Foreign Sovereign Immunities Act of 1976 — International Law — Expropriation Exception — Federal Republic of Germany v. Philipp

The United States has led the world in providing Holocaust victims with a forum for restitution.[1] Over the decades, Congress and the courts have restored billions of dollars to Holocaust victims and their heirs.[2] Last Term, however, the Supreme Court deviated from this course in *Federal Republic of Germany v. Philipp*,[3] holding that the Foreign Sovereign Immunities Act[4] (FSIA) would bar a suit brought against Germany arising out of a Holocaust-era taking of Jewish art dealers' property if those art dealers were German nationals.[5] In so holding, the Court expressed practical concerns with allowing U.S. courts to adjudicate international human rights claims.[6] However, a 2016 amendment to the FSIA's expropriation exception actually seems to reflect Congress's intent to permit such claims, at least where they involve property takings that are part of a campaign intended to cause a group's physical annihilation,[7] thus constituting genocide.[8] The Court's reliance on pragmatic considerations led it to adopt a counterintuitive reading of the FSIA that deprives genocide victims of an avenue of recourse that Congress granted them.

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[1] Michael J. Bazyler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 12 (2002).

[2] CONF. ON JEWISH MATERIAL CLAIMS AGAINST GER. & WORLD JEWISH RESTITUTION ORG., THE ROLE OF THE UNITED STATES IN PURSUING COMPENSATION FOR HOLOCAUST VICTIMS AND HEIRS, AND THE HISTORICAL BASES FOR U.S. LEADERSHIP 12 (2020), https://www.claimscon.org/wp-content/uploads/2020/09/2020.9.23-The-U.S.-Role-in-Holocaust-Compensation-.pdf [https://perma.cc/TTJ9-5DV6]; *see id.* at 7–21.

[3] 141 S. Ct. 703 (2021).

[4] Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended in scattered sections of 28 U.S.C.).

[5] *See Philipp*, 141 S. Ct. at 715.

[6] *See id.* at 714.

[7] *See* Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (Clarification Act), Pub. L. No. 114-319, 130 Stat. 1618 (2016) (codified at 28 U.S.C. § 1605).

[8] *See* Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277 (identifying "[d]eliberately inflicting on [a] group conditions of life calculated to bring about its physical destruction" as genocide); *see also* Matthias Weller, *Genocide by Expropriation – New Tendencies in US State Immunity Law for Art-related Holocaust Litigations*, CONFLICTOFLAWS.NET (Sept. 13, 2018), https://conflictoflaws.net/2018/genocide-by-expropriation-new-tendencies-in-us-state-immunity-law-for-art-related-holocaust-litigations [https://perma.cc/J7RL-82X3]. The U.S. Congress has recognized that property takings in association with the Holocaust constitute genocide. *See* Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2(1), 130 Stat. 1524, 1524 (codified at 22 U.S.C. § 1621) ("[T]he Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign . . . ."); Holocaust Victims Redress Act, Pub. L. No. 105-158, § 201(4), 112 Stat. 15, 17 (1998) ("The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide . . . .").

In 1929, a consortium of Jewish-owned art dealing firms acquired a precious treasure: a collection of medieval art and artifacts known as the Welfenschatz.[9] Around half of the artifacts went to buyers abroad, but in the summer of 1935, the art dealers sold the rest to the State of Prussia, purportedly by means of "a combination of political persecution and physical threats," for only about a third of market value.[10] This alleged forced sale occurred at the behest of high-ranking Nazis, including Hermann Göring and Adolf Hitler himself.[11]

Decades later, the heirs of several consortium members filed suit against Germany and the German instrumentality in possession of the Welfenschatz in the U.S. District Court for the District of Columbia, raising ten claims relating to the 1935 sale.[12] The defendants moved to dismiss, advancing a sovereign immunity argument based on the FSIA.[13] The FSIA generally bars federal courts from asserting jurisdiction over foreign states, but it contains several exceptions.[14] These include the expropriation exception, which permits claims "in which rights in property taken in violation of international law are in issue," as long as that property, or the entity that owns it, is connected to commercial activity taking place in the United States.[15]

The district court denied the defendants' motion to dismiss in part and granted it in part.[16] It determined that five of the heirs' claims appropriately centered on "rights in property"[17] and established the necessary nexus with U.S. commercial activity, as required by the expropriation exception.[18] The court also concluded that the heirs had adequately pled that the Welfenschatz was "taken in violation of international law."[19] It based this determination on the D.C. Circuit case *Simon v. Republic of Hungary*,[20] which decided that the expropriation exception allowed descendants of Hungarian Jews to bring suit against Hungary for "systematic, 'wholesale plunder of Jewish

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[9] Philipp v. Federal Republic of Germany, 248 F. Supp. 3d 59, 64 (D.D.C. 2017).

[10] *Philipp*, 141 S. Ct. at 708.

[11] *Philipp*, 248 F. Supp. 3d at 65. In late 1935, "G[ö]ring presented the Welfenschatz as a personal 'surprise gift' to Hitler during a ceremony." *Id.* (quoting Complaint ¶¶ 13, 172, *Philipp*, 248 F. Supp. 3d 59 (No. 15-266)).

[12] *Id.* at 63. The heirs initially brought their claims before a German commission established to hear Nazi-era art restitution claims, but the commission concluded that the sale did not constitute a coerced transaction. *Id.* at 66–67.

[13] *See id.* at 67. The defendants also argued that the heirs' claims were preempted by U.S. foreign policy and that the doctrine of forum non conveniens required the case to be dismissed. *Id.*

[14] *See* 28 U.S.C. §§ 1604–1605.

[15] *Id.* § 1605(a)(3); *see Philipp*, 248 F. Supp. 3d at 68.

[16] *Philipp*, 248 F. Supp. 3d at 64.

[17] *Id.* at 69. The court dismissed five of the plaintiffs' claims for lack of subject matter jurisdiction because these claims did not sufficiently relate to rights in property. *See id.*

[18] *See id.* at 74.

[19] *Id.* at 70.

[20] 812 F.3d 127 (D.C. Cir. 2016).

property'" because this property destruction amounted to genocide, constituting a taking in violation of international law.[21] Accordingly, the district court concluded that the allegedly coercive sale of the Welfenschatz also constituted genocide because it was intended "to deprive the [art dealers] of their ability to earn a living [and] . . . of resources needed to survive as a people."[22] Though the defendants invoked the domestic takings rule, which indicates that a sovereign's expropriation of its own citizens' property does not violate international law, the district court noted that the *Simon* court "expressly rejected the application of the domestic takings rule in the context of intrastate genocidal takings" because genocide breaches international law regardless of nationality.[23] The district court also rejected the defendants' other arguments.[24] Germany filed an interlocutory appeal, which the district court certified.[25]

The D.C. Circuit mainly affirmed.[26] Like the district court, the panel applied *Simon* to hold that a taking of property, even from a sovereign's own citizens, could open the sovereign to suit "where the taking 'amounted to the commission of genocide.'"[27] The panel addressed the defendants' argument that *Philipp* was distinguishable from *Simon*, deciding squarely that "seizures of art may constitute 'takings of property that are themselves genocide.'"[28] It outlined federal statutes that "made clear that [Congress] considers Nazi art-looting part of the Holocaust."[29] And it affirmed the district court's rejection of Germany's arguments that the expropriation exception includes an exhaustion requirement[30] and that the United States encourages alternative dispute resolution for

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[21] *Id.* at 143 (quoting de Csepel v. Republic of Hungary, 714 F.3d 591, 594 (D.C. Cir. 2013)); *see id.* at 143–44. The court noted that the expropriations were motivated by "an intent to destroy a people." *Id.* at 143.

[22] *Philipp*, 248 F. Supp. 3d at 71.

[23] *Id.* at 72; *see* RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 712(1) (AM. L. INST. 1986).

[24] *See Philipp*, 248 F. Supp. 3d at 75–83. The defendants contended that the suit should be dismissed because U.S. foreign policy favors the use of alternative dispute resolution mechanisms to settle Nazi-era restitution claims, *id.* at 75, but the court reasoned that the plaintiffs had sufficiently pled that the proceedings before the German commission were conducted improperly, leading to a biased outcome, and that international comity did not require it to defer to the German commission, *see id.* at 80–81. It also refused to apply forum non conveniens to dismiss the suit, *id.* at 87, and declined to extend international law's exhaustion requirement to claims brought by individuals against a foreign state, *id.* at 83.

[25] Philipp v. Federal Republic of Germany, 894 F.3d 406, 410 (D.C. Cir. 2018).

[26] *Id.* at 408. The panel diverged from the district court only on the expropriation exception's commercial-nexus requirement, holding that Germany itself could not be sued because the Welfenschatz remained in Germany. *See id.* at 414. The panel did, however, allow the heirs' claims against the German state entity now in possession of the art to proceed. *See id.* at 414.

[27] *Id.* at 410–11 (quoting Simon v. Republic of Hungary, 812 F.3d 127, 142 (D.C. Cir. 2016)).

[28] *Id.* at 411 (quoting *Simon*, 812 F.3d at 144 (emphasis omitted)).

[29] *Id.* at 411–12.

[30] *See id.* at 415.

Holocaust restitution claims.[31] Rather, it concluded that "the United States has repeatedly made clear that it *favors* such litigation"[32] through statutes including the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act[33] (Clarification Act), which generally broadened sovereign immunity under the FSIA for claims arising out of wrongfully taken art — but exempted art taken by the Nazis.[34]

Over a dissent from Judge Katsas, the D.C. Circuit denied the defendants' petition for rehearing en banc.[35] Judge Katsas advocated for a narrower understanding of the expropriation exception's phrase "taken in violation of international law," suggesting that it should "encompass[] only property taken in violation of international *takings* law."[36] He highlighted the panel decision's consequences, warning that its reasoning "cannot be limited to genocide"[37] — if the expropriation exception incorporated human rights law, it should also provide redress for property loss from "slavery, murder, degrading treatment, and systemic racial discrimination," opening nations across the world to liability.[38] To drive home his point, Judge Katsas urged readers to "consider if the shoe were on the other foot," envisioning "the United States' reaction if a European trial court undertook to adjudicate a claim for tens of billions of dollars for property losses suffered by a class of American victims of slavery or systemic racial discrimination."[39] Finally, he explained why, in his view, *Philipp* should have been reheard en banc.[40]

On appeal, the Supreme Court vacated the D.C. Circuit's judgment, remanding the case to the district court.[41] Writing for a unanimous Court,[42] Chief Justice Roberts determined that "the expropriation exception is best read as referencing the international law of expropriation rather than of human rights."[43] The Court explained that when the FSIA was passed, the international law of expropriation included the domestic takings rule, which generally bars suits arising out of a

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31 *See id.* at 416–18.

32 *Id.* at 418.

33 Pub. L. No. 114-319, 130 Stat. 1618 (2016) (codified at 28 U.S.C. § 1605).

34 *See Philipp*, 894 F.3d at 418.

35 Philipp v. Federal Republic of Germany, 925 F.3d 1349, 1349 (D.C. Cir. 2019).

36 *Id.* at 1351 (Katsas, J., dissenting from the denial of rehearing en banc) (emphasis added).

37 *Id.* at 1354.

38 *Id.* at 1355.

39 *Id.*

40 *See id.* at 1357–59.

41 *Philipp*, 141 S. Ct. at 716.

42 *Id.* at 707.

43 *Id.* at 712. The Court did not consider Germany's argument that the case should have been dismissed to preserve international comity, *id.* at 715, and it directed the district court to consider on remand the heirs' argument that the domestic takings rule should not apply because the art dealers were not German nationals at the time of the alleged taking, *id.* at 715–16.

sovereign's expropriation of its own citizens' property.[44] And it reasoned that the FSIA limited the ability to overcome sovereign immunity for acts traditionally associated with human rights violations, like injuries and death, determining that "[t]hese restrictions would be of little consequence if human rights abuses could be packaged as violations of property rights and thereby brought within the expropriation exception."[45]

The Court acknowledged its desire not to interfere unduly with foreign sovereigns. It "recognized that 'United States law governs domestically but does not rule the world,'"[46] explaining that it interpreted the FSIA "to avoid, where possible, 'producing friction in our [foreign] relations.'"[47] The Court noted that "[a]s a Nation, we would be surprised — and might even initiate reciprocal action — if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States Government years ago," concluding that "[t]here is no reason to anticipate that Germany's reaction would be any different."[48]

The Court was unconvinced by the plaintiffs' counterarguments. The heirs reasoned that because the expropriation exception refers to "property *taken* in violation of international law" instead of "property *takings* in violation of law," it encompasses all international law, including human rights law.[49] But the Court refused to "place so much weight on a gerund,"[50] maintaining that "[a] statutory phrase concerning property rights most sensibly references the international law governing property rights, rather than the law of genocide."[51] Nor did the heirs' Clarification Act argument persuade the Court. The heirs contended that the Act's exception for Nazi art-looting claims meant that "Congress anticipated Nazi-era claims could be adjudicated" through the expropriation exception.[52] But the Court was unswayed, interpret-

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[44] *Id.* at 712. In fact, according to the Court, "states and scholars disagreed over whether international law provided a remedy for a sovereign's interference with anyone's property rights," while the principle that they could interfere with their own citizens' property was "beyond debate." *Id.* at 711.

[45] *Id.* at 714; *see id.* (citing 28 U.S.C. §§ 1605(a)(5), 1605A(a), 1605A(h)).

[46] *Id.* (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115 (2013)).

[47] *Id.* (quoting Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1322 (2017)).

[48] *Id.*

[49] *Id.* at 712 (citing Transcript of Oral Argument at 70, *Philipp*, 141 S. Ct. 703 (No. 19-351), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-351_dofi.pdf [https://perma.cc/7UEZ-GZUT]).

[50] *Id.*

[51] *Id.* at 712–13. The Court observed that "[t]he exception places repeated emphasis on property and property-related rights, while injuries and acts we might associate with genocide are notably lacking." *Id.* at 712.

[52] *Id.* at 715.

ing the Act's reference to Nazi art takings to apply only to "claims involv[ing] the taking of a *foreign* national's property," not takings from a country's own nationals.[53] And though the Court recognized that Congress had passed several statutes "aimed at promoting restitution to the victims of the Holocaust," it concluded that these statutes "generally encourage redressing those injuries outside of public court systems."[54]

In holding that the FSIA's expropriation exception incorporates only the international law of property, not human rights law, the Court too quickly brushed past the Clarification Act, which is most naturally read to express congressional approval of the idea that the expropriation exception applies to genocidal property takings, even those that occur against a sovereign's own citizens. Because it specifically singles out art taken by Nazis as redressable through the FSIA,[55] the Act supports the conclusion that the expropriation exception applies to property taken as an act of genocide. In construing the exception as applying only to violations of international *property* law — and therefore, only to takings of property from noncitizens — the *Philipp* Court failed to recognize what the Clarification Act confirmed: the expropriation exception's reference to "international law" incorporates human rights law.

In reversing *Philipp*, the Court also reversed *Simon v. Republic of Hungary*, which had informed the lower courts' decisions in *Philipp*.[56] *Simon* held that descendants of Hungarian Jews could seek redress through the FSIA for genocidal property takings carried out by the Nazi-controlled government of Hungary during the Second World War.[57] The court reasoned that where "*genocide* constitutes the pertinent international-law violation," the domestic takings rule is inapposite, because unlike the law of expropriation, the law of genocide does not require that expropriator and victim differ in nationality.[58] It noted that the expropriation exception's text contained no indication that "taken in violation of international law" referred only to property law.[59]

The Clarification Act, which was passed shortly after *Simon*, seemed to endorse *Simon*'s holding by contemplating descendants of Holocaust victims bringing suit through the FSIA. Generally, the Act made the

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[53] *Id.* The Court would "not interpret Congress's effort to *preserve* sovereign immunity in a narrow, particularized context — art shows — as supporting the broad *elimination* of sovereign immunity" for all property takings by Nazis. *Id.*

[54] *Id.*

[55] *See* 28 U.S.C. § 1605(h)(2)(A).

[56] *See* Philipp v. Federal Republic of Germany, 894 F.3d 406, 410–14 (D.C. Cir. 2018); Philipp v. Federal Republic of Germany, 248 F. Supp. 3d 59, 70–72 (D.D.C. 2017). The Supreme Court vacated and remanded the D.C. Circuit's decision in *Simon* for reconsideration in light of *Philipp*. Republic of Hungary v. Simon, 141 S. Ct. 691, 691 (2021) (per curiam).

[57] *See* Simon v. Republic of Hungary, 812 F.3d 127, 142–43 (D.C. Cir. 2016).

[58] *Id.* at 144; *see id.* at 144–45 ("The international-law prohibition against genocide in fact was a direct reaction to the actions of sovereigns against their own citizens." *Id.* at 145.).

[59] *See id.* at 145.

expropriation exception inapplicable to artwork imported into the United States for temporary exhibition by stating that this would not constitute "commercial activity" within the meaning of the exception.[60] It was passed in response to *Malewicz v. City of Amsterdam*,[61] which held that those wrongfully deprived of art could bring suit through the expropriation exception if that art were later temporarily exhibited in the United States, even if it were otherwise immune from seizure.[62] After *Malewicz*, several countries refused to lend art to U.S. museums for fear of litigation, which led to the Clarification Act's attempt to promote exchange of art pieces.[63] However, the Act singles out two categories of art that still fall under the expropriation exception and thus leave countries open to suit. The first encompasses art taken by representatives of Nazi Germany.[64] The second applies to art taken as part of "a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group."[65] Thus, while the Clarification Act overturned *Malewicz*, it signaled approval of *Simon*'s conclusion: the expropriation exception encompasses genocide-based claims irrespective of citizenship.[66]

Congress and contemporary commentators alike expected the Clarification Act to allow for redress for genocidal art takings. Because the Act's second exception echoes international law's definition of crimes against humanity,[67] it "suggests a broad approval of suits alleging systematic confiscations of property from targeted and vulnerable groups without respect to nationality,"[68] even where those takings do

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[60] *See* 28 U.S.C. § 1605(h)(1).

[61] 362 F. Supp. 2d 298 (D.D.C. 2005); *see Contemporary Practice of the United States Relating to International Law—New Legislation Seeks to Confirm Immunity of Artwork and Facilitate Cultural Exchange*, 111 AM. J. INT'L L. 510, 510–12 (2017).

[62] *See Malewicz*, 362 F. Supp. 2d at 310–12. *Malewicz* concerned the Soviet abstract artist Kazimir Malewicz, who left art with a friend abroad for fear that it would otherwise be destroyed by the Communist regime. *Id.* at 301. The friend sold much of the art to the Stedelijk Museum in Amsterdam, but Malewicz's heirs contended that it was never his to sell. *See id.* at 301–04.

[63] *See* Laura Gilbert, *New Legislation to Protect Foreign Art Lenders from Lawsuits on U.S. Soil*, OBSERVER (Apr. 2, 2012, 5:08 PM), https://observer.com/2012/04/new-legislation-to-protect-foreign-lenders-from-lawsuits-on-u-s-soil [https://perma.cc/K5LE-FT55].

[64] 28 U.S.C. §§ 1605(h)(2)(A), 1605(h)(3).

[65] *Id.* § 1605(h)(2)(B).

[66] *See* Bert Theeuwes, Frédéric Dopagne & Saskia Lemiere, *U.S. Extends Foreign Sovereign Immunity for Art Works*, LEXOLOGY (May 1, 2017), https://www.lexology.com/library/detail.aspx?g=374d0586-c238-4ce5-9d5c-72d4eb5fd567 [https://perma.cc/97YK-4S8T] ("The second exception of the [Clarification Act] seems to leave room for claims similar to the ones in *Simon v. Republic of Hungary*, in which a government expropriates [from] its own nationals.").

[67] The Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, defines crimes against humanity in part as religious, cultural, and ethnic persecution "committed as part of a widespread or systematic attack directed against any civilian population." *Id.* art. 7.

[68] Ingrid Wuerth, *An Art Museum Amendment to the Foreign Sovereign Immunities Act*, LAWFARE (Jan. 2, 2017, 12:48 PM), https://www.lawfareblog.com/art-museum-amendment-foreign-sovereign-immunities-act [https://perma.cc/WRH2-LKHN] ("It is possible that the drafters

not rise to the level of genocide. And given the Act's explicit Holocaust exception, observers certainly anticipated that it would offer redress for Nazi-era art looting.[69] The House Report for the Clarification Act establishes that the Holocaust exception was included because of the massive scope of Nazi art looting, which was part of "the Nazis' exhausting and extensive processes intended to strip European Jews of their dignity and cultural lifestyles . . . symboliz[ing] the profound depths of the Nazis' crimes against humanity."[70] Nowhere does the House Report indicate that recovery should depend on a victim's nationality. Rather, it suggests that the Clarification Act was meant to allow descendants of European Jews whose property was taken by the Nazis — like the plaintiffs in *Philipp* — to bring suit through the FSIA,[71] even if their ancestors were nationals of the country that sought to exterminate them.

The Court's contrary interpretation strangely cramps the Clarification Act, preventing descendants of German Jews from recovering for wrongful expropriations carried out by Nazi Germany. The Court stressed that Nazi-era claims could be brought only where they do not conflict with the domestic takings rule.[72] To support this conclusion, the Court adopted a strained interpretation of *Republic of Austria v. Altmann*,[73] which centered on Viennese Jews whose art was stolen by Nazi-dominated Austria.[74] Though the *Altmann* Court concluded that

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intended that [the Clarification Act] apply narrowly *only* to confiscations of property held by foreigners . . . . But the focus of [its second exception] is not on the confiscation of alien property without compensation, but instead on confiscations of property held by 'vulnerable' groups.").

[69] *See* Doreen Carvajal, *Dispute Over Bill on Borrowed Art*, N.Y. TIMES (May 21, 2012), https://www.nytimes.com/2012/05/22/arts/design/dispute-over-bill-to-protect-art-lent-to-museums.html [https://perma.cc/X5KJ-VN6V] (anticipating that the Act would allow claims by "families whose valuables were taken by the Nazis in World War II . . . cover[ing, perhaps exclusively,] people who lost art directly to the Nazis or their agents" and including Professor Derek Fincham's estimation that "the bill would be difficult to pass without an exception for Holocaust-era claims"); *AAMD Statement on the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act*, ASS'N OF ART MUSEUM DIRS. (May 3, 2012), https://aamd.org/for-the-media/press-release/aamd-statement-on-the-foreign-cultural-exchange-jurisdictional-immunity [https://perma.cc/A96B-492G] (anticipating that the Clarification Act would "address[] claims related to works seized during the Holocaust").

[70] H.R. REP. NO. 114-141, at 7 (2015) (quoting Shira T. Shapiro, Case Note, *How* Republic of Austria v. Altmann *and* United States v. Portrait of Wally *Relay the Past and Forecast the Future of Nazi Looted-Art Restitution Litigation*, 34 WM. MITCHELL L. REV. 1147, 1152–53 (2008)). Senators Orrin Hatch and Dianne Feinstein, the Act's sponsors, also emphasized that it would not apply to art taken by Nazis. *See* 158 CONG. REC. 3,680 (2012) (statement of Sen. Dianne Feinstein); *id.* at 3,681 (statement of Sen. Orrin Hatch).

[71] H.R. REP. NO. 114-141, at 2.

[72] *See Philipp*, 141 S. Ct. at 715.

[73] 541 U.S. 677 (2004). *Altmann*'s story was memorialized in the 2015 film WOMAN IN GOLD. *See* Patricia Cohen, *The Story Behind "Woman in Gold": Nazi Art Thieves and One Painting's Return*, N.Y. TIMES (Mar. 30, 2015), https://www.nytimes.com/2015/03/31/arts/design/the-story-behind-woman-in-gold-nazi-art-thieves-and-one-paintings-return.html [https://perma.cc/ZAD2-P2QH].

[74] *See Altmann*, 541 U.S. at 681–82.

the expropriation exception would allow their descendant to bring suit, the *Philipp* Court intimated that this was possible only because the art owners in *Altmann* were Czechoslovakian nationals and technically the expropriating government was Austria.[75] However, other sources suggest that the original art owner actually did have Austrian citizenship,[76] and the *Altmann* plaintiff herself maintained that she was an Austrian citizen at the time of the seizure.[77] In any event, neither the circuit court nor the Supreme Court in *Altmann* focused on nationality,[78] despite the *Philipp* Court's attempt to characterize this as key to its reasoning.

The *Philipp* Court's emphasis on nationality also sits strangely with the Clarification Act's "systematic campaign" exception.[79] Twentieth-century history abounds with examples of "systematic campaign[s]" against members of a vulnerable group where that group is made up of nationals of the repressive regime.[80] Notably, this exception was added after backlash from commentators who argued that victims of atrocities carried out by the Soviet Bolsheviks and the Cambodian Khmer Rouge, both of which involved "systematic campaign[s]" of oppression against their own nationals,[81] merited redress just as much as victims of the Holocaust.[82] According to the *Philipp* Court, descendants of Cambodian or Soviet nationals would be out of luck if they sought to bring suit through the FSIA, simply because their ancestors were citizens of the country that oppressed them. But the statutory scheme is more easily read to suggest approval of *Simon*'s conclusion that genocidal property takings suffice to invoke the expropriation exception.

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[75] *See Philipp*, 141 S. Ct. at 715.

[76] *See* 3 MICHAEL ANTON, INTERNATIONALES KULTURGÜTERPRIVAT- UND ZIVILVERFAHRENSRECHT 151 (2010) (describing Bloch-Bauer as a citizen of Austria); Todd Grabarsky, Note, *Comity of Errors: The Overemphasis of Plaintiff Citizenship in Foreign Sovereign Immunities Act "Takings Exception" Jurisprudence*, 33 CARDOZO L. REV. 237, 257 (2011); Letter from Stefan Gulner, Att'y for Plaintiff, to Stuart E. Eizenstat, Deputy Sec'y, U.S. Dep't of the Treasury (Feb. 23, 2000), https://web.archive.org/web/20010206185753/http://www.adele.at/Briefe_von_Dr__Stefan_Gulner/Letter_from_Dr__Stefan_Gulner/letter_from_dr__stefan_gulner.htm [https://perma.cc/C8ZS-6URR] (describing the original art owner, Ferdinand Bloch-Bauer, as an "Austrian citizen of Jewish origin"). *But see* 1 Deposition of Maria Altmann at 16:6–16:14, Altmann v. Republic of Austria, 142 F. Supp. 2d 1187 (C.D. Cal. 2001), *aff'd*, 317 F.3d 954 (9th Cir. 2002), *aff'd sub nom. Altmann*, 541 U.S. 677 (No. CV 00-8913).

[77] *See* 1 Deposition of Maria Altmann, *supra* note 76, at 15:17–15:24; Grabarsky, *supra* note 76, at 258 n.148.

[78] *See Altmann*, 541 U.S. at 692; Grabarsky, *supra* note 76, at 258 ("Notably, the [circuit] court downplayed the citizenship issue.").

[79] 28 U.S.C. § 1605(h)(2)(B)(ii).

[80] *See* Roger W. Smith, *Human Destructiveness and Politics: The Twentieth Century as an Age of Genocide*, *in* GENOCIDE AND THE MODERN AGE 25–26 (Isidor Wallimann & Michael N. Dobkowski eds., Syracuse Univ. Press 2000) (1987).

[81] *See* ERIC D. WEITZ, A CENTURY OF GENOCIDE 96–101, 185–89 (2015).

[82] *See* Carvajal, *supra* note 69. The original version of the Clarification Act included an exception only for Nazi-era art looting. *See* Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, H.R. 4086, 112th Cong. § 2 (2012).

Of course, the Clarification Act does not directly apply to the plaintiffs in *Philipp*; it applies to art pieces that are in the United States as part of a temporary art exhibition.[83] But it does suggest congressional support for the idea that certain property takings — namely, those that occurred as part of the Holocaust or a similar campaign of systematic oppression — violate international law, making the expropriation exception applicable, even if these takings occur against a sovereign's own citizens. After all, the facts behind *Philipp* are not far removed from the Clarification Act's Holocaust exception, as *Philipp* fits right into the context of the Nazi-era art looting that formed the impetus for the Clarification Act's attempt to afford victims an avenue of redress.[84]

In interpreting the expropriation exception to refer only to international property law, including the domestic takings rule, the Court adopted a reading of the FSIA that privileged avoiding "friction" between the United States and foreign nations over affording redress to victims of genocide.[85] The Court suggested that Congress could not have intended the exception to incorporate international human rights law, expressing concern that if it held otherwise, foreign countries would "reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation."[86] But even if the Congress that passed the FSIA had assumed that it would apply primarily to property takings from foreign nationals, "the text that Congress enacted does not contain any express restriction to such cases."[87] In fact, the Congress that enacted the Clarification Act singled out property takings that occur as part of a systematic campaign against a vulnerable group — in particular, takings committed by the Nazis during the Holocaust — as sufficient to merit redress through the FSIA.[88] The Court's contrary interpretation subverts congressional intent, stripping away an avenue of recourse for victims of genocide.

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[83] 28 U.S.C. § 1605(h)(1)(A).

[84] *See* H.R. REP. NO. 114-141, at 7 (2015); Complaint, *supra* note 11, ¶¶ 1–13.

[85] *Philipp*, 141 S. Ct. at 714. The decision's deference to concern for the foreign policy risks of allowing the suit to proceed and its willingness to limit the role of the judiciary exemplify foreign relations exceptionalism, or "the idea that foreign affairs are an exceptional sphere of policymaking, distinct from domestic law and best suited to exclusively federal, and primarily executive, control." Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1900 (2015). Recently, the Supreme Court has shown greater reluctance to defer to the Executive in foreign relations cases, *see id.* at 1901, but *Philipp* is an exception to this trend.

[86] *Philipp*, 141 S. Ct. at 714 (quoting Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312, 1322 (2017) (internal quotation marks omitted)).

[87] William S. Dodge, *The Meaning of the Supreme Court's Ruling in* Germany v. Philipp, JUST SEC. (Feb. 8, 2021), https://www.justsecurity.org/74598/the-meaning-of-the-supreme-courts-ruling-in-germany-v-philipp [https://perma.cc/X7MQ-KKZ3] ("The Supreme Court has recently interpreted other statutes to have broader applications than Congress expected — for example, . . . in *Bostock v. Clayton County*[, 140 S. Ct. 1731 (2020)].").

[88] *See* 28 U.S.C. § 1605(h)(2).