International Comity and the Foreign Sovereign Immunities Act in *Usoyan v. Republic of Turkey*

On May 16, 2017, Recep Tayyip Erdoğan, president of Turkey, visited Washington, DC, to meet with U.S. President Donald Trump. During the trip, he was confronted with groups of protesters, who, as the D.C. Circuit would eventually characterize them, "consider him a strongman who rules by decree, violates civil rights, illegally detains and tortures his own citizens and terrorizes Turkey's Kurdish population."[1] By the time Erdoğan's itinerary took him to the Turkish ambassador's residence in late afternoon, pro- and anti-Erdoğan demonstrators faced each other across Sheridan Circle in front of the building and had already briefly clashed.[2] Upon Erdoğan's arrival, as he sat in his vehicle nearby, a mixed group of "Turkish security forces and other pro-Erdoğan individuals" crossed the police

[1] Usoyan v. Republic of Turkey, 6 F.4th 31, 36 (2021). The State Department, not incidentally, seems to agree. *See* U.S. DEP'T OF STATE, TURKEY 2020 HUM. RTS. REP. 1–2, https://www.state.gov/wp-content/uploads/2021/03/TURKEY-2020-HUMAN-RIGHTS-REPORT.pdf [https://perma.cc/WLQ5-WUPJ] (listing various abuses and only "limited steps to investigate, prosecute, and punish members of the security forces and other officials accused of human rights abuses," such that "impunity remain[s] a problem").

[2] *Id.* ("It is unclear which side started the row. . . . [I]t took [city police] about one minute to restore peace.").

cordon and fell upon the protesters.[3] As protesters fell or fled, the attackers "continued to strike and kick the protesters who were lying prone on the ground" and chased down others.[4]

Injured protesters filed two federal lawsuits against the Turkish government, alleging an array of common-law torts and causes of action under federal and District statutes.[5] Turkey moved to dismiss the claims, citing foreign sovereign immunity, the political question doctrine, and international comity. The district court denied the motion, Turkey appealed, and in July's *Usoyan v. Republic of Turkey* ruling, a D.C. Circuit panel unanimously affirmed.[6]

This Report will consider a finding within the panel's opinion that seems at once glancing and sweeping: that the doctrine of international comity, insofar as it could permit a court to decline to exercise jurisdiction over cases against foreign states for any reason other than respect for a foreign court ruling, has been wholly overridden by the Foreign Sovereign Immunities Act of 1976.[7] Such a decision is evidently a surprise—at least to Turkey, which does not seem to have realized that its argument was foreclosed almost half a century ago.

One could be forgiven for thinking the authority on which the *Usoyan* court rested its holding seems a bit thin. It leaned heavily on an article in a law journal. And although it cited some case law calling foreign sovereign immunity "a matter of grace and comity" and saying that it "has its roots . . . in the notion of comity between independent sovereigns,"[8] those quotations seem to imply that all foreign sovereign immunity doctrine is international comity doctrine, but to stop short of the converse. But on closer examination, the court's

---

[3] *Id.* at 36–37.

[4] Usoyan v. Republic of Turkey, 438 F. Supp. 3d 1, 9 (D.D.C. 2020). There are also allegations that Erdoğan personally ordered the attack, which neither the district court nor the D.C. Circuit has yet resolved. *Id.*; *Usoyan*, 6 F.4th at 36.

[5] *Usoyan*, 6 F.4th at 37.

[6] *Id*. at 35–36.

[7] *Id*. at 48–49.

[8] *Id*. at 48 (citing William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015); Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972)).

cursory treatment actually represents as long-established a principle as it claims, and the law of international comity is unchanged (or, at least, little changed) by this ruling.

The *Usoyan* Ruling

The court principally rested its decision on a 2015 article in the *Columbia Law Review* by Professor William Dodge, whose reasoning the court seems to have implicitly adopted into the law of international comity.[9] So, for the first time in the history of this doctrine, the panel split it into three neat parts, following Dodge: international comity doctrine, it held, consists of "deference to foreign lawmakers ('prescriptive comity'), deference to foreign tribunals ('adjudicative comity'), and deference to foreign litigants ('sovereign party comity')"—nothing more.[10]

The court then observed that Turkey had not presented any foreign rule or ruling for it to apply or respect, so that its motion to dismiss could only succeed if the doctrine gave rise to some reason to defer to Turkey as a party.[11] But it immediately defined "sovereign party comity," when applied to a defendant, as "[a] shield[] . . . from certain kinds of suits in federal or state court—*foreign sovereign immunity, in other words*."[12]

The court then held that the Foreign Sovereign Immunities Act ("FSIA") is "comprehensive" in that field.[13] So, absent a foreign court ruling or law, international comity only restrains American courts through the medium of the FSIA. Since the court had already rejected all of Turkey's FSIA arguments,[14] its comity argument had been defunct for 45 years.

Should Turkey Have Been Surprised?

---

[9] *Id.* (citing Dodge, *supra* note 8).
[10] *Id.* (citing Dodge, *supra* note 8, at 2078).
[11] *Id*.
[12] *Id.* (emphasis added). The court did suggest that there is one other application of sovereign party comity as a restraint on the exercise of jurisdiction, which did not apply because "Turkey's competency as a party [wa]s not in doubt." *Id*. at 48–49. The court did not elaborate, and cited for that assertion neither Dodge nor any precedent which could illustrate its meaning.
[13] *Id*. at 49.
[14] *See generally id*. at 37–47.

Whether *Usoyan* changed the law depends on whether the conclusions the court borrowed from Dodge were already the law of the land: that his three categories cover the whole of international comity doctrine, that his third category, as a restraint on American courts' exercise of jurisdiction, is identical with foreign sovereign immunity doctrine, and that all of that doctrine is in fact covered by the FSIA. As it turns out, both principles were already established, if perhaps obscure. To explain why, it is necessary to describe, first, the relationship between international comity and foreign sovereign immunities, and, second, the relationship between the concept of foreign sovereign immunities and the FSIA.

How International Comity Gives Rise to Foreign Sovereign Immunities

International comity has its origins both outside and before the United States. The Dutch theorist Ulrich Huber, trying to articulate the then-current rules of international law in late-seventeenth-century Europe, wrote that states had exclusive power within their own territory but that "[s]overeigns w[ould] so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or its subjects."[15] This statement laid the foundations for several doctrines, most prominently conflicts of law, but it also outlined the space that would be filled by foreign sovereign immunity doctrine: a sovereign on its own territory was not bound to respect another, but it ought, normatively, to respect foreign rights, including sovereign immunities.[16]

Huber's principle was never expressly adopted by an American court, but early Supreme Court rulings claimed for the United States the power to disregard any right of a

---

[15] Dodge, *supra* note 8, at 2085-86 (quoting ULRICH HUBER, DE CONFLICTU LEGEM DIVERSARUM IN DIVERSIS IMPERIIS (1689) (Ernest G. Lorenzen trans. 1919), reprinted in ERNEST G. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 164 (1947)).

[16] *See id.* at 2087-92 (describing the origins of American conflicts, foreign sovereign immunity, and act of state doctrines, and explaining the logical relationship between Huber's principles and foreign sovereign immunity).

foreign sovereign while also admitting some obligation to acknowledge such rights.[17] As Dodge argues, comity is therefore not itself a binding rule of customary or any other international law, but rather a norm which may be weighed against the sovereign's other interests according to its own discretion.[18] So if Dodge's third category does indeed exhaustively list the reasons why an American court would decline to exercise jurisdiction over a foreign sovereign, such a rule must be found in American domestic law.

Significantly, the first time the Supreme Court declined to exercise jurisdiction over a foreign sovereign on comity grounds, Chief Justice Marshall stressed that the discretion comity afforded the United States was not necessarily the courts' to wield:

> [T]he sovereign of the place [i.e. the territorial sovereign] . . . may claim and exercise jurisdiction either by employing force, or by subjecting [a foreign sovereign] to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise.[19]

In other words, as a matter of domestic law, an American court could only exercise jurisdiction over a foreign sovereign if expressly authorized by the political branches. Since/Because American courts today do possess foreign sovereign immunity doctrine, they have received at least some of this authorization.

How Foreign Sovereign Immunities' Became the Courts' Business

The Supreme Court provided the most guidance on the FSIA's reach in *Verlinden B.V. v. Central Bank of Nigeria*, which held that it is constitutional that the Act permits

---

[17] *See id*. at 2089-91 (quoting The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136–46 (1812); Hilton v. Guyot, 159 U.S. 113, 163, 202–03 (1895)).

[18] *See id*. at 2121 (noting that, since comity is discretionary, the state practice of comity is by definition never accompanied by a sense of legal obligation, and that it cannot therefore ripen into a binding rule of customary international law under the modern understanding of such law). *Compare Usoyan*, 6 F.4th at 40 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (Am. L. Inst. 1987)) ("Customary international law . . . is simply the 'general and consistent practice of states followed by them from a sense of legal obligation.'"); *with Hilton*, 159 U.S. at 163–64 (1895) (defining international comity as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other," which is guided by "due regard both to international duty and convenience, and to the rights of [the sovereign's] own citizens").

[19] *The Schooner Exchange*, 11 U.S. at 146.

foreign plaintiffs to sue foreign sovereigns,[20] and *Republic of Austria v. Altmann*, which held that the Act applies to pre-enactment conduct.[21] The *Usoyan* court relied on assertions in both to support the rule that the FSIA is the sole source of law on foreign sovereign immunities,[22] but the Supreme Court's discussion of the history and purpose of the FSIA in each helps elucidate the fate of Marshall's comity.

For most of American history, the political branches did in fact withhold from the courts the power to determine whether they could hear a suit against a foreign sovereign.[23] And "the political branches" typically meant the State Department, which decided on a case-by-case basis whether it would allow the courts to claim jurisdiction.[24] Although the State Department made some efforts to exercise this power in service of policy aims,[25] by the mid-twentieth century, it had become more of a thorn in the Department's side than a useful tool, as it subjected the Department to lobbying by foreign governments and forced it to thread political needles with every new suit filed against a foreign sovereign.[26] The more the State Department attempted to use this power, the more the power became a lawless bargaining chip.[27] At the same time, foreign governments did not always request State Department interventions in suits filed against them, leading the courts to devise a garbled doctrine modeled on the Department's own inconsistent decisions.[28]

The executive branch—reluctant though it usually is to surrender powers—consequently endorsed the FSIA, which codified the sovereign immunity policy that the State

---

[20] 461 U.S. 480 (1983).
[21] 541 U.S. 677 (2004).
[22] Usoyan v. Republic of Turkey, 6 F.4th 31, 49 (D.C. Cir. 2021).
[23] *Verlinden*, 461 U.S. at 486.
[24] Dodge, *supra* note 8, at 2138–39.
[25] *See Altmann*, 541 U.S. at 688–89 (mentioning a 1949 State Department policy authorizing American courts to disregard sovereign immunity and hear claims filed to restore Nazi-looted property).
[26] Dodge, *supra* note 8, at 2137–39.
[27] *See Altmann*, 541 U.S. at 690.
[28] *Id*. at 690-91.

Department had irresolutely pursued for over two decades.[29] Since international comity binds American courts to follow the political branches' decisions on whether to hear cases against foreign states, per *The Schooner Exchange*, the FSIA functions as "the most recent such decision."[30] It is, and was before *Usoyan*, the only source of judicial power on that question derived from that doctrine.

So the D.C. Circuit was right: Turkey's comity defense was closed off 45 years ago. Although Turkey was right that international comity grants a sovereign the discretion to decline to hear cases against another sovereign, the American system vests that discretion in the political branches, so a court cannot venture beyond the Foreign Sovereign Immunities Act, which represents the political branches' last word on the subject. American law is largely unaffected by the *Usoyan* ruling, except, perhaps, in that the doctrine is a bit less disorderly and ambiguous after *Usoyan* than it was before.[31]

---

[29] Dodge, *supra* note 8, at 2138-39; *see* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486–88 (1983).

[30] *Altmann*, 541 U.S. at 696.

[31] Dodge, *supra* note 8, at 2073–74 ("Scholars . . . point out that 'courts appear to have little understanding of what exactly comity consists,' or at a minimum that courts are 'not always clear or consistent.'")