logos, although Taishan was separate in these respects.<sup>86</sup> The plaintiffs thus demonstrated significant overlap between CNBM Group and its subsidiaries and some serious degree of control. Neverthe-

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79. *Id.* at 935 (“[T]he commercial activity exception applies only if Plaintiffs’ claims are ‘based upon’ an act or activity by CNBM Group.”).

80. *Id.*

81. *Id.* at 935–36.

82. *Id.* at 936.

83. *Id.* (quoting *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba (BaneC)*, 462 U.S. 611, 629 (1983)).

84. *Id.* at 926.

85. *Id.*

86. *Id.* at 927.

less, the court found that these facts did not overcome the presumption of separate status.<sup>87</sup> Without indications of “day-to-day control,” the court found the subsidiaries were not alter egos of CNBM Group.<sup>88</sup> The court therefore granted CNBM Group’s motion to dismiss, and while the litigation continues to this day with respect to the other parties, CNBM Group is beyond the court’s subject matter jurisdiction.<sup>89</sup>

As it stands, the plaintiffs are not left without parties to sue—the various subsidiaries named above are still going through a lengthy litigious process. Nevertheless, as Senator Grassley notes in his criticism of this line of cases, the dismissal of CNBM Group highlights the difference in treatment between the Germany-based entities—which had no tie to any state and ultimately settled their claims—and the Chinese-owned entities—which first ignored the judicial process and then managed to evade liability, at least as far as the ultimate corporation was concerned. This raises concerns about the economic injustice that results when companies can simply remove themselves from U.S. courts by invoking their corporate structures and proving their close ties to a foreign state, while others continue to be held to higher standards and face more serious consequences when products fail or contracts are breached. This inconsistency leads to both unfair competition and a weakening of the tort-based system of regulation. The unfair competition results from the differences in the scope of liability two equally positioned companies can experience: The company that can claim foreign sovereign immunity as an SOE is less concerned with the costs of litigations and settlement than the company that cannot evade liability so easily. Similarly, this undermines the use of tort laws to regulate companies by removing the deterrent effect of litigation and liability from those companies that can avoid court. An SOE claiming immunity will be less motivated to take safety steps to ensure no one is harmed, since they have a way to evade jurisdiction.

CNBM Group is not the only Chinese SOE to use the foreign sovereign immunity defense to avoid liability in U.S. courts. The Aviation Industry Corporation of China (AVIC) recently claimed immunity under the FSIA in the Sixth Circuit

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87. *Id.* at 938.

88. *Id.* at 939.

89. *Id.* at 940 (granting Defendant’s motion to dismiss).

Court, in response to a breach of contract claim.<sup>90</sup> The lawsuit concerned Global Technology, Incorporated (GTI)—a company engaged to facilitate the purchase of another company—and Yubei, the AVIC subsidiary on whose behalf GTI was engaged.<sup>91</sup> China wholly owns AVIC, which is thus entitled to the presumption of immunity under the FSIA.<sup>92</sup> GTI challenged the presumption by claiming that the commercial activity exception was applicable to AVIC in this matter.<sup>93</sup> Here, the court focused more on the issue that the presumption of separateness presented. This, while a different legal framing from the CNBM Group case, presents similar issues of how to reconcile control, ownership, and liability.

The Sixth Circuit Court remanded the issue to the lower court in order to consider whether a sufficiently close relationship existed between Yubei and AVIC to create alter ego status between the two, and thereby to allow the subsidiary's actions to be attributed to the parent company.<sup>94</sup> The problem, the Sixth Circuit Court noted, was the lack of clarity around whether corporate veil-piercing is allowed when determining immunity under the FSIA.<sup>95</sup> Corporate veil-piercing would allow the courts to look beyond the subsidiary's actions as a separate legal entity and consider the ownership structure behind it; for instance, the extent to an SOE claiming immunity owns and controls the subsidiary.

In general, the presumption of separateness prevents corporate veil-piercing when examining the ownership of SOEs. As the *Bancec* decision notes, Congress intended to ensure that state instrumentalities were accorded separate juridical personalities in keeping with corporate law, partly out of concern that, if U.S. courts failed to do so, foreign courts would simi-

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90. Glob. Tech., Inc. v. Yubei (Xinxiang) Power Steering Sys. Co., 807 F.3d 806 (6th Cir. 2015).

91. *Id.* at 813.

92. *Id.* at 812.

93. *Id.* at 814.

94. *Id.* (“[I]n examining whether GTI overcomes AVIC’s presumption of immunity, the district court must determine which—if any—of the complained-of actions are legally attributable to AVIC, or, instead, if those actions are legally attributable to Yubei only.”).

95. *Id.*

larly pierce the veil of U.S. companies.<sup>96</sup> The FSIA is silent on the matter of corporate veil-piercing, and in *Bancec*, the Supreme Court turned to corporate law to provide guidance. The Court noted that veil-piercing is appropriate in some situations: when the assets of one instrumentality are really the property of another,<sup>97</sup> when the “relationship of principal and agent is created,”<sup>98</sup> when there is an equity interest in preventing fraud or injustice,<sup>99</sup> or when the corporation was created solely to evade the goals the legislature sought.<sup>100</sup>

*Bancec* was decided on equity grounds, as the Court found that the Cuban government had created the agency specifically to avoid paying a judgment; thus, the plaintiffs were allowed to enforce their claim on the assets of different instrumentalities, circumventing the presumption of separateness.<sup>101</sup> Importantly, however, the decision provides little guidance for how to proceed in cases with facts that less clearly demonstrate bad-faith acts on the part of the SOE or the state. The D.C. Circuit Court previously established that complete ownership and control over the appointment of all board members is not sufficient to show the agent-principal relationship suggested in *Bancec*, but hesitated to specify what would constitute enough control.<sup>102</sup> As the same court noted in a

96. First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 628 (1983) (“If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.” (quoting H.R. REP. NO. 94-1487, at 29–30 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6628–6629)); *see also* RESTatement (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 452 cmt. c (AM. LAW INST. 1987) (“When a state instrumentality is not immune . . . , for instance because the claim arises out of a commercial activity, the claim is ordinarily to be brought only against the instrumentality.”).

97. *Bancec*, 462 U.S. at 628 (quoting H.R. REP. NO. 94-1487, at 29–30).

98. *Id.* at 629.

99. *Id.* (“[O]ur cases have long recognized ‘the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice.’” (quoting *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939))).

100. *Id.* at 630.

101. *Id.* at 630, 633.

102. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 448 (D.C. Cir. 1990) (remanding to the District Court to perform a more “explicit” fact-finding).

later case, “[t]he question defies resolution by ‘mechanical formulae,’ for the inquiry is inherently fact-specific.”<sup>103</sup> What the Circuit Courts seem to agree on most, when it comes to the presumption of separate status, is that no one is quite sure how to overcome it.

This confusion is what current legislation proposed in the U.S. Congress is intended to address. If no court is quite sure how to overcome the presumption of separate status such that potentially liable parent companies can be examined and held accountable in U.S. courts, then an injustice can occur; subsidiaries which were really acting on behalf of their parent companies, under their management and control, must go to court and answer for wrongs done, while potential perpetrators that are high enough in the corporate ownership structure to be accorded the shield of foreign sovereign immunity walk away.

This is the corporate equivalent of the accountability-liability gap that arose out of the Holocaust art cases. While human rights and corporate law are often conceptualized separately, the concern with correctly attributed responsibility under the FSIA is present in both. The current system is illogical and does not result in just resolution of these matters. The next section of this paper will turn to a series of potential solutions to this problem, from both the human rights and corporate perspectives.

#### IV. ALTERNATIVES TO THE CURRENT FSIA SCHEME UNDER U.S. LAW

This section will examine potential changes to the foreign sovereign immunity regime under U.S. law, before moving on to look at how other states handle the question of SOE immunity. The section will describe and then evaluate each framework for its potential effects on the treatment of human rights claims and the resolution of corporate claims.

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103. TransAmerica Leasing, Inc. v. Republica de Venezuela, 200 F.3d 843, 849 (D.C. Cir. 2000).

A. *The State-Owned Entity Transparency and Accountability Reform Act of 2016*

One U.S. proposal aims to eliminate the disparate impact of the FSIA by redefining how the statute addresses issues of attribution. In September 2016, Senator Chuck Grassley questioned the FSIA's special treatment of SOEs under the commercial activity exception: "As [SOEs'] involvement in international commerce grows, how can we ensure that foreign state-owned companies are held to the same standards and requirements as their non-state-owned counterparts."<sup>104</sup> Seeing the accountability-liability gap, Senator Grassley introduced legislation to address the problem of differentiated treatment of SOEs versus non-state-owned corporations. The State-Owned Entity Transparency and Accountability Reform (STAR) Act of 2016 was specifically intended to address the problems presented by the commercial activity exception cases.<sup>105</sup> It would do so by amending the commercial activity exception, § 1603(d), and adding a second clause that specifically addresses attribution:

- "(2) For purposes of section 1605(a)(2), a commercial activity of an agency or instrumentality of a foreign state shall be attributable to any corporate affiliate of the agency or instrumentality that—
  - "(A) directly or indirectly owns a majority of shares of the agency or instrumentality; and
  - "(B) is also an agency or instrumentality of a foreign state."<sup>106</sup>

No action has been taken on the bill since its introduction; it was referred to the Senate's Committee on the Judiciary, where it has remained.<sup>107</sup>

However, the proposed legislation still leaves gaps in the system, and fails to address fully the problems of the accountability-liability gap. Applied to the Chinese drywall case, CNBM Group does have direct or indirect ownership of the other par-

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104. Press Release, Chuck Grassley, *supra* note 16.

105. *Id.*

106. State-Owned Entity Transparency and Accountability Reform (STAR) Act of 2016, S. 3323, 114th Cong. § 3 (2016).

107. *S.3323 - State-Owned Entity Transparency and Accountability Reform Act of 2016*, LIBR. CONGRESS, <https://www.congress.gov/bill/114th-congress/senate-bill/3323> (last visited Apr. 22, 2019).

ties in the drywall cases, and would thus fall within the scope of the new provision: majority ownership, and agency and instrumentality status. The provision would not apply to the AVIC case, however, under the facts as presented to the Sixth Circuit Court. AVIC only owned 49% of Yubei, the subsidiary held directly responsible for the alleged harm.<sup>108</sup> Perhaps, with further discovery, a more complicated corporate structure would emerge that would put AVIC over the requisite 50% equity needed under Senator Grassley's bill, but as it stands, AVIC would still evade liability under the amended FSIA.

Senator Grassley's solution is simple, but in its simplicity, misses the heart of the problem of the accountability-liability gap. Ownership is not necessarily a proxy for control: A parent company could own over 50% of a subsidiary and not have anything to do with it, while similarly a particularly active parent company could exert considerable influence over a subsidiary even while holding less than a 50% ownership stake. The alter ego standard is a searching one precisely for this reason—to ensure that liability is properly attributed.

The problem with the alter ego test is that it sets the bar too high. Courts often rely on assessing direct control over day-to-day activities, but fail to apply it literally, resulting in a vague test. What this approach fails to consider is that if a parent corporation appoints all board members and issues directives to the subsidiary, those actions effectively amount to control over day-to-day activities, regardless of which party takes the actual steps to fulfill the given directions. If Senator Grassley is concerned that SOEs evade liability to which other corporations are subject, then he is correct to want to adjust the application of the alter ego standard and the separate status presumption. However, simply targeting ownership is not a sufficiently nuanced approach to the issue, and the possibilities for evasion are evident. This proposal could drive corporations to implement more complicated corporate structures and subdivide ownership to avoid liability under the standard—two unintended consequences that would be less likely if courts relied on a true factual evaluation of who is directing the company's activities.

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108. Glob. Tech., Inc. v. Yubei (Xinxiang) Power Steering Sys. Co., 807 F.3d 806, 813 (6th Cir. 2015).

While the basic principle of the STAR Act could provide for state accountability and liability in human rights cases, the amendment only applies to agencies and instrumentalities. Given this limitation, victims like those in the Holocaust art cases would still be left without recourse under the amended FSIA structure since these cases arise under the “takings in violation of international law” exception. The STAR Act is intended to address only the commercial activities exception. A similar proposal that encompassed state ownership as well would be quite effective at ensuring accountability; for many SOEs, it is evident that they are state-owned, as the acronym itself implies. Perhaps if broadened, the STAR Act could do a lot of good for human rights victims. As it stands, though, it does not, and the Act only provides a modicum of equality in the commercial activities sphere.

#### B. *The Justice Against Sponsors of Terrorism Act of 2016*

The STAR Act is not the only amendment to the FSIA raised in the U.S. Congress. In 2016, the Justice Against Sponsors of Terrorism Act (JASTA) successfully amended the FSIA to create a civil cause of action for victims of terrorism within the United States.<sup>109</sup> JASTA automatically strips immunity from foreign states sued for acts of international terrorism, or tortious acts carried out by a state or its agents.<sup>110</sup>

JASTA expanded on a similar amendment enacted in 2008, which created the original terrorism exception to the FSIA under § 1605A. Section 1605A created an exception to the presumption of immunity for injury or death that resulted from the responsibilities defined in § 1605B (as of JASTA, either an act of international terrorism, or a tortious act of a foreign state or an “official, agent, or employee of that foreign state while acting within the scope of his or her office, employment, or agency” regardless of location<sup>111</sup>).<sup>112</sup> The exception was limited, however, to countries that were already desig-

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109. Justice Against Sponsors of Terrorism Act (JASTA), Pub. L. No. 114-222, § 2(b), 130 Stat. 852, 853 (2016) (codified at Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§ 1605A–1605B (Supp. V 2018)).

110. 28 U.S.C. § 1605B(b).

111. *Id.*

112. Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1605A (2012).

nated as state sponsors of terrorism at the time of the act, and victims who were U.S. nationals or otherwise serving the United States at the time of the act.<sup>113</sup> JASTA broadened the 2008 terrorism amendment by allowing suit to be brought against states that are not designated state sponsors of terrorism; as such, any state is made potentially liable under JASTA.<sup>114</sup> It also broadened the scope of the tortious act clause by applying the immunity exception to torts caused by a state or its agent anywhere, not just those committed on U.S. soil.<sup>115</sup> Barring a clause clarifying that torts resulting from negligence are not covered by the exception,<sup>116</sup> JASTA is largely unbounded.

President Obama vetoed JASTA upon presentment.<sup>117</sup> In his statement accompanying the veto he noted three main areas of concern: first, that the bill would undermine national security efforts to thwart terrorist plots; second, that it violated the reciprocity principle in foreign relations and could result in other countries adjusting their sovereign immunity laws to allow suit to be brought against the United States and its agents abroad for acts that could be considered terrorism; and third, that it would heighten diplomatic tensions with other states, including close allies of the United States.<sup>118</sup> His veto was overridden by Congress shortly thereafter.<sup>119</sup>

JASTA is both too broad in its application and too narrow in its scope. It effectively undermines sovereign immunity when it comes to acts that could be considered terrorism, while also setting out very few standards—thus creating an open season on all states that could possibly be accused of

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113. 28 U.S.C. § 1605A(a)(2).

114. See Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1605B(b) (Supp. V 2018) (including only language that limits the acts due to which states can lose immunity, thereby eliminating the language that limits the applicable countries and victims).

115. 28 U.S.C. § 1605B(b)(2).

116. 28 U.S.C. § 1605B(d).

117. Press Release, Barack Obama, President of the U.S., Veto Message from the President—S.2040 (Sept. 23, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040>.

118. *Id.*

119. Karoun Demirjian & Juliet Eilperin, *Congress Overrides Obama's Veto of 9/11 Bill*, WASH. POST (Sept. 28, 2016), [https://www.washingtonpost.com/news/powerpost/wp/2016/09/27/senate-poised-to-vote-toOverride-obamas-veto-of-911-bill/?noredirect=ON&utm\\_term=.e2622925bde1](https://www.washingtonpost.com/news/powerpost/wp/2016/09/27/senate-poised-to-vote-toOverride-obamas-veto-of-911-bill/?noredirect=ON&utm_term=.e2622925bde1).

complicity in a terrorist act. However, this complete openness only applies to acts that fall within the definition of international terrorism, which is rather limited.<sup>120</sup>

The 2008 amendment better addressed both of JASTA's shortcomings. First, it limited the application of the law to states that were listed as state sponsors of terrorism. Second, it listed the crimes that could be the basis of a cause of action, including acts beyond the definition of terrorism. For instance, under § 1605A, a plaintiff could seek damages against a foreign state on grounds of "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources."<sup>121</sup>

Since its enactment, JASTA has been construed by only one court in a case that victims of the September 11th terrorist attacks (9/11) brought against Saudi Arabia and its instrumentality, the Saudi High Commission for Relief in Bosnia and Herzegovina (SHC).<sup>122</sup> Though the case had been dismissed by the District Court, Congress passed JASTA while the appeal to the Second Circuit Court was pending. The plaintiffs argued that in light of the enactment of JASTA, the case now had grounds to move forward—especially as JASTA was written with 9/11 in mind.<sup>123</sup> The Southern District of New York laid out the four elements for evaluating claims brought under JASTA: (1) a "physical injury to a person or property or death occurring in the United States"; (2) "an act of international terrorism in the United States *and* a tortious act" either by a foreign states, or by a state official, employee, or agent done within the scope of office, employment or agency; (3) causation supported by some reasonable connection between the act and the damage; and (4) damages.<sup>124</sup> The court also ruled that JASTA removed the presumption of immunity from both the state and its instrumentality. Ultimately, the court held that SHC's connection to 9/11 was too tenuous, and thus

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120. For the definition of "international terrorism," see 18 U.S.C. § 2331(1) (2018) (referring to acts that are "dangerous to human life," and intended to intimidate or coerce).

121. Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1605A(a)(1) (2012).

122. Ashton v. Al Qaeda Islamic Army (*In re Terrorist Attacks on September 11, 2001*), 298 F. Supp. 3d 631 (S.D.N.Y. 2018).

123. *Id.* at 639–40.

124. *Id.* at 642.

granted SHC's motion to dismiss the charges against them.<sup>125</sup> However the claim as to Saudi Arabia and its agent was allowed to proceed to limited discovery in order to determine whether the state satisfied the components of the JASTA exception to sovereign immunity.<sup>126</sup>

The case brought under JASTA presents the inverse of the Holocaust art cases. There, the charges brought against Hungary were dismissed due to the higher standard for sustaining a suit against a foreign government. Here, charges against the instrumentality were dismissed while the state remained liable. JASTA addresses the accountability-liability gap by making states liable for any crimes to which the JASTA applies. Of course, JASTA can provide no relief to the victims of the Holocaust; it is limited only to acts of terrorism, and is retroactive only for the victims of 9/11.<sup>127</sup> A broader version of JASTA, one that encompasses all crimes under international law, could address the accountability-liability gap as JASTA does for terrorism, without leaving victims without a mechanism to obtain justice.<sup>128</sup>

Of course, the foreign policy implications of JASTA are significant. President Obama was right to be worried that other countries might see JASTA as an open invitation to bring the United States before their own courts to hold the United States or its military liable for misconduct. While the legislative history of the FSIA indicates a desire to charge the courts with immunity determinations instead of the executive branch, the 2008 amendment's reliance on the state sponsor of terrorism designation implicitly empowers the executive foreign policy apparatus to influence the application of the new exception. In contrast, JASTA does not consider any diplomatic concerns, leaving the entire determination up to the courts. While

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125. *Id.* at 647.

126. *Id.* at 661.

127. Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1605B note (Supp. V 2018) (Effective Date).

128. The United Nation's International Law Commission has used the term "crimes under international law" to "denote crimes of a particularly serious nature such as genocide, crimes against humanity, war crimes and torture"—all of which are defined by international treaties. U.N. Secretariat, Immunity of State Officials from Foreign Criminal Jurisdiction, Memorandum by the Secretariat, ¶ 12, Int'l Law Comm'n, U.N. Doc. A/CN.4/596 (Mar. 31, 2008).

JASTA can be commended for what it does for victims, it fails to balance competing interests in this sphere and can open up a realm of significant litigation that is not necessarily beneficial overall.

### C. *The United Kingdom: The State Immunity Act of 1978*

Considering the international relations and comity issues inherent in the foreign sovereign immunity doctrine, it is worth considering how other countries approach SOE immunity. In 1978, the United Kingdom passed its own statute addressing state immunity.<sup>129</sup> Much like the FSIA, this U.K. law replaced the traditional rule of absolute immunity with a more restrictive view: States retain their immunity only when acting within their sovereign capacity.<sup>130</sup> The law's definition of a state, however, is much narrower, limited to the central government of the state and entities which are not distinct from it.<sup>131</sup> An entity with its own juridical personality has no presumption of immunity, unless it was shown to be acting in a sovereign capacity in such a manner that, were it the state and not a separate entity, the state would have been accorded immunity.<sup>132</sup>

The commercial activities exception under this U.K. law is broader than the U.S. version. While the FSIA requires some commercial activity that takes place on U.S. soil, its U.K. counterpart has no such limitation, provided the broader rules of jurisdiction would allow a U.K. court to exercise jurisdiction over whatever commercial activity had occurred.<sup>133</sup> The U.K. statute also more clearly delineates what types of activity the commercial activities exception covers; the situation of the Hungarian train company, which simply operated a website that was accessible for the purchase of tickets in the United States, would be less likely to succeed as grounds for jurisdiction under the U.K. law. The U.K. framework would require

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129. State Immunity Act 1978, c. 33 (UK).

130. See generally Georges R. Delaume, *The State Immunity Act of the United Kingdom*, 73 AM. J. OF INT'L L. 185 (1979) (comparing the State Immunity Act with the FSIA).

131. *Id.* at 187.

132. *Id.* at 188.

133. *Id.* at 191.

some sort of transaction or activity to create a commercial transaction giving rise to an exception.<sup>134</sup>

As compared to the U.S. approach, the U.K. framework makes it much harder for an SOE to receive immunity. The law looks not to the nature of the entity, but to the type of acts or omissions it has engaged in. If those acts or omissions fall within the purview of state power, then immunity is more likely. If not, and the entity is a separate juridical person, then there is no grant of immunity.<sup>135</sup> In some ways, this addresses the accountability-liability gap more effectively than does the U.S. model. By focusing more on substance than form, the U.K. statute makes it more likely that the correct party will be held accountable for alleged wrongs. One cost, however, is the lack of remaining potential for an SOE acting at the behest of a state to be held liable while the state enjoys immunity. There is no provision in the law that explicitly allows the courts to look beyond the acts taken to examine culpability. The U.K. state immunity law also suffers from one of the same weaknesses as the FSIA: the lack of a clear exception for human rights violations.

The U.K. framework goes a long way towards addressing concerns about disparate treatment of corporations, and would allow for jurisdiction over companies like CNBM Group and AVIC, as they were not acting with state power and were separate juridical entities. However, for those concerned with the human rights element of the immunity problem, the U.K. approach does not represent a significant step forward.

#### D. South Korea: The Japanese Reparations Cases

South Korea has taken a different approach. In October 2018, the South Korean Supreme Court ordered Nippon Steel, a Japanese company that used forced labor during the Second World War, to pay compensation to the victims of that labor system.<sup>136</sup> The following month, a similar decision was

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134. See State Immunity Act 1978, c. 33, § 3 (UK) (defining “commercial transaction” for purpose of exception).

135. State Immunity Act 1978, c. 33, § 14 (UK).

136. Hyonhee Shin, *Friction Likely as Korean Court Orders Nippon Steel to Compensate WWII Workers*, REUTERS, Oct. 29, 2018, <https://www.reuters.com/article/us-southkorea-japan-laborers/friction-likely-as-korean-court-orders-nippon-steel-to-compensate-wwii-workers-idUSKCN1N32TS>. Nippon Steel’s

rendered in a case brought against Mitsubishi for similar use of forced labor.<sup>137</sup> While these two corporations did not constitute SOEs as they are understood today, their ties with the Japanese government, and the human rights abuses they committed on behalf of the state, bring them into the ambit of this discussion.

The Japanese government argued, and still maintains, that a 1965 agreement between the two countries which addressed claims involving “property, rights and interests” covered all possible suits brought for wartime damages.<sup>138</sup> The South Korean Supreme Court, however, directly rejected this claim, and held that the right to reparation survived the treaty.<sup>139</sup> The court asserted that “[t]he treaty does not cover the right of the victims of forced labor to compensation for crimes against humanity committed by a Japanese company in direct connection with the Japanese government’s illegal colonial rule and war of aggression against the Korean peninsula.”<sup>140</sup>

Japan, as could be expected, was outraged at the ruling. By one count, 300 Japanese corporations could be at risk of litigation based on the precedent set by the South Korean

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predecessor company was a consolidation of several steel-work countries that, at the time of the Second World War was partially owned by the Japanese government. *Nippon Steel Corporation*, THE ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Nippon-Steel-Corporation#ref225905> (last visited Apr. 24, 2019).

137. Hyonhee Shin & Joyce Lee, *South Korean Court Angers Japan With Order to Compensate Wartime Laborers*, REUTERS, Nov. 28, 2018, <https://www.reuters.com/article/us-japan-forcedlabour-southkorea/south-korean-court-angers-japan-with-order-to-compensate-wartime-laborers-idUSKCN1NY05D?feedType=RSS&feedName=WorldNews>. While Mitsubishi was a private corporation during the Second World War, the lawsuit concerns their work building military aircraft at the behest of the Japanese state while using forced labor from prisoners provided by the Japanese state, functionally making them a state entity for the purposes of this discussion. *Mitsubishi Group*, THE ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Mitsubishi-Group> (last visited Apr. 30, 2019).

138. Azusa Kawakami & Yosuke Onchi, *70 Japanese Companies at Risk of Litigation After Wartime Ruling*, NIKKEI ASIAN REV. (Oct. 31, 2018), <https://asia.nikkei.com/Politics/International-Relations/70-Japanese-companies-at-risk-of-litigation-after-wartime-ruling>.

139. Shin, *supra* note 136.

140. Shin & Lee, *supra* note 137 (quoting a statement from the court).

court's interpretation in these cases.<sup>141</sup> Japanese Prime Minister Abe stated that "[t]he ruling is unthinkable in light of international law,"<sup>142</sup> while Japanese Foreign Minister Kono stated that "[t]he decisions completely overthrow the legal foundation of the friendly and cooperative relationship" shared by the two states.<sup>143</sup> The court's decision is expected to add yet another source of tension to an already strained relationship between the two states.<sup>144</sup> As of the end of 2018, the plaintiffs in the Nippon Steel case have requested that the courts seize the corporation's South Korean assets in response to the corporation's failure to negotiate how the compensation should be paid.<sup>145</sup>

As in the Holocaust looted-art cases, the public state and private corporations are also intertwined in the Korean reparation cases. The forced labor system did not, and could not, exist separate from the mandate and police power of the state.<sup>146</sup> It was the state that facilitated the provision of Korean workers, and it was also the state that demanded production from many of the companies implicated to aid the Japanese war effort.<sup>147</sup> This parallels the actions taken by Hungarian companies at the behest of a government looking to perpetuate the Holocaust.

The Korean cases highlight, however, the delicate balance at issue in these matters. Korea and Japan signed the 1965 agreement to lay grievances to rest, and firmly settle the issue of the war's harm to allow the two countries to proceed with normalized diplomatic relations. The agreement included \$300 million in aid from Japan to South Korea, intended to

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141. Sang-Hun Choe & Rick Gladstone, *How a World War II-Era Reparations Case is Roiling Asia*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/world/asia/south-korea-japan-compensation-world-war-two.html>.

142. Kawakami & Onchi, *supra* note 138.

143. Shin & Lee, *supra* note 137.

144. Choe & Gladstone, *supra* note 141.

145. Jiji Kyodo, *South Korean Forced Labor Plaintiffs Seek Nippon Steel Asset Seizure*, JAPAN TIMES (Jan. 2, 2019), <https://www.japantimes.co.jp/news/2019/01/02/national/crime-legal/south-korean-forced-labor-plaintiffs-seek-nippon-steel-asset-seizure-report/#.XC0MFC9KgWo>.

146. See Petra Schmidt, *Japan's Wartime Compensation: Forced Labour*, 2 ASIA-PAC. J. ON HUM. RTS. & L. 1, 3–5 (2000) (discussing the Japanese mobilization of Korean labor).

147. *Id.* at 2–3, 14.

settle the issue of reparations as well.<sup>148</sup> And yet, the South Korean court ruling suggests that justice has not been served, and that the agreement did not fully account for the severity of the crimes that occurred. The court specifically named in its statement crimes against humanity, illegal occupation, and aggression as aspects of the offense that the Japanese committed.<sup>149</sup> In effect, the court appears to be saying that gross violations of human rights, as violations of the highest crimes under international law, require proper remedy even at the risk of upsetting diplomatic relations.

While this is not specifically a case addressing the status of immunity for SOEs, the fact that the companies were effectively acting at the behest of their government during the Second World War, makes the decision of the South Korean court relevant to the discussion here. Japan drove the actions of the companies by having them contribute to the war effort and giving them prisoners of war to use as forced labor. The same issues of accountability and liability are raised in these cases, where the courts have found these corporations liable for actions that the foreign state incited and directed. Though the court did not go so far as to hold Japan liable directly, the state and the corporations are intertwined, especially since the agreement negotiated in 1965 was clearly intended to address both public state action and private corporate actions.

While U.S. courts require an explicit grant of jurisdiction over a matter in order to consider a case, the Korean courts effectively claimed a specialized exception for what are often considered the most serious crimes under international law. One potential solution to ensure accountability for victims of human rights abuses would be to start there, and simply add to the FSIA an exception granting U.S. courts jurisdiction when certain crimes have been committed—perhaps those crimes that are generally accepted as *jus cogens* violations. This would allow the victims of mass atrocities such as genocide, including the victims in the Holocaust art cases discussed above, to obtain some sort of effective remedy against the perpetrators of the crimes against them.

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148. Kawakami & Onchi, *supra* note 138.

149. Shin & Lee, *supra* note 137.

E. *China: Application of the Rule of Immunity*

A related example arises out of similar legislation in China addressing immunity questions related to Japan's use of forced labor during the Second World War. The Chinese courts, in recent years, have seen suits brought against Japan itself, and against Japanese companies that participated in the atrocities of the Second World War.<sup>150</sup> The charges levied against the state refer to indiscriminate bombing carried out during the war, as well as suits brought against the state for forced labor.<sup>151</sup> The plaintiffs in these cases are making *jus cogens*-based arguments, claiming that the violation of peremptory norms abrogates the privilege of immunity.<sup>152</sup> The Chinese courts hearing these cases had yet to rule on the matter of jurisdiction as of 2016.<sup>153</sup>

At the same time, a lawsuit brought directly against two Japanese companies that made use of the forced labor system has been allowed to proceed in the Chinese courts.<sup>154</sup> Here, similar issues arise concerning the meaning and scope of a post-war agreement between Japan and China that re-established relations between the countries.<sup>155</sup> The 1972 Joint Communiqué contains language on reparations, which the Supreme Court of Japan has interpreted as foreclosing any claims for reparations brought by victims of war-time actions.<sup>156</sup> The Chinese Ministry of Foreign Affairs, however, disagreed with that interpretation, and no Chinese court appears to have ruled on the issue as of 2016.<sup>157</sup> The lower Chinese court is not permitted to hear the case without the consent of numerous other parties, including the Supreme Court of China and the Ministry of Foreign Affairs.<sup>158</sup> This is perhaps

150. Congyan Cai, *International Law in Chinese Courts During the Rise of China*, 110 AM. J. INT'L L. 269, 279–80 (2016) (noting that there have been several such suits, but focusing analysis and observations on two suits in particular).

151. *Id.*

152. *Id.*

153. *Id.* at 280.

154. *Chinese Sue Japan Firms Over Forced World War Two Labour*, BBC NEWS (Feb. 26, 2014), <https://www.bbc.com/news/world-asia-26340359>.

155. Cai, *supra* note 150, at 280.

156. *Id.*

157. *Id.* at 281.

158. *Id.* at 282.

due in part to the fact that these cases, even those brought against private parties, present diplomatic difficulties. A prior case that was in the negotiation phase of an award for damages resulted in the seizure of a Japanese cargo ship, which increased tensions between the two states.<sup>159</sup>

The South Korean and Chinese examples demonstrate that bringing suit against companies that acted at the behest of governments can be an effective way to obtain some sort of remedy for victims. However, these cases do not exist in a vacuum and have serious consequences. In South Korea, the courts are acting relatively independently from national considerations, while in China the state exerts significant influence over whether the cases will be heard or not. It is important to consider the balance of government interference in these matters, in order to preserve international comity and the interests of the victims. Neither the South Korean nor the Chinese cases look beyond the corporations to target the state action that lead to the forced labor system; however, the accusation exists in the penumbra around each of these cases.

#### V. CONCLUSION: A PROPOSAL FOR LEGISLATIVE REFORM OF THE FSIA

A better solution to the accountability-liability gap that the FSIA and its interpretation create exists somewhere between the examples above. The two areas of concern—the human rights issue and the commercial competition issue—require different statutory solutions, but the two complement each other in order to form a satisfactory regime for SOE immunity.

On the human rights side, a potential solution lies between the current form of JASTA, which is too narrow in its scope and too broad in its application, and the approach of the South Korean courts with respect to the Second World War forced labor cases. The United States could take the basic framework of JASTA, but replace the law's reliance on exceedingly broad conspiracy and terrorism provisions with an exception that applies to crimes under international law. These crimes could include genocide, crimes against humanity, tor-

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159. Lucy Hornby, *China Opens Door to More Lawsuits Against Japanese Companies*, FIN. TIMES (Apr. 22, 2014), <https://www.ft.com/content/17853a38-c9fb-11e3-8a31-00144feabdc0>.

ture, slavery, and other wrongs that international law broadly considers unacceptable actions. Such an exception would allow more victims of heinous crimes to achieve some sort of remedy through the courts. It would also anchor the exception in concepts that the international community at large accepts, thereby removing some of the diplomatic pitfalls of using purely U.S. legal concepts to hale foreign states into court. The South Korean and Chinese cases show that considerations such as *jus cogens* or crimes against humanity are persuasive in other legal systems, and therefore might be accepted if relied upon in U.S. courts. A clause could also be added that allows the U.S. Department of State to intervene in these cases through the form of a temporary stay, or perhaps in a direct appeal to the judge. This would help ensure that foreign relations concerns are still considered when foreign sovereign immunity is at issue. A new exception along these lines, based on the existing JASTA framework but broadened and with a diplomatic safeguard in place, would allow for victims of human rights violations that are crimes under international law to hold both SOEs and the states behind them accountable for wrongs committed.

On the commercial side, Senator Grassley's proposal is too simplistic. The United States would do better to look closer at the U.K. approach, where the actual substance of the wrongful act is determinative of liability in court. By judging the acts taken by an SOE based on what they were doing, whether their act was *jure imperii* or *jure gestionis*, courts can evaluate more clearly whether an SOE should be entitled to immunity in a way that is related to the underlying basis of the alleged crime. This evaluation is more in keeping with traditional notions of sovereign immunity, the reasons the principle was codified in its more restrictive form, and the modern concept that a state is not immune for purely commercial acts. The U.K. statute's test—whether the act could have been accomplished without the police power of the state—is a much clearer notion than the current alter ego analysis that U.S. courts mobilize today. Clarifying the application of the law in this manner is good for plaintiffs: The standard is easier to understand and use, and prevents corporations from hiding behind the shield of immunity regardless of the nature of their actions. This approach comes much closer

to providing the equal playing field that Senator Grassley and those that share his concerns want to achieve.

Veil-piercing based on acts rather than legal form would also help victims of crimes under international law by making it easier to establish when a state is simply acting through a corporation. For example, in *Simon*—the case involving the Hungarian railway corporation—a court could look at the facts and determine that the railways were acting at the behest of the state, and thus as an extension of it. Although this would result in the SOE receiving immunity under the adopted U.K. framework alone, if combined with an exception to the FSIA that denied immunity for crimes such as genocide, the plaintiffs would be able to reach past the rail company to the state, and hold both liable in court. This would provide a remedy that avoids the problems arising from the accountability-liability gap.

Ultimately, the combination of these two proposals would allow courts to move beyond the rigid framework of the FSIA and look deeper into the heart of the cases before them. The development of corporate forms often allows defendants, whether they be states or corporations, to evade legal responsibility by masking the relationships between entities. With an exception that removes immunity for crimes under international law and an analytical framework for determining SOE immunity that is more dependent on the facts than the corporate legalities, the United States can move towards a system that is more just for all parties, whether they be individuals, corporations, states, or some hybrid combination thereof.