CASENOTES AND COMMENTS

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Sovereign Immunity for Military Activities on the High Seas: *Amerada Hess v. Argentine Republic*

In June 1982, Argentine military aircraft attacked a neutral merchant vessel on the high seas on three separate occasions without warning or provocation. The incident occurred during the Falklands/Malvinas War between the Argentine Republic and the United Kingdom. The *Hercules,* however, was attacked in international waters beyond the "exclusion zones" declared by the parties to the conflict. The United States Maritime Administration had previously notified Argentina and the United Kingdom of U.S. interest ships, including the *Hercules,* that would be traversing the South Atlantic, to ensure the safety of these neutral vessels. The crude oil tanker suffered extensive damage as a result of the attacks and was eventually scuttled due to an undetonated bomb lodged in its hull.[1]

After unsuccessful attempts to obtain redress in Argentine courts, the Liberian corporations that owned and time-chartered the *Hercules* (United Carriers Inc. and Amerada Hess Shipping, respectively) sued Argentina for damages in the United States District Court for the Southern District of New York. The complaints were filed under the Alien Tort Statute,

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1. The Circuit Court accepted the plaintiffs' allegations as true because the complaints were dismissed by the district court for lack of jurisdiction. Amerada Hess Shipping Corp. v. Argentine Republic, 638 F. Supp. 73 (S.D.N.Y. 1986), *rev'd,* 830 F.2d 421, 423 (2d Cir. 1987), *cert. granted,* 108 S. Ct. 1466 (1988).

which provides original jurisdiction "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[2] The district court granted Argentina's motion to dismiss the actions for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 (FSIA).[3] In granting this motion the court stated that "Plaintiffs' claims undeniably fall outside of the exceptions to blanket foreign sovereign immunity provided by the FSIA."[4]

The district court did not decide whether Argentina would be entitled to claim immunity under international law:

> Plaintiffs next argue that foreign sovereign immunity is not absolute or requisite, and that the Argentine Republic's refusal to repay the plaintiffs is so manifest a violation of its obligations under international law that this country has a right to refuse it immunity. Let us assume that this argument is valid as a matter of international law. Nonetheless, that fact does not empower this court to create an ad hoc exception to a Congressional statute in order to hear this case.[5]

The plaintiffs appealed the district court's decision to dismiss the actions to the United States Court of Appeals for the Second Circuit. The decision was reversed by a divided panel of the court, which held that (1) the Alien Tort Statute gives the federal court jurisdiction to determine claims against Argentina based on international law violations, and (2) this jurisdiction is not preempted by the FSIA, which is not the exclusive basis for determining the immunity of a foreign state.[6]

The Alien Tort Statute was interpreted by the court of appeals as a jurisdictional grant based on evolving standards of international law that determine permissible defendants, actionable conduct, and the existence of immunity. The court concluded that international law would not provide immunity for Argentina in suits relating to the activities of its armed forces that violated international law:

> Thus we must look to modern international law to decide whether the statute provides jurisdiction over a foreign sovereign. For example, if a current norm of international law immunized sovereigns for behavior that, if committed by an individual, would be a violation of international law, such an action by a sovereign would not be a tort "committed in violation of the law of nations." The modern view, however, is that sovereigns are not immune from suit for their violations of international law.[7]

2. Alien Tort Statute, 28 U.S.C. § 1350 (1982).
3. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, codified at 28 U.S.C. §§ 1330, 1332(a)(2-4), 1391(f), 1441(d) and 1602-11 (1982).
4. *Amerada Hess*, 638 F. Supp. at 75.
5. *Id.* at 76.
6. *Amerada Hess*, 830 F.2d at 421.
7. *Id.* at 425.

This article discusses the court's decision with regard to Argentina's right to claim immunity under international law for military activities on the high seas in the course of an armed conflict.[8]

I. Sovereign Immunity

Sovereign immunity is a principle of international law that determines Argentina's right to claim immunity. The purpose of the FSIA is to codify international law and to provide procedural guidelines for U.S. courts.[9] Assuming the district court is correct in holding that the FSIA provides a comprehensive legislative scheme for determining immunity, the statute is to be construed in accordance with international law whenever possible.[10] If, on the other hand, the court of appeals is correct in its interpretation of the Alien Tort Statute as an independent jurisdictional grant not subject to the standards and procedures for determining sovereign immunity contained in the FSIA, then the question of immunity must be determined by reference to international law.[11]

International law may be ascertained by reference to treaties, state practice as evidence of customary law, and scholarly writings.[12] While there is no international convention on sovereign immunity, the International Law Commission has been engaged in the process of codifying this area of law since 1978.[13] The highly regarded Special Rapporteur, Dr. Sompong Sucharitkul, prepared several reports and proposed draft articles on the Jurisdictional Immunities of States and Their Property. In 1986 the Commission provisionally adopted a set of draft articles, which were referred to Member States for comments.[14]

The principle of sovereign immunity exempts a State and its property from the judicial jurisdiction of another State. This immunity is based on the independence, equality, and dignity of sovereign States, as well as

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8. For a discussion of the issues relating to the Foreign Sovereign Immunities Act, see Kirgis, *Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts*, 82 AM. J. INT'L L. 323 (1988).

9. Revised Section-by-Section Analysis of the FSIA, page 5, prepared by the Department of State and submitted to Congress on January 22, 1973. *See* S. 771, 93d Cong., 1st Sess., 119 CONG. REC. 3433–40 (1973).

10. MacLeod v. United States, 229 U.S. 416, 434 (1913); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

11. The Paquete Habana, 175 U.S. 677, 700 (1900).

12. *Id.*

13. The International Law Commission was created by the United Nations General Assembly in 1947 to promote the codification and progressive development of international law pursuant to article 13 of the United Nations Charter.

14. The draft articles are contained in the *Report of the International Law Commission to the General Assembly*, 41 U.N. GAOR Supp. (No. 10) at 9–24, U.N. Doc. A/41/10 (1986), *reprinted in* [1986] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER.A/1986/Add.1 (Part 2).

foreign relations considerations.[15] Two competing theories have influenced the development of the law of sovereign immunity. The absolute theory prevents a court from exercising jurisdiction over a foreign State in the absence of consent. This theory may have been more persuasive in the last century when States were primarily engaged in governmental activity. Today, however, the restrictive theory, which limits immunity to acts that are public or governmental in nature, has gained wide acceptance as States have increasingly engaged in trading and commercial activities that fall within the realm of "private" activity.[16]

The basis for the immunity or nonimmunity of a State under the restrictive theory is discussed by Dr. Sucharitkul in the report presented to the Commission in 1982:

> The juridical basis for "non-immunity" may be described as the counterpart of the legal basis for "State immunity." If the exercise of *imperium* by a State was the basis for immunity, then the absence of connection with *imperium*, or the non-exercise of sovereign power by the State, would afford the *raison d'être* for cases of "non-immunity." If it can be said that a State is immune on account of, or because of, or in respect of its acts or activities in the exercise of its sovereign power, or in the performance of its sovereign functions, then likewise that immunity ceases where no such sovereign act or activity or power or function of a State is involved or affected by the exercise or resumption or continuation of judicial authority by the court of another State.[17]

The report also discussed the standards recognized by the national courts of various countries for determining immunity under the restrictive theory: the dual personality of the State (political entity, *ente politico,* and judicial personality, *corpo morale*); the dual capacity of the State (political power, *potere politico,* and juristic person, *persona civile*); the public or private nature of the State activities *(acta jure imperii* or *acta jure gestionis)*; and the governmental or commercial nature of the State activities.[18] Whether a State activity is consistent with international law has not been recognized as a criterion for ascertaining sovereign immunity. Thus, the fact that Argentina's military aircraft attacked a neutral vessel on the high seas, in violation of international law, does not determine Argentina's right to claim immunity. The essential question is whether the activities are public or governmental in nature.

While there is some disagreement concerning the exceptions to State immunity under the restrictive theory, there is universal agreement on the immunity of a State with regard to purely public or governmental acts.

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15. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).
16. Revised Section-by-Section Analysis of the FSIA, *supra* note 9, at 5.
17. Sucharitkul, *Fourth Report on Jurisdictional Immunities of States and Their Property*, U.N. Doc. A/CN.4/357 at 26 (1982), *reprinted in* [1982] Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER.A/1982/Add.1.
18. *Id.* at 27–33.

Based on an extensive survey of State practice, Dr. Sucharitkul concluded that:

> There is common agreement that for acts performed in the exercise of the *prerogatives de la puissance publique* or "sovereign authority of the State," there is undisputed immunity. Beyond or around that hard core of immunity, however, there appears to be a grey zone in which opinions and existing case-law, and indeed legislations still vary.[19]

The military activities of the armed forces clearly fall within the hard core of immunity recognized for public acts involving the sovereign authority of the State. The immunity of a foreign State for the activities of its armed forces can be traced to the development of the principle of sovereign immunity first recognized in connection with warships.

> It was therefore not surprising that the doctrine of State immunity first came to be recognized and accepted as a proposition of law in cases involving a "floating territory" of one State which happened to sail into the territorial or national waters of another State, with the result that the principle of sovereign equality could not permit the exercise of jurisdiction by the territorial sovereign over the floating territory, which formed part of the armed forces of another, equally sovereign State. This was actually how the basic principle of State immunity or sovereign immunities of States in general came to be recognized and settled as a natural outcome of international intercourse and an inevitable principle of international law. The first concrete illustration of its application is to be found in cases of public armed vessels or warships.[20]

One of the leading cases in the development of the principle of sovereign immunity is *The Schooner Exchange* decision written by Chief Justice Marshall in 1812. As in *Amerada Hess,* this case involved an alleged violation of international law—the seizure of a merchant vessel and its commission as a national armed vessel of France pursuant to orders of Emperor Napoleon. In discussing the immunity extended to a warship, Chief Justice Marshall recognized the quintessential sovereign or governmental character of the activities of the armed forces:

> [A public armed ship] constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity.[21]

By the next century, the immunity extended to a public armed ship acting as part of the armed forces of a foreign State was recognized as an accepted principle of comity, if not international law:

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19. *Report of the International Law Commission to the General Assembly, supra* note 14, at 35.

20. Sucharitkul, *Sixth Report on Jurisdictional Immunities of States and Their Property,* U.N. Doc. A/CN.4/376/Add.1 at 16 (1984), *reprinted in* [1984] Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/376/SER.A/1984/Add.1.

21. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 144 (1812).

> The well-settled rule that, under the comity existing between nations, the public armed ship of a friendly nation, acting under the immediate and direct command of the sovereign power, is not to be interfered with by the courts of a foreign state, is based upon the principle that, if the courts did attempt to assume jurisdiction over such vessel, it would require the sovereign of the nation to which the vessel belongs to be impleaded in the court from which the process issued, and, by common consent of nations, such situations could not arise without interference with the power and dignity of the foreign sovereign. Therefore the courts will not assume jurisdiction over such vessel or its officers, while acting as such, but leave controversies arising out of the acts of the vessel, and its officers, while acting in their official character, for settlement through diplomatic channels.[22]

Indeed the Second Circuit Court of Appeals stated that it would accept a claim of sovereign immunity, even though the State Department had not recognized the immunity under procedures existing before the FSIA, if "the activity in question falls within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive. . . . [including] acts concerning the armed forces."[23]

The jurisdictional immunity accorded to a foreign State for its armed forces is codified in the FSIA, which recognizes the immunity of a foreign State subject to enumerated exceptions. The immunity exception for public ships extends only to maritime liens based on commercial activity, thus preserving the immunity of public armed vessels engaged in military activities.[24] Furthermore, the statute expressly provides immunity from attachment or execution for State property of a military character or under the control of a military authority that is, or is intended to be, used in connection with a military activity.[25] This approach is consistent with the draft articles provisionally adopted by the International Law Commission.[26]

Today few principles of international law enjoy greater recognition or acceptance than the sovereign immunity of a State for the public or governmental activities of its armed forces.[27] As Dr. Sucharitkul unequivo-

22. United States v. Thierichens, 243 F. 419, 420 (E.D. Pa. 1917).

23. Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964).

24. 28 U.S.C. § 1605(b)(1982).

25. 28 U.S.C. § 1611(b)(2). Revised Section-by-Section Analysis of the FSIA, *supra* note 9, at 35–36.

26. *See Report of the International Law Commission to the General Assembly, supra* note 14, draft art. 6, 18, 21, 23(b).

27. *See* Geneva Convention on the High Seas, Apr. 29, 1958, arts. 8–9, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11 (complete immunity for warships and other ships owned or operated by a State and used only for government non-commercial service on the high seas); Treaty on International Commercial Navigation Law, Mar. 19, 1940, art. 35, *reprinted in* 37 AM. J. INT'L L. 114 (Supp. 1943) (immunity of warships or airplanes employed at the time the claim arises in some public service outside the field of commerce); Bustamante Code of Private International Law of 1928, art. 337, *reprinted in* THE INTERNATIONAL

cally stated: "Vessels of war belong to the armed forces of the State, adding to its military strength and might, and as such lie outside the reach and jurisdiction of the courts of other States."[28]

A foreign State is immune from the jurisdiction of the courts of another State for the activities of its armed forces even in time of war, such as the attacks against the *Hercules* carried out by the Argentine Air Force during the Falklands war:

> In international law, in time of peace or even in the event of an armed conflict, warships or men-of-war have a special status, special privileges, and admittedly cannot be proceeded against, unless they have been decommissioned or condemned as lawful prizes by a prize-court, an institution which has gone out of fashion.[29]

II. Amerada Hess v. Argentine Republic

The court of appeals erred in analogizing Argentina's refusal to provide compensation for damages resulting from the attacks on the *Hercules* to acts of piracy.[30] The unlawful bombing of a neutral ship on the high seas by a military aircraft acting on government orders in the context of an armed conflict does not constitute an act of piracy committed for private ends.[31] As Ian Brownlie clearly stated:

> The essential feature of the definition is that the acts must be committed for private ends. It follows that piracy cannot be committed by warships or other government ships, or government aircraft, except where the crew "has mutinied and taken control of the ship or aircraft" (Article 16 [Geneva Convention]).[32]

Thus, the principle of universal jurisdiction recognized for acts of piracy would not apply to the actions of the Argentine military aircraft.

The court of appeals also erred in relying on the denial of immunity for international law crimes:

> Indeed, the sovereign immunity defense raised by Nazi war criminals at the Nuremberg trials was rejected by the international tribunal. ("The principle of international law, which under certain circumstances, protects the represen-

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Conference of American States 69 (J. Scott ed. 1931) (immunity accorded to commanders of war vessels or aircraft); International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, Apr. 10, 1926, art. 3, 176 L.N.T.S. 200 (immunity of warships and other craft owned or operated by a State and used, at the time a cause of action arises, for governmental and non-commercial service).

28. *Sixth Report on Jurisdictional Immunities of States and Their Property*, *supra* note 20, at 10.

29. *Id.*

30. *Amerada Hess*, 830 F.2d at 424.

31. Geneva Convention on the High Seas, *supra* note 27, arts. 15, 16; Law of the Sea Convention, arts. 101–102, *done* at Montego Bay, Dec. 10, 1982, 21 I.L.M. (1982); U.N. Doc. A/CONF. 62/122 (Oct. 7, 1982).

32. I. Brownlie, Principles of Public International Law 244 (3d ed. 1979).

tatives of a state, cannot be applied to acts which are condemned as criminal by international law.") Since the sinking of a neutral vessel on the high seas without justification violates a substantive principle of international law, no matter who does the sinking, there is no immunity under international law in this case.[33]

It is important to differentiate between the Nuremberg trials, which concerned the liability of individuals for crimes under international law, and the controversial concept of the criminal responsibility of States.[34] The law of international criminal responsibility of individuals does not determine Argentina's right to claim immunity in a civil action for damages filed in the national courts of another State. Furthermore, there is reason to question whether the sinking of a neutral vessel on the high seas in the context of an armed conflict, while clearly a violation of customary law, rises to the level of an international crime.[35]

In rejecting Argentina's claim of sovereign immunity, the court of appeals failed to distinguish between immunity from the judicial jurisdiction of another State and immunity from international responsibility for violations of international law:

> That international law currently denies immunity for violations of international law is not surprising, when one considers that international law consists primarily of rules guiding the conduct of nations. If sovereign acts were immunized today from scrutiny under international law, the exception would nearly swallow the rule. For example, the emerging international law prohibition of genocide . . . would make little sense, even in theory, if sovereign states were not covered by the prohibition.[36]

Sovereign immunity merely provides that claims relating to the public or governmental activities of a foreign State should not be resolved in the national courts without the consent of the foreign State. A State should not be required to submit its public or governmental acts to the judicial review of another State. This jurisdictional immunity, however, applies

33. *Amerada Hess*, 830 F.2d at 426 (citation omitted).

34. I. BROWNLIE, SYSTEM OF THE LAW OF NATIONS, STATE RESPONSIBILITY, PART I, at 32 (1983):

> The more important and preliminary problems in international relations grow out of the unsuitability of the present system for the imposition of criminal responsibility on states. It is very doubtful if governments are prepared to accept the notion. . . . However, the concept of criminal responsibility appears in the draft articles on state responsibility adopted by the International Law Commission.

See article 19, Draft Articles on State Responsibility, provisionally adopted on first reading by the International Law Commission, [1976] 2 Y.B. INT'L LAW COMM'N (pt. 2) 73, 95–122.

35. Geneva Convention on the High Seas, *supra* note 27, art. 2; Law of the Sea Convention, *supra* note 31, arts. 87, 90; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1986) [hereinafter RESTATEMENT (THIRD)]. However, see article 19, Draft Articles on State Responsibility, *supra* note 34.

36. *Amerada Hess*, 830 F.2d at 425–26.

only to national courts and does not negate any responsibility that may exist under international law: "Under international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury."[37] The States concerned may pursue a resolution of the dispute on the international level through diplomatic channels or accepted international procedures, such as arbitration.[38]

III. Conclusion

Argentina is immune from the jurisdiction of United States courts, under accepted principles of international law, for claims relating to attacks by its military aircraft on the *Hercules* in international waters during an armed conflict. The broad immunities extended to warships apply equally to military aircraft engaged in military or defense activities on the high seas. The air force is an integral part of Argentina's armed forces. Attacks conducted by military aircraft in the course of an armed conflict are activities of a purely public or governmental nature involving the sovereign or governmental authority of the State. The members of the Argentine military who conducted the bombing of the *Hercules* were presumably acting pursuant to the decisions and instructions of government officials. This type of activity clearly falls within the undisputed hard core of immunity that is recognized under the restrictive theory of sovereign immunity.

37. RESTATEMENT (THIRD), *supra* note 35, § 901. As stated by Ian Brownlie in his discussion of sovereign immunity, "Moreover, it must be stressed that there is no immunity from international responsibility where this exists under general international law." I. BROWNLIE, *supra* note 32, at 326.

38. RESTATEMENT (THIRD), *supra* note 35, § 902.